MAINE REPORTS

96

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1902

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1902

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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.
HON. ALBERT M. SPEAR.†

Justices of the Superior Court.

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

ATTORNEY GENERAL.

HON. GEORGE M. SEIDERS.

CHARLES HAMLIN, REPORTER OF DECISIONS.

* Died February 18, 1902.
† Appointed March 1, 1902.

ASSIGNMENT OF JUSTICES.

FOR THE YEAR 1902.

LAW TERMS.

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

INHABITANTS OF CARIBOU *vs.* CARIBOU WATER COMPANY.

Aroostook. Opinion December, 1901.

Water Company. Contract. Power. Sale. Electricity.

On June 28th, 1888, the Caribou Water Company, chartered in 1887 with the usual powers of such corporations, entered into a written contract with the town of Caribou, in which the company agreed to furnish, set and maintain twenty-five hydrants at points on its pipe line, to be designated by the town, and to furnish at all times a constant and sufficient supply of water for protection against fire, unavoidable accident excepted, and to furnish and set additional hydrants at a fixed price. For this service the town agreed to pay the company the sum of two thousand dollars per annum and to pay for the additional hydrants at the price named.

The contract also contained provisions in regard to the capacity of the company's reservoir or standpipe, the character of the dam across the river and the head of water to be maintained, the size and character of the water mains and the streets in which they were to be located, and a provision that the company should supply water for town buildings, school houses and for other public purposes in full payment of all local taxes assessed upon its property.

The contract also contained this clause:

"Fifteenth. The said company agrees to pay to the said town each year one-half of the net income derived from the sale or lease of power on said dam."

By an additional act of the legislature, approved February 9, 1893, the company was authorized "to carry on the business of furnishing lights, heat and power by electricity in the towns of Caribou and Fort Fairfield."

The water is pumped from the river by the power developed on the company's dam through a main leading to Caribou village, about a mile distant, where it is distributed through a pipe system to the inhabitants, and water is furnished to various parties and used by them in water-motors for the purpose of driving coffee-mills, a printing-press and other small machinery. Electricity is developed by the power at the dam and transmitted from the generator at the station through a system of wires to the village, where it is used in the usual way for heating and lighting purposes, and also for propelling electric-motors. No electricity is so used within three-fourths of a mile of the dam.

Upon a bill in equity praying for discovery and general relief, heard by the court on a report of the pleadings and agreed statement of facts, *held;* that under the fifteenth clause of the contract of June 28th, 1888, it is not necessary that the power leased or sold by the water company should be used upon its dam, in order that the company should be liable to the town for one-half of the net proceeds derived therefrom.

The contract had reference to the sale of any and all power that might be developed upon this dam, except that used by the company in carrying out its original corporate purpose of supplying the town with water for domestic, sanitary and municipal purposes.

The electricity generated by means of the power on the dam and transmitted through wires to the village of Caribou, where it is sold, is a sale of power on the dam. The power is developed at the dam and by means of it. It is directly transmitted from the dam to the village where it is used as power in propelling electric-motors, and, in another and converted form of power, for the purpose of heating and lighting.

And so as to power sold to individuals and used by them through the intervention of water-motors, as power. This is simply the power of the dam transmitted in the form of water and pressure through the company's pipe-line, and a sale of power within the meaning of the contract. And it is equally a sale of such power, whether the water is used for the production of power by reason of the direct pressure from the pump at the dam, or by the force of gravity after it has first been forced by means of the power developed at the dam to a reservoir, standpipe, or to the private tank of an individual taker.

In either case it is the power of the dam, there developed, that gives it its entire value for use in the production of power.

On report. Bill sustained.

Bill in equity asking for a discovery and accounting, and heard on bill, answer which included a demurrer, and an agreed statement of facts, which are as follows:—

The defendant's dam is across the Aroostook river about one mile from the village of Caribou.

At the west end of the dam the defendant has two water wheels connected by shafting with an electric generator and power pump located in its pumping station, which is also on or near the west end of said dam. Water drawn from the west end of said dam is pumped by the power so developed through a main leading to said Caribou village about a mile distant, where it is distributed through a pipe system to the inhabitants, and from such pipes water is furnished through service pipes to various parties for use in water motors by them used in driving coffee-mills, a printing-press, an ice cream freezer.

The electricity so developed by said wheels at said dam is transmitted from the generator at said station through a system of wires to the village of Caribou, where it is used in the usual way for heating and lighting purposes, public and private, and also for the propelling of electric-motors. No electricity is so used within three-fourths of a mile of said dam.

No power has ever been generated, or used at said dam, except as above stated and as admitted by the answer.

Defendant admitted that plaintiff has demanded an accounting under their contract set forth in the bill.

E. Foster, O. H. Hersey; B. L. Fletcher, for plaintiff.

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

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

WISWELL, C. J. The Caribou Water Company is a corporation organized under a special act of the legislature, approved March 11, 1887, for the purpose of supplying the inhabitants of the town of Caribou with water for all domestic, sanitary and municipal purposes, including the extinguishment of fires. It was given by its charter the usual rights and privileges of similar corporations, and was authorized for its corporate purposes to erect and maintain a dam on the Aroostook River, to make contracts with other corporations and with individuals for a sale of water, and with the town of Caribou for a supply of water for the extinguishment of fire and for other municipal

purposes. The company was also authorized to sell or lease any power not used by it on its dam.

On June 28, 1888, the Water Company entered into a written contract with the town of Caribou, in which the company agreed to furnish, set and maintain twenty-five hydrants at points on its pipe line, to be designated by the town, and to furnish at all times a constant and sufficient supply of water for protection against fire, unavoidable accident excepted, and to furnish and set additional hydrants at a fixed price. For this service the town agreed to pay the Water Company the sum of two thousand dollars per annum and to pay for the additional hydrants at the price named. The contract also contained provisions in regard to the capacity of the company's reservoir or standpipe, the character of the dam across the river and the head of water to be maintained, the size and character of the water mains and the streets in which they were to be located, and a provision that the company should supply water for town buildings, school houses and for other public purposes in full payment of all local taxes assessed upon its property.

The contract also contained this clause:

"Fifteenth. The said company agrees to pay to the said town each year one-half of the net income derived from the sale or lease of power on said dam." By an additional act of the legislature, approved Feb. 9, 1893, the company was authorized "to carry on the business of furnishing lights, heat and power by electricity in the towns of Caribou and Fort Fairfield."

In this bill in equity the plaintiffs, after fully setting out the facts above briefly referred to, further allege that since the execution of the contract between the town and the Water Company, the latter had sold or leased "power on said dam," for lighting purposes, and had furnished "power on said dam, to run water motors, grist-mills and other machinery, and had received a large net income from such sale or lease of power, but that the amount of such net income was unknown to the complainants, and that they had been unable to ascertain the amount thereof from the Water Company, although they had made diligent inquiry and frequent demand upon the company therefor; that the company had refused to pay to the town one

half of the net income derived from the sale or lease of power on the dam, and had neglected and refused to account to the complainant for one-half thereof; that the information in regard to the amount thus received was wholly within the possession of the company, and that the accounts of the net income derived from these sources were of such an intricate and complex nature that the complainants were without adequate remedy at law. They therefore in this bill pray for discovery, that the Water Company may be compelled to account and for other relief.

The case comes to the law court upon a report of the pleadings and upon an agreed statement of facts, from which it appears that water is pumped by the power developed on this dam through a main, leading to Caribou village, about a mile distant, where it is distributed through a pipe system to the inhabitants, and that water is furnished to various parties and used by them in water-motors for the purpose of driving coffee-mills, a printing-press and other small machinery; that the electricity developed by the power at the dam is transmitted from the generator at the station through a system of wires to the village, where it is used in the usual way for heating and lighting purposes and also for propelling of electric-motors. It is admitted that some income has been derived by the company from these sources. No electricity is so used within three-fourths of a mile of the dam.

The only question raised by the report is as to the construction of the clause above quoted in the contract, in which the company agrees to pay the town each year one-half of the net income "derived from the sale or lease of power on said dam." As we construe this clause, it is not necessary that the power leased or sold by the defendant should be used upon its dam, in order that the company should be liable to the town for one-half of the net proceeds derived therefrom. The subject matter of the provision was the power on the dam, exclusive, of course, of that used in pumping water for domestic, sanitary and municipal purposes, and it is immaterial where that power is used or how it may be transmitted, so long as it is the power on the dam, that is, power developed by means of the dam and the head of water thereby accumulated, which is by some means transmitted to the place where it is used for the production of power.

It would not be questioned, we take it, if this power developed at the dam should be transmitted a short distance by the means of shafting or belts and there used in a manfacturing establishment, that the sale of power in this manner would come within the meaning of the contract. We think that it is equally within that meaning if the power is conveyed a greater distance by some other means and there used as power.

It made no difference to the contracting parties where the power might be used. They were providing for the contingency that this dam might be capable of producing more power than would be required by the company in carrying out its corporate purposes, which power might be sold, and in view of the pretty liberal stipulations of the town as to the payment for the hydrant service, and in regard to the payment of all municipal taxes by the company by supplying water for the public purposes named, the company seems to have been willing to agree to divide with the town any net income that might be received from this source. In fact, we think that the contract had reference to the sale of any and all power that might be developed upon this dam, except that used by the company in carrying out its original corporate purpose of supplying the town of Caribou with water for domestic, sanitary and municipal purposes.

The electricity generated by means of the power on the dam and transmitted through wires to the village of Caribou, where it is sold, is a sale of power on the dam. The power is developed at the dam and by means of it. It is directly transmitted from the dam to the village where it is used as power in propelling electric-motors, and, in another and converted form of power, for the purpose of heating and lighting.

And so as to the power sold to individuals and used by them through the intervention of water-motors, as power, this is simply the power of the dam transmitted in the form of water and pressure through the company's pipe-line, and is, we think, a sale of power within the meaning of the contract. And it is equally a sale of such power, whether the water is used for the production of power by reason of the direct pressure from the pump at the dam, or by the force of gravity after it has first been forced, by means of the power

developed at the dam, to a reservoir, standpipe or to the private tank of the individual taker. In either case it is the power of the dam, there developed, that gives it its entire value for use in the production of power; in the first case, by reason of the direct pressure; in the latter case, because by reason of the power at the dam, the water has been pumped and forced to an elevation, from which it may be taken by the force of gravity and used in the production of power.

In our view, then, of the meaning of the contract in this respect, the Water Company is liable to the town for one-half of the net income from the sale, by any of these methods, of the power developed at the dam.

The bill will therefore be retained and remanded for further proceedings.

So Ordered.

LOUISE PEASE *vs.* HARRY J. BAMFORD and others.

Kennebec. Opinion December 12, 1901.

Libel. Witness. Money had and received. R. S., c. 82, §§ 29, 101.

It is a familiar principle, that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise on the part of such person to pay the same to him to whom it belongs, and in such case an action for money had and received may be maintained.

In an action of libel it appeared that the defendants, selectmen of the town of Fayette, published in their town report, among the assets of the town, these words concerning the plaintiff: "Due from Louise Pease three dollars." The defendants justified, among other defenses, that the words were true, and if they were true, that under R. S., c. 82, § 29, it was a complete defense.

It appears that the defendants, in their official capacity, were prosecuting a matter in the probate court and had caused the plaintiff to be summoned as a witness to attend that court; the officer served the subpœna by leaving it at the plaintiff's last and usual place of abode with the sum of three dollars for her travel and attendance; this sum was not the full amount she was entitled to under the statute for her travel and attendance: the

plaintiff was unable to attend and did not attend the court as a witness. Subsequently, the town reimbursed the officer for the witness fees which he thus advanced.

Held; that if the plaintiff actually received the three dollars in question, knowing the same to be intended as a witness fee, and did not attend the probate court, she was liable to repay the same to the town.

Through some inadvertence or mistake, an insufficient sum of money was left as a witness fee for the plaintiff. She was therefore not obliged to obey the subpœna, and was not liable for the damages sustained by reason of her failure to attend under R. S., c. 82, § 101, because she was not legally summoned. But the plaintiff cannot refuse to attend court upon that ground and also retain the money which she actually received. This money in her possesssion, in equity and good conscience, belonged to the town and constituted a debt to the town.

Exceptions by plaintiff. Overruled.

Action for libel. Verdict for defendants.

J. Williamson, Jr., and L. A. Burleigh, for plaintiff.

Fred Emery Beane, for defendants.

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

WISWELL, C. J. Action of libel. The defendants were the selectmen of the town of Fayette, and the alleged libel was the publication in their town report, among the assets of the town, of these words: "Due from Louise Pease three dollars." Among other defenses the defendants justified upon the ground that the words were true, which, if true, under the statute, R. S., c. 82, § 29, was a complete defense, "unless the publication is found to have originated in corrupt or malicious motives." *Pierce* v. *Rodliff,* 95 Maine, 346.

There was evidence tending to show that the defendants, in their capacity as selectmen, had caused the plaintiff to be summoned to attend the probate court as a witness in the matter which the defendants, in their official capacity, were prosecuting, and that the officer who was given the subpœna to serve left the same together with the sum of three dollars, as her fees for travel and attendance as a witness, at the plaintiff's last and usual place of abode. This sum was not the full amount that she was entitled to under the statute

for travel and attendance. The plaintiff was unable to attend and did not attend the court as a witness. Subsequently, the town reimbursed the officer for the money which he advanced and left at the plaintiff's last and usual place of abode, as her witness fee.

The only question raised by the exceptions is as to the correctness of this instruction, bearing upon the justification that the words published were true: "If the plaintiff actually received the three dollars in question, knowing the same to be intended as a witness fee, and did not attend the probate court, she was liable to repay the same to the town."

It is a familiar principle, that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such a case an action for money had and received may be maintained.

In this case, through some inadvertence or mistake, an insufficient sum of money was left as a witness fee for the plaintiff. She was therefore not obliged to obey the subpœna. She was not liable for the damages sustained by reason of her failure to attend under R. S., c. 82, § 101, because she had not been legally summoned. But she could not refuse to attend court upon that ground and also retain the money which, as found by the jury, she actually received. She had in her possession money which in equity and good conscience belonged to the town, and which constituted a debt due to the town.

Exceptions overruled.

ROBERT ALLISON *vs.* IRA F. HOBBS and others.

Piscataquis. Opinion December 12, 1901.

Trespass. Pleading. Action. Election. Damages.

Where several persons jointly commit a tort, the person injured has his election to sue all or any of the joint tort-feasors, and, in an action against one or more may recover the damages caused by all jointly.

Persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment. Yet if such persons acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort-feasors within the rule, and may be sued either jointly or severally at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered.

The defendants, as assessors of the town of Milo for 1898, assessed a poll tax against the plaintiff as an inhabitant of that town. On June 16, 1899, the plaintiff was arrested for non-payment of the tax by the collector upon a warrant issued by the defendants and taken to the jail in Bangor. The plaintiff claimed that he was not an inhabitant of Milo that year, that consequently he was not liable to be assessed for a poll-tax therein, and that his arrest was illegal. Before his commitment to jail, in order to prevent such commitment and relieve himself from arrest, he paid the collector the tax and the costs of his arrest. In an action of trespass for the illegal arrest, the jury found for the plaintiff and the only question presented by the defendants' exceptions is as to an instruction upon the question of damages.

A poll tax had also been assessed against the plaintiff for 1897 by the assessors of Milo, but not these defendants, and for the non-payment of it the plaintiff was arrested simultaneously by the same collector of the tax of 1898. The plaintiff paid this tax to prevent his commitment to jail at the same time he paid the tax of 1898.

It was claimed, in defense, that the plaintiff having been arrested simultaneously by the same collector upon both warrants, the damages should be divided, and the defendants were liable for a portion thereof. *Held;* that the plaintiff, having been illegally arrested upon the warrant issued by the defendants, sustained no separate, and, in fact, no additional injury because of his illegal arrest at the same moment by the same person upon another tax warrant issued by other assessors, and continued concurrently with the other arrest, except as to the amount of money which he was

obliged to pay to free himself from arrest upon the 1897 tax warrant, and this sum, which appears to have been only the amount of the tax, was expressly excluded by the instruction to the jury, as an element of damage.

Exceptions by defendants. Overruled.

Trespass against the assessors of taxes of the town of Milo for an illegal arrest of the plaintiff, upon a tax warrant issued by them to the collector of taxes.

The case appears in the opinion.

J. B. Peaks and E. C. Smith, for plaintiff.

H. Hudson and M. L. Durgin, for defendants.

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

WISWELL, C. J. Action of trespass for the alleged illegal arrest and false imprisonment of the plaintiff, upon a tax warrant issued by the defendants.

The defendants as assessors of the town of Milo for the year 1898, assessed a poll-tax against the plaintiff as an inhabitant of that town. The tax was committed to the collector of taxes, who on June 16, 1899, arrested the plaintiff upon the warrant issued by the defendants and took him to Bangor for the purpose of committing him to jail. The plaintiff claimed that he was not an inhabitant of the town in that year, that consequently he was not liable to be assessed for a poll-tax therein, and that his arrest was illegal. Before his commitment to jail, in order to prevent such commitment and relieve himself from arrest, he paid the collector the tax and the costs of his arrest. At the trial, the plaintiff recovered a verdict, and the only question presented by the exceptions is as to an instruction upon the question of damages.

A poll-tax had also been assessed against the plaintiff for the year 1897, by the assessors of the town for that year, and had been committed to the same person as collector, and it was claimed in defense that the plaintiff was arrested simultaneously by the same collector upon both warrants, one issued by the defendants, and the other by the assessors of the same town for the year 1897; that the arrest

upon the 1897 warrant was equally illegal, as the plaintiff also denied his liability to be taxed for that year for the same reason, and that consequently the damages should be divided and that the defendants should only be liable for a portion thereof. At the time that the plaintiff paid the 1898 tax and the costs of his arrest, he also paid to the collector the tax for 1897.

Upon this question, the presiding justice, after explaining the contention of the parties in this respect, instructed the jury as follows: "But I instruct you, as a matter of law, that if this man was arrested at the same time for the (non) payment of both taxes upon both warrants, and the damages arising from one and the other are so intermixed that they can not be separated, that these defendants are liable for the whole amount of damages and suffering which this plaintiff underwent, except the three dollars for the tax of 1897."

We think that this instruction was sufficiently favorable to the defendants. The plaintiff having been illegally arrested upon the warrant issued by the defendants, sustained no separate, and, in fact, no additional injury because of his illegal arrest at the same moment by the same person upon another tax warrant issued by other assessors, and continued concurrently with the other arrest, except as to the amount of money which he was obliged to pay to free himself from arrest upon the 1897 warrant, and this sum, which appears to have been only the amount of the tax, was expressly excluded by the instruction as an element of damage. It would be a strange doctrine if an injury caused by a defendant's tort is in no way increased by the independent but concurrent wrongful act of a third person, that the extent of the defendant's liability in damages should thereby be lessened.

Moreover, these defendants and the assessors for the year 1897, provided the plaintiff was also illegally arrested upon their warrant by the same officer and at the same time, were joint trespassers, although each board of assessors acted independently of each other and neither had knowledge that the plaintiff was to be arrested upon the warrant of the other. The plaintiff in fact suffered only one wrong, his illegal arrest and detention by the one person acting under the authority of the two boards of assessors. The trespasses on the

person of the plaintiff were simultaneous and contemporaneous acts committed on him by the same person acting at the same time for each of these boards of assessors, and the assessors for both of these years, upon whose warrant the plaintiff was simultaneously arrested, were joint tort-feasors. The case of *Stone* v. *Dickinson*, 5 Allen, 29 is directly in point. It is of course a familiar rule that where several persons jointly commit a tort, the person injured has his election to sue all or any of the joint tort-feasors, and in an action against one or more may recover the damages caused by all jointly.

Again, while it is true that persons who act separately and independently, each causing a separate and distinct injury, can not be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment, yet if such persons acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort-feasors within the rule, and may be sued either jointly or severally at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered. 15 Encyl. of Pleading and Practice, 558; *Boston & Albany Railroad Co.* v. *Shanly*, 107 Mass. 568; *Newman* v. *Fowler*, 37 N. J. L. 89. While this rule may not be applicable to all cases, as, for instance, where domestic animals of different owners jointly contribute in causing the same injury, *Van Steenburgh* v. *Tobias*, 17 Wend. 562, 31 Am. Dec. 310, nor perhaps to some other cases, we think it is a salutary rule when applied to such torts as are here complained of.

Exceptions overruled.

PETER STEWART *vs.* INTERNATIONAL PAPER COMPANY.

Androscoggin. Opinion December 12, 1901.

Negligence. Defective Machinery. Master and Servant. Fellow-Servant.

Supplying safe machinery and appliances, as a duty imposed on the master, is one thing; the operation of the same by his servants in the business for which they are used, is another.

In operating machinery, or in the ordinary use of appliances furnished, a servant assumes the risk of injury from the negligence of his co-servant, if the servant employed is competent for the service required of him.

A master is not liable to one servant for the negligence of a co-servant in the management and use of suitable structures and appliances in carrying on the master's work.

The ordinary use of machinery and appliances may be left to competent hands, calling for no attention by the master, where he has supplied the servant with suitable machinery and appliances.

The plaintiff alleged that he was injured by falling into a drain in defendant's pulp mill, situated in the basement, and uncovered at the moment when the accident occurred. This drain, several inches deep, was used to carry off the waste pulp that collected around the pump and floor. A plank had been provided with which to cover the drain, and which, so far as the exceptions show, was proper both in size and in all respects for the purpose. When the plank was down over the drain, it formed a part of the floor of the basement and was used by the employees. But in order to use the drain, it was necessary to remove the plank and use it in that way, including the removal of the plank,—a matter of daily occurrence.

Held; that the servant, whose duty it was to remove the plank in order that the drain might be used, and then to replace it, was not performing any of the personal duties which the master owed to his employees.

The negligence of this servant in the use, management and operation of an appliance provided by the master, and which so far as the question raised by the defendant's exceptions is concerned may be assumed to have been suitable and proper in all respects, was the negligence of a co-servant of the plaintiff, for which the defendant is not liable.

Exceptions by defendant. Sustained.

Case for injuries received by plaintiff while in the employ of the defendant at their mill at Rumford falls.

The opinion states the case.

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

G. D. Bisbee and R. P. Parker, for defendant.

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

WISWELL, C. J. The plaintiff, having sustained personal injuries while in the employ of the defendant in the latter's pulp mill, alleged, as one of the causes therefor, a drain in the basement of the mill which, at the moment of the accident, was uncovered and into which the plaintiff stepped, fell, and in consequence thereof received the injuries complained of.

This drain, several inches deep, was used to carry off the waste pulp that collected around the pump and upon the basement floor. A plank had been provided with which to cover the drain, and which, so far as the exceptions show, was proper in size and in all respects for the purpose. When the plank was down over the drain, it formed a part of the floor of the basement and was used by the employees who had occasion to be there. But in order to use the drain for the purpose for which it was intended, in washing the basement floor and in carrying off the waste pulp that had accumulated there, it was necessary to remove the plank, and the use of the drain in this way, including the removal of the plank covering it, was a matter of daily occurrence.

The presiding justice gave very clear instructions to the jury in regard to the respective rights and duties of master and servant, and especially as to the duty of the master, "not only to provide, but to maintain, a reasonably safe place in which his employee may do his work." In the course of his instructions he said: "While an employer in contracting does not make himself liable as a rule for the negligence of other parties, and the employee takes upon himself and assumes the risks which arise from the negligence of fellow-servants, yet so far as these personal obligations which I have named, those of providing and maintaining a safe place in which to do the work, are concerned, the master or employer can not escape his responsibility by delegating that work to another servant." He then gave the following instruction, which is the one complained of: "And if you find, under the rules which I have given you, and under the evidence in this case, that the servant whose duty it was to replace

that plank, was negligent in not replacing it, after he had moved it for the purpose of washing out the basement, then that negligence would be negligence for which the master would be responsible, in case the injury resulted to the plaintiff therefrom."

This was an incorrect application of the general principles, already correctly given to the particular facts referred to. The servant whose duty it was to remove the plank in order that the drain might be used, and then to replace it, was not performing any of the personal duties which the master owed to his employees. The negligence of this servant in the use, management and operation of an appliance provided by the master, and which so far as the question raised by the exception to this instruction is concerned, may be assumed to have been suitable and proper in all respects, was the negligence of a co-servant of the plaintiff, for which the defendant was not liable. The negligence referred to in the instruction was not in the construction or maintenance of a reasonably safe place for the servant to perform his work, for which the master would be liable, but it was the fault of a co-servant in the operation of an appliance provided by the master. Supplying safe machinery and appliances is one thing; the operation of the same in the business for which they are used, is another. In operating machinery, or in the ordinary use of appliances furnished, a servant assumes the risk of injury from the negligence of his co-servant, if the servant employed is competent for the service required of him. A master is not liable to one servant for the negligence of a co-servant in the management and use of suitable structures and appliances in carrying on the master's work. The ordinary use of machinery and appliances may be left to the competent hands, calling for no attention by the master, where he has supplied the servant with suitable machinery and appliances. The authorities in support of these propositions are very numerous, the citation of only a few is necessary. *Rounds* v. *Carter*, 94 Maine, 535; *Small* v. *Manufacturing Company*, 94 Maine, 551; *Wosibigian* v. *Washburn and Moen Manufacturing Company*, 167 Mass. 20. A very full collection of the authorities may be found in the exhaustive note to *Mast* v. *Kern*, 34 Oregon, 247, in 75 Am. St. Reports, 580-605.

Exceptions sustained.

EASTMAN HATHORN

vs.

JOHN ROBINSON AND SYLVESTER J. WALTON, Trustee.

Somerset. Opinion December 12, 1901.

Attachment. Exemptions. Frat. Ben. Organizations. Stat. 1897, c. 320.

The statute of 1897, c. 320, § 14, relating to Fraternal Beneficiary Organizations, provides that: "The money or other benefit, charity, relief, or aid to be paid, provided or rendered by any corporation, association or society, authorized to do business under this act, and as herein provided, shall not be liable to attachment by trustee, or other process, and shall not be seized, taken or appropriated, or applied by any legal or equitable process, nor operation by law, to pay any debt or liability of a certificate holder, or any beneficiary thereof." *Held:*—

That under this statute, money received by a beneficiary from such organization does not continue to be exempt any longer from attachment, or seizure upon execution, after it has come into his possession.

The statute gives protection and exemption only to money to be paid, and not to money paid and in a debtor's possession.

The framers of this statute may well be presumed, to have had good reason to know the probable construction of the statute, since they followed the language of another statute similar in effect that had long before been passed upon by this court, and in which it denied a debtor's claim of exemption of pension money after the money had actually gone into the possession of the pensioner.

Exceptions by trustee. Overruled.

Debt on judgment by trustee process. The case is stated in the opinion.

H. D. Eaton, for plaintiff.

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

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

WISWELL, C. J. The plaintiff, a judgment creditor of the defendant, had summoned the latter before a disclosure commissioner. Upon his examination, it appeared that the defendant then had in his

immediate possession a sum of money, considerably more than the amount of the execution. But it was claimed by the debtor that this money could not be seized, or taken in any way, and applied to the payment of the execution, because it had been received by him as a beneficiary under an insurance policy issued by a fraternal beneficiary organization, known as the "United Order of the Golden Cross of the World," authorized to do business in this state under chap. 320, Public Laws of 1897; and that money so received was exempt from attachment or seizure upon execution, by reason of the provisions of that chapter.

A question arising between the parties and the counsel as to the validity of this contention, it was agreed by them that $500 of the sum in the debtor's possession, should be deposited in the hands of his attorney, and that suit should be commenced by the plaintiff upon his judgment, this money attached by trustee process, and the question submitted to judicial determination in such suit. Suit was accordingly commenced by trustee process, and upon the disclosure of the trustee, the court at nisi prius held that the trustee was chargeable. The case is before us upon an exception to this ruling.

The decision of the case depends upon the construction of section 14, chap. 320, Public Laws of 1897, which is as follows: "The money or other benefit, charity, relief, or aid to be paid, provided or rendered by any corporation, association or society authorized to do business under this act, and as herein provided, shall not be liable to attachment by trustee, or other process, and shall not be seized, taken or appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a certificate holder, or any beneficiary thereof."

The question is whether under this statute money received by a beneficiary from such an organization continues to be exempt from attachment, or seizure upon execution, after it has come into his possession. It is evident that literally the statute does not go to this extent. It refers to the money or other benefit "to be paid." But it is argued that, if the effect of this statute is only to exempt such money before it is received by the beneficiary, the exemption would be of such slight value to him, that something more must have been

intended. Upon the other hand, it is difficult to understand why, if the framers of this statute meant to extend the exemption to money received from such a source after it has come into the possession of the beneficiary, they did not employ language that would make this meaning clear and explicit.

We can not believe that, if the legislature had intended to make so important and far-reaching an exemption, as is claimed by the defendant, it would have used the language above quoted. If the effect of this statute is to continue the exemption after the money has come into the possession of the beneficiary, such exemption might perhaps be claimed to follow the money, so long as its identity was preserved, in investments and in the purchase of property not otherwise exempt from attachment. As to this we, of course, do not intend to express an opinion; we refer to it merely to show that the consequences of such a continuing exemption are too important, and the questions involved in such a construction, are too serious, to permit us to give an effect to this statute far beyond that which would naturally follow from the ordinary meaning of the words used.

This court, in *Friend* v. *Garcelon*, 77 Maine, 25, 52 Am. Rep. 739, placed its construction upon a somewhat similar statute, section 4747, Revised Statutes of the United States, which is as follows: "No sum of money due or to become due to any pensioner, shall be liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner." In that case the court said: "It is money due or to become due, and not money collected, that is protected by the law. . . . . When the money is actually in the possession of the pensioner the protection is gone."

The language of the statute construed in that case, "no sum of money due or to become due to any pensioner," is very similar, in effect, to the language of this statute, "no money etc., to be paid." We think that this statute, like the one construed in the case cited, gives protection and exemption only to the money "to be paid," and not to money paid and in a debtor's possession.

Moreover, the opinion in the case of *Friend* v. *Garcelon*, supra, was announced long before the passage of this statute. On that account, the framers of this statute had good reason to know what the probable construction by this court would be of language similar in effect to the words in the federal statutes; with this knowledge, they deliberately used the language above quoted: this affords, we think, an additional reason for giving the statute the more literal and strict construction.

Exceptions Overruled.

ADELIA R. WALDRON, Executrix,

vs.

HENRY A. PRIEST.

Kennebec. Opinion December 12, 1901.

Evidence. Account Books. Docket.

In an action by an executrix to recover for professional services rendered to the defendant by her testator, a lawyer, the plaintiff, called as a witness to prove the books of account of her testator, may be asked whether she found the charges against the defendant in the account book which are the foundation of the account annexed to the writ.

Such an inquiry of the witness is merely introductory, not for the purpose of showing what the charges are, but simply to call the attention of the witness to the particular charges in question that they may be pointed out to the jury, or read from the book after it has been put in evidence.

The witness may also be asked whether she found any credits upon the books against the charges. The court, in the exercise of its discretion, may allow any witness who has examined the book to testify whether it contains any other entry, debit or credit, in favor of or against the defendant.

This inquiry is only for the purpose of obtaining a reply in the negative, a matter of convenience merely and to prevent the necessity of an examination of the whole book, which defendant's counsel has a right to make, if not satisfied with the answer.

It is the well-settled and long-adhered to rule in this state not to allow a money charge of more than forty shillings, $6.67, to be proved by a book account as independent evidence.

The defendant, also a lawyer, offered in evidence his office docket which contained this memorandum: "Nov. 18, 1896, paid F. A. W. $25.00 which settles to date as per agreement." This book and certain inquiries relating to the time when the entry was made were excluded by the court. *Held;* that the rulings are right. The entry was not a charge of goods delivered, or services rendered, which for the purpose of preventing a failure of justice is admitted in evidence as an exception to the general rule. It was merely a memorandum made for the defendant's convenience and such an entry or memorandum is not admissible in evidence.

Exceptions by defendant. Overruled.

Assumpsit on account annexed to recover for professional services rendered by an attorney at law. The action was brought by the executrix of his will. The case appears in the opinion.

H. D. Eaton, for plaintiff.

W. C. Philbrook, for defendant.

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

WISWELL, C. J. Action of assumpsit by an executrix to recover for professional services rendered by her testator, a lawyer.

The plaintiff was called as a witness to prove the books of account of her testator and in the course of her examination was asked, subject to objection, if she found in the account book charges against the defendant which were the foundation of the account annexed to the writ, to which she replied in effect that she did find such charges. She was also asked, subject to objection, if she found upon the book any credits against these charges, to which she replied that she did not. This account book, referred to in the inquiries, having been duly proved was offered and admitted in evidence.

There was no error in admitting these questions and answers. The first inquiry as to whether she found upon the account book charges against the defendant which were the foundation of the account sued, was merely introductory, not for the purpose of showing what they were, but simply to call the attention of the witness to the particular charges in question, that they might be pointed out to the jury, or read from the book, after the book had been put in evidence. The account book itself showed what the charges were.

The next inquiry was only for the purpose of obtaining a reply in the negative. It was perfectly proper for the court, in the exercise of its discretion, to allow any witness, who had examined the book, to testify that it did not contain any other entry, debit or credit, in favor or against the defendant. This was merely a matter of convenience and might prevent the necessity of an examination of the whole book, which however the defendant's counsel had a right to make if he was not satisfied with the answer.

The defendant, also a lawyer, offered his office docket which contained this memorandum: "Nov. 18, 1896, Paid F. A. Waldron, $25.00 which settles to date as per agreement." This book and certain inquiries in relation to the time when the entry was made were excluded subject to the defendant's exceptions. The rulings were right. The entry was not a charge of goods delivered or services rendered which, for the purpose of preventing a failure of justice, is admitted in evidence as an exception to the general rule. It was merely a memorandum made for the defendant's convenience. Such an entry or memorandum is not admissible in evidence. *Lapham* v. *Kelly*, 35 Vt. 195.

Again, the well-settled and long-adhered to rule in this state does not allow a money charge of more than forty shillings, $6.67, to be proved by a book account as independent evidence. The defendant's book being inadmissible in evidence, inquiries in relation thereto were immaterial.

Exceptions overruled.

CYRUS A. CASWELL *vs.* JOHN E. PARKER, JR.

Androscoggin. Opinion December 12, 1901.

Infants. Torts. Contracts. Pleading.

It is a general rule of law that where the substantial ground of action against an infant is contract, a party cannot, by declaring in tort, make the infant liable, when he would not have been in an action of contract.

Infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is ex delicto.

Exceptions by plaintiff. Overruled.

Trover against a minor for conversion of shoes, taken by the defendant to sell on commission.

The case appears in the opinion.

W. F. Estey and A. L. Bennett, for plaintiff.

R. W. Crockett, for defendant.

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

WISWELL, C. J. This action of trover against an infant was heard by the court, without a jury, with the right of exception to rulings upon matters of law.

The plaintiff intrusted the defendant with a quantity of shoes to be sold by the latter upon commission. The shoes were to remain the property of the plaintiff until sold, and those remaining unsold, and the proceeds of those sold, less the defendant's commission, were to be turned over to the plaintiff. The plaintiff claimed that he gave instructions to the defendant to sell only for cash; that the defendant sold some of the shoes upon credit and failed to account to him therefor. The defendant pleaded infancy.

The court found that "it was not expressly agreed that the defendant should under no circumstances sell shoes on credit;" that the defendant did sell one or more pairs of the shoes received by him for sale on credit, that in making such sale, he acted in good faith, "intending to pay to the plaintiff the price of the goods thus sold,

but that he failed to make such payment as to one or more pairs of the shoes." Upon these facts, the presiding justice ruled, as matter of law, that the defendant was not deprived of the benefit of his plea of infancy, by reason of the action being in tort, instead of an action of assumpsit for breach of the contract, and ordered judgment for the defendant.

The ruling was right. Even if the sale by the agent upon credit was contrary to instructions, express or implied, and even if such a sale, under the circumstances of this case, would constitute a technical conversion by the agent, so that the plaintiff might, at his election, bring an action of tort, instead of one of contract, for the breach of the instructions as to the terms of sale, which we do not by any means decide, the defendant would not be deprived of the benefit of his plea of infancy, by the plaintiff's election to commence an action of tort.

It is a general rule that where the substantial ground of action is contract, a party cannot, by declaring in tort, make the infant liable, when he would not have been in an action of contract. While it is true as a general proposition of law that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is ex delicto. *Nash* v. *Jewett*, 61 Vt. 501, 15 Am. St. Rep. 931, 4 L. R. A. 561.

That it is the substance and not the form of the action, which determines the infant's liability, is well illustrated by a decision of this court in *Shaw* v. *Coffin*, 58 Maine, 254, 4 Am. Rep. 290, where it was held that an infant is liable in assumpsit for money stolen, and for the proceeds of property stolen by him and converted into money. But, as decided in *Towne* v. *Willey*, 23 Vt. 359, 56 Am. Dec. 85, cited and quoted from in *Shaw* v. *Coffin*, supra, he is not liable in tort for the mere violation of a contract, where he has committed no substantial and positive wrong, even if the plaintiff may, under the rules of pleading, have his election to bring his action either in tort or contract. And this principle is as well established as any rule of the common law. 16 A. & E. Encyl. of L. 2d. Ed. 308.

Exceptions overruled.

MILTON G. SHAW

vs.

MONSON MAINE SLATE COMPANY, and others.

Piscataquis. Opinion December 14, 1901.

Equity. Creditor's Bill. Pledge. Practice. Stat. 1891, c. 53; R. S., c. 77, § 6, par. IV; par. X; c. 91, §§ 57, 58. Equity Proc. Act, 1881, § 22.

1. A creditor's bill under chapter 77, § 6, par. 4 of the revised statutes is not the proper process for a pledgee to enforce his claim against the pledgeor and the property pledged.
2. Under the equity procedure act of chapter 77, § 10 of the revised statutes, a case should not be reported to the law court until the pleadings have been completed with all necessary amendments and the evidence taken out; and not even then, unless the decision of the law court upon the questions of law involved will practically determine the case without further amendment or proceedings.
3. While the court has full discretionary power to allow amendments to equity pleadings at any time, and will exercise that power at any stage of the case upon reasonable terms, or even without terms if necessary for the preservation of some substantial right, it will not ordinarily allow amendments to the bill after the case has been reported to the law court. If the bill cannot then be sustained without further amendment, it will ordinarily be dismissed with costs and the plaintiff left to bring a new bill.
4. In this case the bill cannot be sustained as a creditor's bill and it does not appear that the plaintiff's rights, which are those of a pledgee, will be irretrievably lost if the amendment be refused and this particular bill be dismissed without prejudice.

On report. Creditor's bill dismissed without prejudice.

This was a creditor's bill in equity under R. S., c. 77, § 6, par. IV, against the Monson Maine Slate Company, Otis Martin, deputy sheriff of Piscataquis county, and the First National Bank of Guilford, to enforce the plaintiff's right, as a judgment creditor, to certain bonds issued by the Slate Company.

A. N. Williams and Enoch Foster, for plaintiff.

H. Hudson and J. B. Peaks, for defendants.

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

EMERY, J. In this bill in equity the plaintiff has set forth: (1) that he had recovered a judgment against the Monson Maine Slate Company,—(2) that upon the execution issued upon that judgment the officer undertook to seize and sell as the property of the judgment debtor forty $1000 bonds, numbered from 261 to 300 inclusive, issued by the debtor company as part of an issue of $300,000 of bonds,—(3) that the bonds could not be seized and sold upon execution, and (4) that the bonds were in the possession of the officer and of the First National Bank of Guilford as the bailee of the officer, and were the property of the debtor company, which company had no other property from which the execution could be satisfied. The debtor company, the officer, and the bank were made parties defendant.

The prayers in the bill are,—(1) that the officer be enjoined from selling the bonds pendente lite,—(2) that the bank be enjoined from giving up the bonds to any person pendente lite,—(3) that the officer transfer the bonds to some appointee of the court to be sold by him under the court's order for the satisfaction of the plaintiff's judgment, —(4) that the bonds be so sold,—(5) that the plaintiff be authorized to bid at the sale,—(6) for general relief. The injunctions prayed for pendente lite were granted.

To this bill the company demurred and also answered denying the allegations in the bill, and alleging that the company had never sold or issued the forty bonds named, and that the officer and the bank had no right to detain them. The case was not set for hearing upon the demurrer, but a replication was filed, and the case was then heard by a single justice upon bill, answer and evidence. No ruling upon the demurrer or the evidence was asked of the justice, but the whole case with all the evidence was reported to the law court.

The evidence for the plaintiff disclosed important facts which were known to the plaintiff before filing his bill, but of which he made no mention in the bill, viz:—the forty bonds had never been sold by the company, nor issued in any other way than pledging them for some floating indebtedness,—and that they had been directly pledged by

the company to the plaintiff as security for the debt upon which his judgment was recovered, and that he had deposited them for safe keeping in the defendant bank.

The plaintiff ignored these facts in his bill and made it a simple creditor's bill, basing his claim for equitable relief upon the sole ground that he was a judgment creditor,—and that the forty bonds were the property of his judgment debtor which could not be . . . . taken on execution. R. S., c. 77, § 6, par. X.

It must be apparent from the evidence for the plaintiff above cited that a creditor's bill is not his proper remedy. As to this property he is not a mere creditor and the defendant company is not a mere debtor. He is a pledgee, the holder of the property, with the rights of a pledgee. The defendant company is a pledgeor, with the rights of a pledgeor. A creditor's bill is manifestly not the proper procedure to determine and enforce the rights of either. *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 558; *Donnell* v. *Portland and Ogdensburg Railroad Co.*, 73 Maine, 567. The bill as framed must be dismissed. The plaintiff apparently has ample remedy under R. S., c. 91, §§ 57 and 58 without any resort to the court.

The plaintiff, at the argument before the law court, apparently realizing that he had mistaken his remedy, asked leave of the law court to reform his bill so that it should be a bill to enforce his rights as pledgee of the property, and suggested that facts could be shown making such a bill necessary to the full enforcement of these rights.

The frequency with which parties in equity cases wait until after issue is joined, the testimony taken, the case heard by a single justice, and then taken by appeal or on report to the law court, before asking for proper amendments,—requires us to caution them against such delays. In equity proceedings the court has ample power to allow proper amendments at any time, but it also has as ample power to refuse them at any time. The whole matter of amendments is within the discretion of the court. It more willingly allows amendments in the early stages of the case, especially before issue joined, and is less and less inclined to allow them as the case progresses. Especially is the court disinclined to allow amendments after the

pleadings have been completed, the evidence taken out, and the case sent to the law court for final determination. It certainly will not allow them as a matter of course, but only when necessary to save some material right, and then usually only upon terms.

It should be borne in mind that the law court is not the equity court of the first instance. The single justice is that court. He has all the powers of the court in equity to hear cases and to make all decrees, final as well as interlocutory. He can make all orders and decrees the law court can make. The design of the Equity Procedure Act of 1881, R S., c. 77, § 6, et seq., was to have all equity causes heard and determined by the single justice, reserving a right of appeal and exceptions to the law court. The provision for reporting cases to the law court after a hearing by a single justice, without ruling or decision by him, was not intended for every case, but for those cases where the solution of the question of law involved would ordinarily dispose of the case. The very purpose of the act was to expedite equity procedure. Appeals and exceptions to interlocutory decrees or orders are not allowed to delay the case, and they cannot be taken to the law court until after final decree in the case (§ 22). To permit a report of the case to the law court to determine one question, then to be sent back and reported again to determine another question, and so on as long as new questions are raised by amendment or otherwise, would defeat the purpose of the act and restore all the evil delays of the old practice which made equity procedure a terror to the suitor. It is well stated in Whitehouse's Equity Practice, § 611, that "equity causes should not be reported to the law court until the pleadings are sufficiently perfected to enable the law court to make a final decision upon the merits. Furthermore, a cause should only be reported for the determination of some doubtful question of law, the decision of which will practically decide the case." Parties reporting an equity case must expect that the law court will ordinarily make a final disposition of that particular case at least, upon the pleadings and evidence presented by the report, without permitting it to go back for further pleadings and evidence. Those should be made right and sufficient before the case is first reported.

In the case now before us, the facts disclosed by the evidence and showing him not entitled to relief under his present bill were well known to the plaintiff before beginning his proceedings. His rights as pledgee were not obscure or doubtful so far as the evidence now shows. The sufficiency of his bill was challenged by the demurrer and his attention thus early called to its character. He did not have the case set for hearing on bill and demurrer, nor did he after the evidence was out ask for any amendment such as was evidently necessary if he was to have any relief in equity. By consenting to report the case without asking for any amendment or any decision by the court of the first instance, he impliedly stated he would abide by the bill and the evidence as they stood. We think he has no cause of complaint if we take him at his implied word and decide this case here, upon the record before us. In the interest of that celerity so much desired in equity procedure, we think the case should not be delayed for the proposed amendment. Whitehouse Eq. Pr. §§ 411-417; Beach's Eq. Pr. §§ 157, et seq., 1 Dan. Ch. Pr. 545 (1st Am. Ed.); Story's Eq. Pl. 268; *Codington* v. *Mott*, 14 N. J. Eq. 430, 82 Am. Dec. 258; *Shields* v. *Barrow*, 17 How. 130; *Whelan* v. *Sullivan*, 102 Mass. 204; *Merrill* v. *Washburn*, 83 Maine, 189; *Loggie* v. *Chandler*, 95 Maine, 220; *Clifford* v. *Coleman*, 13 Blatch. 210.

Nevertheless, the court has the power and does not limit its power to grant an amendment at any stage of a case where it is shown that justice requires it,—that some material right will be lost without it. The court also has the power and does not limit its power to dismiss a bill without prejudice, thus giving the plaintiff an opportunity to assert his claim of right by a new bill.

Though the evidence in this case does not disclose any need of relief in equity, the statutory remedy of the plaintiff being apparently sufficient, yet upon the assurance of the plaintiff that he can show need of relief in equity to fully enforce his rights, we reserve for him the opportunity of making such need apparent in a new bill. This bill is therefore dismissed with costs to the answering defendant only, but without prejudice.

So ordered.

IRENE EGAN by Frank A. Morey, Pro Ami,

vs.

ELIZABETH G. HORRIGAN, and others.

Androscoggin. Opinion December 17, 1901.

Deeds. Evidence. Delivery. Infant. R. S., c. 82, § 110.

Revised Statutes c. 82, § 110, provides that "when original deeds would be admissible, attested copies of such deeds from the registry may be used in evidence without proof of their execution, when the party offering such copy is not a grantee in the deed, nor claims as heir, etc. *Held;* that this statute is inapplicable in cases where the plaintiff claims as heir of the grantee; nor is an office copy offered by an heir of the grantee admissible, under this statute, without proof of the execution of the deed; nor is it admissible as secondary evidence without proof that all apparent means to procure the original have been exhausted.

There is no sufficient warrant in reason or precedent for declaring as a rule of law, or presumption of fact, that the record of a deed is, under all circumstances, prima facie evidence of a delivery.

The plaintiff sought in a real action to recover the entire property described in the writ. The defendants claimed seven-ninths of the premises, deraigning title from the same ancestor, and disclaimed the other two-ninths.

The case was submitted to the law court upon a report of all the testimony to render such judgment as the law and evidence require.

The court adduce the following finding of facts:—Ann Haley, the plaintiff's grandmother, who was seized of the property, on August 9, 1886, signed and acknowledged a warranty deed of the premises to her daughter, Annie Haley, an infant twelve years of age, who afterwards married one Egan and became the plaintiff's mother.

This deed appears to have been prepared in the office of an attorney at Lewiston and was recorded on the day of its date. Patrick Haley, the husband of the grantor was not present in the attorney's office at that time, but signed the deed elsewhere before it was recorded, at some later hour in the day.

At the same time, and as part of the same transaction, Annie Haley, the infant grantee, gave back to her mother a deed of the same premises, but it was not recorded until February 3, 1887. The daughter, Annie Haley Egan, died about six months before the death of the mother.

The plaintiff claimed that the deed from Annie Haley to her mother, Ann Haley, executed while she was a minor, was absolutely void, or if not void that it was voidable, not ratified after she became of age; and that by virtue of the deed from her mother, with a release of dower by her father, she acquired a valid title to the whole property which descended to the plaintiff at the decease of her mother, Annie Haley Egan.

On the other hand, the defendants claimed that the deed from Ann Haley to her daughter was never delivered to the child so as to take effect as a conveyance of title. After a careful consideration of all the evidence reported and full consideration of the situation and the circumstances of the parties, more fully detailed in the opinion of the court, it is considered by the court that there is not only no affirmative testimony of an actual delivery of the deed from the mother to her daughter, or to any agent or attorney of the daughter, but no competent evidence from which any presumption of delivery arises.

It is admitted that the attorney who witnessed and took the acknowledgment of the mother and daughter, the grantors in the two deeds, respectively, has no knowledge of their delivery. The original deed from Ann Haley to her daughter, under which the plaintiff claims, was not produced in court, and there is no evidence that it was ever in the possession of either the plaintiff or her mother; while, on the other hand, it does appear that this deed was in the possession of the administrator of the grantor, Ann Haley, and was delivered by him to the defendant Callahan, who it is not shown was notified to produce it in court.

Held; in this case, that there is no contradictory testimony and nothing in the situation and circumstances of the parties having any necessary tendency to repel the presumption that the deed in question, shown to have been in the possession of the grantor's representative, had not been delivered to the grantee.

On report. Judgment for plaintiff for two-ninths of demanded premises.

Real action against Elizabeth C. Horrigan, Catherine Dugan and Dennis J. Callahan, heirs of Ann Haley, to recover all of certain premises in the city of Lewiston.

The case is stated in the opinion.

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

W. H. Judkins, for defendant Horrigan.

W. H. Newell and W. B. Skelton, for defendants Dugan and Callahan.

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

WHITEHOUSE, J. This is a writ of entry in which the plaintiff seeks to recover possession of the real estate described in the writ, claiming title to the entire property. The defendants Horrigan and Dugan claim each an undivided two-ninths part, and the defendant Callahan, an undivided three-ninths of the property, and all the defendants disclaim the residue. It is accordingly admitted by the pleadings that the plaintiff is in any event entitled to judgment for two-ninths of the premises described in her writ.

It is not in controversy that August 9, 1886, Ann Haley, the plaintiff's grandmother, was lawfully seized of the property in question, and signed and ackowledged a deed of warranty of the premises to her daughter, Annie Haley, an infant twelve years of age, who afterwards married Egan and became the mother of this plaintiff. This deed appears to have been prepared in the office of Judge Cornish of Lewiston, and was recorded in the registry of deeds on the day of its date. Patrick Haley, the husband of the grantor, was not present in the office at that time, but affixed his signature to the deed elsewhere before it was recorded, at some later hour in the day. At the same time, and as a part of the same transaction, Annie Haley, the infant grantee, executed a deed of the same premises back to her mother, but the deed was not recorded until February 3, 1887. Ann Haley died April 6, 1897. The daughter, Annie Haley Egan, died about six months before the death of her mother.

It is claimed on behalf of the plaintiff that the deed from Annie Haley to her mother, executed while she was a minor, was absolutely void, or if not, that it was a voidable deed, not ratified after she became of age, and that by virtue of the deed from her mother, with a release of dower from her father, she acquired a valid title to the whole property which descended to the plaintiff at the decease of her mother.

On the other hand, it is contended in behalf of the defendants that this deed from Ann Haley to her daughter was never delivered to the child so as to take effect as a conveyance of title, and hence that it is

unnecessary to consider the effect of the deed from Annie Haley back to her mother.

After a careful examination of all the evidence reported and full consideration of the situation and the circumstances of the parties, it is the opinion of the court that the defendants' contention must be sustained. There is not only no affirmative testimony that the deed was ever actually delivered to the grantee, or to any agent or attorney of the grantee, but no competent evidence from which any presumption of delivery arises. It appears that Judge Cornish witnessed the signatures and took the acknowledgments of Ann Haley and the daughter Annie Haley, the grantors in the two deeds, respectively, but it is admitted that he has no knowledge whether either of the deeds was delivered or not. The original deed from Ann Haley to her daughter, under which the plaintiff claims, was not produced in court, and there is no evidence that it was ever in the possession of either the plaintiff or her mother. On the other hand it does appear in testimony that this deed was in the possession of the administrator of the grantor, Ann Haley, and was by him delivered to the defendant Callahan. It is not shown, however, that Callahan was ever notified to produce the deed in court, and without assigning any reason for the absence of the original, the plaintiff's counsel introduced in evidence, subject to objection, an attested copy of it from the registry of deeds. He now contends that this office copy is prima facie evidence of the delivery as well as of the execution of the deed.

Section 110 of chapter 82, R. S., provides that "when original deeds would be admissible, attested copies of such deeds from the registry may be used in evidence without proof of their execution, when the party offering such copy is not a grantee in the deed nor claims as heir," etc. And in *Whitmore* v. *Learned*, 70 Maine, 276, it was held that the production of an office copy of a deed in such a case, in the absence of any circumstances tending to remove the presumption arising therefrom, is prima facie evidence not only of the execution, but also of the delivery of the deed. But it has been seen that the plaintiff in this case does claim as heir of the grantee in the deed under consideration. The statute is, therefore, clearly inapplicable to the plaintiff's case. It expressly excludes from its operation

the deed to a party who is himself the grantee or who claims as heir. The office copy offered by the plaintiff in this case was not admissible under the statute without proof of the execution of the deed. Neither was it admissible as secondary evidence without proof that all apparent means to procure the original had been exhausted.

Nor does the fact that the deed was recorded have any necessary tendency, under the circumstances of this case, to prove that it had been delivered. In *Rowell* v. *Hayden*, 40 Maine, 582, the defendant pleaded in bar of a writ of entry, that after the commencement of the action the demandant had conveyed the premises to a third party "by his deed duly executed, acknowledged and recorded . . . . whereby the demandant was wholly devested of all right, title and interest in and to the premises;" and in considering the sufficiency of this plea, on demurrer, the court say: "The pleas are not defective. The fact that a deed is recorded is prima facie evidence that it has been delivered." But this general statement was not necessary to the decision of the question there presented; for it is an established rule of pleading that "the delivery of a deed, though essential to its validity, need not be stated in pleading." 1 Chitty's Pl. (16 Ed.) 378. So in *Jackson* v. *Perkins*, 2 Wend. 317, the court say, with reference to the facts of that case: "Proof of the due execution of a deed, and of its having been recorded, is perhaps prima facie evidence of its delivery; but it would be subversive of all principle to hold the nominal grantee concluded by these acts, all of which may be performed by the grantor, without the knowledge, privity or consent of the grantee. It is true, that in pleadings it is not necessary to aver in terms either the sealing or the delivery of a deed; they are both implied in the term deed or writing obligatory. But this is merely a rule of pleading, and does not determine the question as to what shall be evidence of the sealing or delivery upon the trial." See also *Scrugham* v. *Wood*, 15 Wend. 545, 30 Am. Dec. 75; and *Gilbert* v. *No. Am. Fire Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 543.

It is unnecessary to controvert the proposition, however, that the record of a deed may be an evidential fact having more or less tendency, according to circumstances, to show that the deed had been

delivered to the grantee therein named or to some person for his use. It may, under some circumstances, be prima facie evidence of delivery. But there is no sufficient warrant in reason or precedent for declaring as a rule of law or presumption of fact, that the record of a deed is, under all circumstances, prima facie evidence of a delivery. On the other hand, experience has shown it to be undoubtedly true that, under some circumstances, the record may have no legitimate tendency whatever to prove a delivery. The case of *Hill* v. *McNichol*, 80 Maine, 220, is an apt illustration of this statement. In that case the following language used by the presiding judge in his charge to the jury was expressly approved by the law court, viz: "It is no evidence that a deed has been delivered because containing the words 'signed, sealed and delivered'; that is a preparation for delivery, because the words must be written before the deed can be delivered. Nor is it any evidence in this case that the deed was delivered because it has been recorded; that is not the least legal evidence of delivery." Again, in *Hatch* v. *Haskins*, 17 Maine, 397, cited with approval in *Patterson* v. *Snell*, 67 Maine, 559, it is said in the opinion: "The possession and production of a deed by the grantee is prima facie evidence of its having been delivered; and for like reasons in the absence of all contradictory testimony the presumption arises, when found in the possession of and produced by the grantor, that it has not been delivered."

In the case at bar there seems to be no "contradictory testimony" and nothing in the situation and circumstances of the parties having any necessary tendency to repel the presumption that this deed, shown to have been in the possession of the grantor's representative, had not been delivered to the grantee. It is admitted that both before and after August 9, 1896, the date of the deed in question, Ann Haley was repeatedly convicted of violating the statutes of the state against the unlawful sale of intoxicating liquors; and in the absence of any other reason for the extraordinary transaction it seems entirely probable that the deed was executed as a mere form in the hope that the public record of the conveyance of her property to another, would tend to shield her against the enforcement of the penalties likely to be imposed upon her in these criminal prosecutions, and also against

any judgments that might be recovered under the civil damage act. She doubtless believed that this purpose might be as effectually subserved by creating the appearance of a formal conveyance of the property on the records, without an actual delivery of the deed, as by a legal transfer of the title. And it is not probable that, without special instructions in regard to the necessity of a delivery, she would have intrusted such an important paper to the keeping of a child of that age. That she did not intend to be absolutely devested of her title is evident from her precaution in taking a deed of the property from her daughter back to herself.

Judgment for the plaintiff for two undivided ninth-parts of the premises described in her writ.

GEORGE W. PARTRIDGE, Appellant from decree of Judge of Insolvency Court.

Waldo. Opinion December 18, 1901.

Insolvency. Inchoate Preferences. Proof of Debt. R. S., c. 70, §§ 29, 33.

1. A mortgage given to secure a prior debt, at a time when the debtor was in fact insolvent and the creditor had reason to so believe, does not constitute a preference under the Insolvency Act, R. S., c. 70, § 29, unless it was recorded at least three months prior to commencement of insolvency proceedings.
2. Such mortgage, not thus recorded, being invalid as against the assignee, the creditor is not obliged to cancel it upon the record or otherwise, before proving his debt in the court of insolvency.
3. The fact that the assignee brought a bill in equity to procure a cancellation of the mortgage and obtained a decree therefor, does not make such cancellation a condition precedent to proving the creditor's claim. If the assignee desires such decree enforced, he should proceed in the equity suit.

See *Boyd* v. *Partridge*, 94 Maine, 440.

Exceptions by appellant. Overruled.

Appeal by George W. Partridge, a creditor of Hosea B. Littlefield,

an insolvent, from the disallowance of his proof of debt in the court of insolvency for Waldo county.

The appeal was heard at nisi prius, in this court below, by the presiding justice who sustained the appeal and admitted the claim.

The case below was submitted on the following agreed statement:

On the sixth day of January, 1898, Hosea B. Littlefield was indebted to George W. Partridge in the sum of twelve hundred dollars, and on that day gave said Partridge his three promissory notes for four hundred dollars each, secured by a mortgage of his farm of the same date. This mortgage was recorded on the second day of May, 1898. On the eighth day of June, 1898, the requisite number and amount of creditors of Hosea B. Littlefield filed a petition against him in insolvency, on which he was duly adjudged to be an insolvent debtor on the thirteenth day of July, 1898, and Arthur Boyd was duly appointed assignee of his estate in insolvency, and an assignment in due form of law was made to him. On the sixth day of January, 1898, when this mortgage was given, Hosea B. Littlefield was in fact insolvent and Partridge then had reasonable cause to believe that Littlefield was insolvent, and in contemplation of insolvency.

After the appointment of Arthur Boyd as assignee, he brought a bill in equity against Partridge who held one of said notes and Herbert Black who held two of said notes, to procure the cancellation and discharge of said mortgage. Partridge contested this suit and took it to the law court on exceptions. Upon this bill in equity the court declared said mortgage to be null and void, and ordered Partridge to discharge the same; the final decree in said case being entered at the January Term, 1901, of the Supreme Judicial Court held in Waldo county. Partridge has not discharged the mortgage in the registry of deeds nor given the assignee a discharge of the mortgage, nor filed any discharge of the mortgage with the register of the Court of Insolvency. On the thirteenth day of February, 1901, said Partridge filed a proof of debt of the four hundred dollar note held by him in due form of law in the Court of Insolvency.

The assignee filed his petition in due form, verified by oath, setting forth, as the grounds of his objection to the proof of said claim, that

said Partridge had accepted a preference contrary to the provisions of R. S., c. 70, as amended.

The judge of the Court of Insolvency sustained the objections of the assignee and disallowed the claim; from which judgment of the Court of Insolvency Partridge appealed to this court.

The presiding justice ruled, as matter of law, that these facts do not show that Partridge had accepted a preference contrary to the provisions of the statutes, and sustained the appeal and allowed the claim of Partridge against the estate of said Littlefield in insolvency. To these rulings of the presiding justice the assignee took exceptions, and the case, argued in writing as provided in R. S., c. 70, § 12, was certified to the Chief Justice.

Jos. Williamson, for appellant.

The mortgage in question was ordered to be cancelled and discharged by a decree in equity rendered by this court, not upon the ground of a preference, but on other grounds. Preference was not claimed in the bill, nor is it mentioned in the opinion of the court in *Boyd* v. *Partridge*, 94 Maine, 440.

Counsel also cited: *Bean* v. *Brookmire*, 1 Dill. 24; *Gibson* v. *Warden*, 14 Wall. 244; *Hubbard* v. *Allaire Works*, 7 Blatch. 284; *Stuart* v. *Redman*, 89 Maine, 435.

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

Partridge resisted the bill in equity brought to procure the cancellation of this mortgage at every step till the final decree was entered, and has neglected or refused to comply with the order of court requiring him to discharge the mortgage. Even if he had complied with the order of the court to discharge the mortgage, this would not be such a surrender or discharge of his security as is required by R. S., c. 70, § 29, as amended by the statute of 1897, c. 25, § 4.

If the assignee is compelled to bring an action to invalidate a transfer, and if he recovers and enters up judgment, no subsequent payment of that judgment by the preferred creditor, and no subsequent compliance by him with its terms can be considered a surrender. By his judgment the assignee has recovered the property. In legal effect the creditor no longer has anything to surrender.

Collier on Bankruptcy, p. 319, and cases there cited. Dyer's Maine Insolvent Law, p. 29, Note 4, and cases cited.

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

EMERY, J. January 6, 1898, Littlefield, the insolvent debtor, was indebted to Partridge, the claimant, and on that day undertook to secure that prior indebtedness by giving him promissory notes and a real estate mortgage of that date. At the time of this transaction Littlefield was in fact insolvent and Partridge had reasonable cause to believe that he was insolvent and was contemplating insolvency. No proceedings in insolvency, however, were begun by or against Littlefield until June 8, 1898, more than four months after the mortgage was given.

Had the mortgage been recorded more than three months preceding the commencement of the insolvency proceedings, it might have escaped the effect of those proceedings, but it was not recorded till May 2, 1898, and within the three months named in § 33 of the insolvency statute (R. S., c. 70). The mortgage was, therefore, invalidated by the insolvency proceedings begun within three months after its record, and it was so adjudged upon that ground in an equity case by the assignee in insolvency against Partridge. (94 Maine, 440). It was declared to be of no force as against the assignee and the creditors, and was ordered to be discharged and cancelled. This does not appear to have been formally done, but there is no suggestion that he has been asked to do it, or has had any actual notice of the decree. At any rate, the mortgage is of no force as against the assignee and creditors, and in view of the adjudication of the court may be disregarded by them.

It having been thus adjudged that his mortgage was invalid and of no avail and should be cancelled, Partridge undertook to prove his debt against the insolvent estate of Littlefield as an unsecured claim. This was opposed by the assignee under § 29 of the insolvency statute (R. S., c. 70) which declares that "a person who has accepted any preference knowing that the debtor was insolvent or in

contemplation of insolvency, shall not prove the debt on which the preference was given nor receive any dividend thereon, until he surrenders to the assignee all property, money, benefit or advantage received by him under such preference."

It is to be noted that by the statute a creditor who has accepted a preference is not absolutely debarred from proving his claim, but is only delayed until he surrenders "all the property, money, benefit or advantage received by him under such preference." He seems to have an option, to keep what he may have received from the debtor and forego any claim upon the estate, or to return all that he so received and make a claim against the estate. The statute does not seem to be penal, but remedial only, to secure equality among all creditors seeking to prove their claims. *Morey* v. *Milliken*, 86 Maine, at page 476.

Partridge in fact had no preference over other creditors. He has no "property, money, benefit or advantage" received under any preference. He has nothing to surrender. By his omission to seasonably record his mortgage he surrendered all that he obtained under it. It is in fact invalid and has been so adjudged. It no longer incumbers the insolvent estate, or hinders its division among creditors. Though a preference was intended, none was effected. As to the assignee, it was as though a mortgage was intended to be executed but was not executed. An intent alone does not constitute a preference.

The assignee urges, however, that there was once a preference, and that it was destroyed only by his proceeding against it in equity to have it cancelled. He inquires whether Partridge could have proved his claim, if there had been no decree of the court cancelling the mortgage? The answer is, that the court did not destroy a once valid mortgage. It merely held that the mortgage never became effective as against the assignee. The mortgage never was valid nor a preference as against the assignee. The assignee and purchasers from the assignee could have ignored it.

The assignee again urges that Partridge cannot prove his claim until he obeys the decree of the court ordering a cancellation of the mortgage,—that he has not surrendered his preference until he makes

such cancellation. It is not the cancellation that destroys the mortgage. The mortgage was dead as against the assignee before his suit in equity was begun. The cancellation will be simply its removal from sight. If the assignee or any purchaser from him so desires, he can enforce the cancellation by proceedings for contempt.

Still again it is urged that the conduct of Partridge in taking the mortgage compelled the assignee to expend funds of the estate in litigation to compel a cancellation, and thus reduce the dividends to the unsecured creditors. Waiving the question whether the equity suit was necessary, it is enough to say that, in view of the law, the costs recovered are an expiation of the sin of defending against proceedings at law or in equity.

The decision of the presiding justice that Partridge could prove his claim was correct.

Exceptions overruled.

MOSES ERSKINE *vs.* FRANK H. SAVAGE.

Lincoln. Opinion December 19, 1901.

Deed. License. Trees. Trover.

A grantor in a deed reserved "all hard and soft wood growth, with right of entry upon the premises at any and all times for a period of five years from the date of the deed with men and teams for the purpose of cutting and removing the same."

Within the five years, the plaintiff, who was the purchaser of the rights reserved by the grantor, cut all of the wood reserved, but some of it had not been removed before the end of the period.

Held; that the wood remained a part of the real estate until severed from the soil; that as soon as it was severed, within the period limited, it became personal property, that the title then vested in the plaintiff, and that the plaintiff did not lose his title to the wood cut, but not removed, by failure to remove it within the five year period.

The defendant who was owner of the soil, forbade the plaintiff's removing the wood from the land. *Held;* that under the circumstances, this was such an exercise of dominion over the wood as warranted the presiding

justice below, before whom the case was tried without a jury, in finding a conversion by the defendant.

Exceptions by defendant. Overruled.

Trover for wood and timber.

The facts appear in the opinion.

R. S. Partridge, for plaintiff.

John Scott, for defendant.

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

SAVAGE, J. A man sold and conveyed a tract of land to the defendant. The deed contained the following reservation: "Reserving all hard and soft wood growth thereon; with right of entry upon the premises at any and all times for a period of five years from the date hereof with men and teams for the purpose of cutting and removing the same." The grantor afterwards sold to the plaintiff by "bill of sale," all rights reserved to himself by the foregoing reservation. Within the five years, the plaintiff cut all the wood reserved, but some of it had not been removed before the end of the period. Thereupon the defendant forbade the removal of the remaining wood, and for this alleged conversion, trover has been brought.

It is settled law in this state that a sale, by parol, of growing wood, with the right to enter upon the land to cut and remove the trees, within a specified time, is an executory contract merely, for the sale of the wood after it has been severed from the soil, with a license to enter upon the land for the purpose of cutting and removing it; that the rights of the parties rest wholly in contract; that the wood remains a part of the real estate until severed; that until it is severed, the title does not pass to the vendee; and that so soon as severed, within the period limited, it becomes personal property, and the title then vests in the vendee. It is also settled that if it is not severed until after the expiration of the period, title does not pass to the vendee; but in such case, if he enters to sever and remove it, he becomes a trespasser. *Pease* v. *Gibson,* 6 Maine, 81; *Howard* v. *Lincoln,* 13 Maine, 122; *Moody* v. *Whitney,* 34 Maine, 563; *Whid-*

den v. *Seelye*, 40 Maine, 247, 63 Am. Dec. 661; *Webber* v. *Proctor* 89 Maine, 404; *Donworth* v. *Sawyer*, 94 Maine, 242; *Emerson* v. *Shores*, 95 Maine, 237; *Giles* v. *Simonds*, 15 Gray, 441, 77 Am. Dec. 373. The same principles hold when the wood is reserved, instead of being conveyed.

The question now presented is whether, under such a contract, the wood must be removed, as well as severed, within the time limit, in order to prevent a forfeiture of title of so much as has been severed, but not removed. We think not. We have already stated that when the tree is severed from the soil, the wood becomes personal property, and, further, it becomes the property of the licensee. He was licensed to enter to cut and remove, within a limited period. He has entered and cut within the period, and thereby has acquired a property in the wood. Will he lose that property because he neglects to exercise the other powers of his license within the limit of time? We can perceive no valid reason why he should. The contract does not call for a forfeiture, and we are aware of no legal principle that requires it.

But it is argued that when the license has expired, the one who was licensee can no longer go upon the land to remove his wood without being guilty of a trespass. Grant that to be so. It is only the case of one whose goods or chattels are unlawfully upon the land of another. Does he lose title, for the reason that he must commit a trespass to recover them? This same question was asked in *Irons* v. *Webb*, 41 N. J. Law, 203, 32 Am. Rep. 193, where the trees had been cut within the period limited for removal, but a portion of the wood had not been removed. And the question was answered in this way: "The only particular relied upon is the circumstance that if the timber was permitted to remain on the premises until the time of removal had expired, it became unlawful to enter for the purpose of taking it away. But the effect of such an incident is not in law to work a forfeiture of title. Such a position of property is not uncommon. Chattels are frequently placed or left by their owner on the land of another without his permission, but it will scarcely be pretended that, by so doing, the title to such chattels becomes vested in the proprietor of the land. In such case the land owner has an

adequate remedy for the wrong suffered by him; he is entitled to be indemnified for all the loss he may have sustained by having had his land illegally burdened by chattels placed there without right, and in consequence of the entry to remove them; and in this way, instead of by the exorbitant method of forfeiture of such chattels, the law applies to the case its ordinary measure of damages, and thus gives compensation. . . . . And this, it seems to me, is the extent of the right of the vendor of this timber after the time for its removal had elapsed; he could have called the vendee to account for leaving it on the land beyond the stipulated time, and for all damages to his land done by its removal after such period, but he had no right to claim such timber as his own, and put it to his own uses." To the same effect is the reasoning in *Hoit* v. *Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119. See *Davis* v. *Emery*, 61 Maine, 140, 14 Am. Rep. 553.

The precise question upon which this case turns was decided in accordance with the views we have expressed, in *Plumer* v. *Prescott*, 43 N. H. 277, in which case the court used the following language: "When, however, these trees are lawfully cut by the vendee within the time limited by the contract, they cease to be parcel of the land and become the personal property of the vendee; and unless it can be considered that he has waived or forfeited his title to the timber by neglecting to remove it within the time, it must stand for aught we can see upon the footing of any other personal property of the vendee, which by his fault or neglect, and without any fault of the vendor, is upon the land of the latter. It is very clear, we think, that having been lawfully severed from the land it has become personal property, and at any period before the expiration of the limited time, at least, the title is vested in the vendee as fully as any other chattels. If this be the case, it is difficult to see how the title can be lost by the neglect to remove it."

The case of *Kemble* v. *Dresser*, 1 Met. 271, 35 Am. Dec. 364, is cited by the learned counsel for the defendant as being opposed to this conclusion. In that case the sale seems to have been made upon *the express condition* that the wood should be "got off and removed within two years, *and not afterwards*," and thus the case is distin-

guished by the court in *Plumer* v. *Prescott,* supra. We do not deem it necessary to discuss this distinction, if such it be, as we are satisfied, upon reason as well as upon authority, that the title to the wood cut during the time fixed was not lost by neglecting to remove it within the same period.

This case was submitted to the presiding justice, with the right of exception, upon facts stated, to determine whether the action was maintainable. The justice ruled that it was maintainable. And as we have found the title to be in the plaintiff, the only remaining question presented by the exceptions to that ruling is whether the justice was warranted in finding a conversion by the defendant. We think he was. The defendant was the owner of the land on which the wood was. He not only forbade the plaintiff's entering upon the land, but also his removing the wood therefrom. It is apparent that the defendant assumed that he owned the wood. Under these circumstances, we think his act was such an exercise of dominion over the wood as to warrant the presiding justice in finding a conversion. *Woodis* v. *Jordan,* 62 Maine, 490.

In accordance with the stipulation, the case is to go back for assessment of damages by a jury.

Exceptions overruled.

Case remanded for assessment of damages.

HALLOWELL SAVINGS INSTITUTION

vs.

LENDALL TITCOMB, Exr., and MARTIN T. V. BOWMAN, Claimant.

Kennebec. Opinion December 19, 1901.

Gift. Savings Bank Deposit. Delivery. Trust.

A gift inter vivos is not valid, unless there is a delivery to the donee, or to some one for him; unless the donor parts absolutely with all present and future dominion and right of control over it; and unless the gift is intended to take immediate effect, to be complete as a transfer of title, in presenti, and is absolute and irrevocable.

Where a depositor in a savings bank caused the deposit to be transferred on the books of the bank to his brother and surrendered his old deposit book and took out a new one in the name of his brother, it was the same as if he had drawn the money and then deposited it in his brother's name, and that is the same as if he had then so deposited it for the first time.

A delivery of money to the treasurer of a savings bank, as a deposit, for a donee may be regarded as a sufficient delivery to the donee.

But where, in such case, the depositor retained the new deposit book and in writing to his brother, about what he had done, declared that he wanted the interest as long as he lived, "to live on" and used the expression "If I should be taken away, it is yours," and proposed to give his brother a writing, "so that you (the brother) will have something to show," "now, you will have it to show when I am gone" and declared that he wanted to "secure this fifteen hundred to you (the brother) in case of my death," the court is of opinion that the depositor did not intend to make an absolute gift, in presenti.

A depositor after making the transfer declared to his brother, that the money, after the brother's death, must be divided equally among the brother's children, that he had transferred the money with that "understanding," and that he wanted the interest to live on during his own life, and this arrangement was agreed to by the brother.

Held; that the depositor's purpose was for his brother to hold the money in trust for the benefit of the depositor himself during his lifetime and later for the benefit of the brother's children and that the trust is valid.

The creation of a trust is but the gift of the equitable interest. An unequivocal declaration as effectually passes the equitable title to the cestui que trust, as delivery passes the legal title to the donee of a gift inter vivos.

In order to create a trust, it is not essential that all the steps be taken at one time. The declaration may follow the deposit. The declaration may at first be conditional or provisional, or tentative. If ultimately the conditions are eliminated, and the provisions are settled, so that the declaration becomes unequivocal, it is sufficient.

ON REPORT.

Bill of interpleader to determine the ownership of a savings bank deposit. The facts were agreed and are stated in the opinion.

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

S. L. Titcomb, for executor.

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

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

SAVAGE, J. Bill of interpleader to determine ownership of deposit in the plaintiff bank. It is claimed by Lendall Titcomb, Esq., as executor of the last will of Joseph J. Bowman, and by Martin T. V. Bowman, a brother of Joseph. It is not in dispute that the deposit was originally made by Joseph, and in his own name. That being so, it should now come into the hands of his executor for administration, unless in some way Joseph J. Bowman was devested of his title in his lifetime. Martin T. V. Bowman sets up a gift inter vivos, subject to a parol trust, for the benefit of his children, from Joseph to himself; or if the gift be not sustained, a trust created by Joseph for the benefit of Martin's children. The executor replies that the gift was invalid for want of delivery. The executor also claims that the donor did not intend to part with his dominion and control of the deposit, and that no gift was made with intent to take effect in presenti, but only, at the most, in futuro, as a testamentary disposition; and that if the gift was imperfect, as claimed, a trust cannot now be predicated from a transaction intended as a gift. And here we find the only issues presented for our consideration.

No principle of law is more firmly established than that a gift inter vivos is not valid, unless there is a delivery to the donee, or to some one for him; unless the donor parts absolutely with all present and future dominion and right of control over it, and unless the gift

is intended to take immediate effect, to be complete, as a transfer of title, in presenti, and is absolute and irrevocable. *Allen* v. *Polereczky*, 31 Maine, 338; *Dole* v. *Lincoln*, 31 Maine, 422; *Donnell* v. *Wylie*, 85 Maine, 143; *Bourne* v. *Stevenson*, 58 Maine, 499; *Hill* v. *Stevenson*, 63 Maine, 364, 18 Am. Rep. 231; *Robinson* v. *Ring*, 72 Maine, 140, 39 Am. Rep. 308; *Augusta Savings Bank* v. *Fogg*, 82 Maine, 538.

This case shows the following essential facts. In 1899, Joseph J. Bowman deposited $1500 in his own name in the Hallowell Savings Institution. A short time before February 20, 1900, he asked the treasurer of the bank if he could transfer the account "to his brother M. T. V. Bowman, as he wished his brother's children to have it when he was gone." He was told that it could be done, and the book sent to his brother with his instructions. On February 20, 1900, he presented his deposit book at the bank and requested that it should be transferred to his brother M. T. V. Bowman, which was accordingly done. The account with Joseph J. Bowman on the books of the bank was balanced, and a new account opened with M. T. V. Bowman. The old deposit book was surrendered, and a new book was issued in the name of M. T. V. Bowman, but delivered to Joseph J. Bowman.

Nearly two years before this, Joseph had written to his brother Martin, saying among other things,—"Don't you think you could come on some time before a great while as I would like for you to know in case I am taken away what will come to you." In quoting from this letter, as we shall do in quoting from others, we do not undertake to give literally the writer's illiterate, ungrammatical and sometimes confused sentences. We give them as we interpret them. March 29, 1900, five or six weeks after the transfer of the deposit on the books of the bank, Joseph wrote to his brother again, saying, "I have transferred to you fifteen hundred dollars, or taken out a savings bank book in your name. If I should be taken away, it is yours with the understanding that your wife shall have no part of the sum. In case of your death, it must be divided equally among your children. The law is such in this state that I want to have this fixed while I am living. My folks are gone to-day. I could

find no pen to write with. I will write with ink giving you this so you will have something to show, but if anything happens that I should need it, I know I can trust you. I have a right to do this. I get three and a half per cent here. I want the interest while I live to live on. I don't know but you had better draw the money. I don't know what you could do with it there. Write and tell me what you think. I shall send a writing making this gift now you will have it to show when I am gone."

On April 5, 1900, M. T. V. Bowman replied: "Now in regard to this gift that you mention. The best way I know of if you wish to do this, is to send me a New York draft for the amount and I will pay you four per cent interest on it as long as you live. You say you are getting 3½ per cent now. . . . . Now I would pay you 4 per cent interest as long as you live, and send you the interest semi-annually. . . . . As you desire it should go to my children, that is all right. . . . . If you should prefer that I should draw from here for the money instead of your sending draft, why instruct me fully what bank to draw on. . . . . Please let me hear from you on receipt of this so I will know what arrangements to make and what to do in regard to your proposition on the money question."

About this time, probably after the receipt of this letter, Joseph went to the bank and tried to draw the money, saying that he wished to send it to his brother. The banker refused to pay without the order of Martin, and gave Joseph a blank order to be filled out by Martin for the money. April 28, 1900, Joseph enclosed this blank order to Martin, in a letter in which he said:— "Now I want you to sign the receipt (order) in this letter, and send it back to me as I put the money in the bank in your name, and cannot withdraw it without your order. There is a Trust Company in Augusta that pays four per cent. I never put any money there. I want to secure this fifteen hundred to you. In case of my death life is uncertain with you and me both is why I want it divided equally among your children, in case of your death. Now send me the interest. I will get the money as soon as I can without losing interest. . . .

I have the money in Oakland bank. As soon as I can go there,

I will send you a check. . . . Now send the order. If I can do no better, I can draw it here."

To this letter Martin replied, on May 8 following. He enclosed the order signed by himself, and said:—"I have signed the order on the Treasurer of the Hallowell Savings Institution, amount in blank. . . . I think the better way would be for you to send draft on New York for the amount when you draw it. I think that would be the safest way. However, fix it just as you think best. When it comes I will put it right out at interest and send you the interest promptly every six months. . . . Whatever disposition you shall make and send here shall go directly to them (his children) share and share alike at my death, after you have the profits and interest of it while you live. This, I believe, is just according to your wish and what you stated."

Joseph J. Bowman died May 18 following, never having presented the order of his brother to the bank, or drawn the money. The deposit book which he took out in the name of his brother February 20, 1900, when he transferred the account, remained in his possession until his death.

The first objection raised by the executor to the validity of the alleged gift,—that of want of delivery,—does not appear to us to be troublesome. If the transaction of February 20 was intended to vest title to the deposit immediately and absolutely in Martin, without any further present or future dominion and control of the donor over it, then the case seems to fall within the rule, as to delivery, established in *Barker* v. *Frye*, 75 Maine, 29. In that case the donor had made a deposit in bank in the name of the donee, "subject to the order of Lydia P. Frye, during her lifetime." It was held that this constituted a trust, under the circumstances of that case. Subsequently she informed the treasurer of the bank that she wished to give the donee full control over the deposit, and the absolute ownership of it. And to accomplish this purpose, the treasurer, at her request, erased from the books the original entry "subject to the order of Lydia P. Frye."

It being claimed that that constituted a gift to the donee, the same objection was made in that case that is made in this, namely, want of

delivery. But the court said: "Here the evidence of title was given to the treasurer. . . . . But this is not all. The deposit was the subject of the gift. The act and declarations of Mrs. Frye with the change in the books were equivalent to a withdrawing and redepositing the money for the donee. If this had been done the delivery could hardly have been questioned. But the ceremony would have been a useless one, and would have added no force to the evidence of a change of property." It is important to bear in mind that in this case, as in *Barker* v. *Frye*, it was the deposit itself which was transferred by the acts which it is claimed constituted the gift. Frequently the transfer is made by a delivery of the bank-book, the evidence of the deposit, and that is held to be a sufficient delivery, even though it has not been assigned. *Hill* v. *Stevenson*, 63 Maine, 364, 18 Am. Rep. 231. But here it was a transfer of the deposit on the books of the bank. It was the same as if he had drawn the money and then deposited it in his brother's name, which is the same as if he had then so deposited it for the first time. No doubt a delivery of the money to the treasurer for the donee is a sufficient delivery under such circumstances. And as said in *Barker* v. *Frye*, "when the change of entry was made thus giving authority to the bank to pay to the donee, it was a more effectual delivery than if an unassigned pass-book had been given to the donee."

Much more serious questions arise when we inquire whether Joseph J. Bowman ever intentionally parted with all dominion and control over this fund in the savings bank, and whether he intended this transaction to take full effect as a gift in his own lifetime. The answer to these questions must be found chiefly in the two or three letters written by him which are made a part of the case. The fact that he retained the deposit book is not conclusive, though it has some weight. But in his letters we think we can discover his intenion, although they are the letters of an illiterate man, a man who apparently was unable to express himself clearly in writing, and whose statements in these letters are sometimes obscure and confused; and although his expressions are not in all respects consistent with each other.

We think that a fair interpretation of his language justifies the fol-

lowing conclusions as to his purpose and intentions. He wanted Martin's children to have the money when he was gone. So he told Treasurer Dudley. To accomplish this purpose he transferred his account in the bank to Martin. He did not intend by this act to devest hinself of all beneficial interest in the deposit. He did not intend it as a gift, immediate and absolute. He intended to receive the interest as long as he lived, "to live on." The expression, "If I should be taken away, it is yours," his proposal to give Martin a writing, "so that you will have something to show," "now you will have it show when I am gone," his declaration that he wanted to "secure this fifteen hundred to you in case of my death,"—all show that he did not intend to make an absolute gift, in presenti. Though he had transferred the deposit, he retained the deposit book. He seems to have supposed that he could still draw the money. For these reasons, we think that the transaction did not amount to a gift.

It still remains to inquire whether he created a valid trust. We think he did. It is true that if the transaction was intended as a gift in presenti, but was imperfect, as for want of delivery, a trust cannot now be substituted for the gift. If it was intended to be a gift inter vivos, whether it was perfect or imperfect, it was not a trust. *Norway Savings Bank* v. *Merriam*, 88 Maine, 146. On the other hand, if the transaction was not intended to be a gift, it might constitute a trust.

To return again to the facts in this case. Joseph Bowman had two concurrent purposes. One was to secure the money after his death to his brother Martin's children; and the other, to secure the income for himself, during his lifetime. How did he attempt to accomplish these purposes? He placed the money to the credit of his brother in the bank. He made the declaration to his brother that the money, after the brother's death, must be divided equally among the brother's children, that he had transferred the money with that "understanding." He reserved the interest during his own life. There is nothing equivocal about the purpose of the transfer, or in the language which declared it. The brother took no immediate beneficial interest. Joseph was to have the income as long as he lived, and the principal was to be kept afterwards for Martin's children. If Martin accepted

the proposal, he became trustee of the fund, subject to these two express trusts. Martin did accept. He made a definite proposal to pay even more interest than the fund was then producing, if the money should be sent to him for reinvestment in Iowa. This appears to have been acceptable to Joseph. All the following steps seem to have been taken with a view simply of taking the money out of the bank where it stood in Martin's name and sending it to Iowa.

The creation of a trust is but the gift of the equitable interest. An unequivocal declaration as effectually passes the equitable title to the cestui que trust, as delivery passes the legal title to the donee of a gift inter vivos. One may constitute himself trustee by mere declaration. *Bath Savings Institution* v. *Hathorn*, 88 Maine, 122, 51 Am. St. Rep. 382, 32 L. R. A. 377; *Norway Savings Bank* v. *Merriam*, supra. In the case at bar there were both deposit and declaration.

The character of this transaction was completely determined when Martin accepted the trust. The money may have been affected by the trust without Martin's acceptance. But the trusteeship itself was undetermined. However, when Martin consented to act under the terms of the trust as declared by Joseph, he became trustee and the trust was complete.

In order to create a trust, it is not essential that all steps be taken at one time. The declaration may follow the deposit. The declaration may at first be conditional or provisional, or tentative. As in this case, Joseph's first declaration may have been intended to be conditional on Martin's acceptance of the trust according to its terms. If ultimately, as the result of continued negotiations, the conditions are eliminated, and the provisions are settled, so that the declaration becomes unequivocal, that is sufficient. We may, therefore, look through the several letters written by Joseph at different times, to find his declaration of the purpose of his transfer of the deposit. Taken all in all, we have no doubt that this purpose was for Martin to hold it in trust for the benefit of Joseph in his life time, and later for the benefit of Martin's children. Thus he unequivocally declared.

The validity of the trust, if sufficiently created, is not affected by the fact that Joseph reserved the income of the trust fund during

life. He might even have made himself trustee, and reserved the income. *Norway Saving Bank* v. *Merriam*, supra.

A single Justice may enter a decree below that the plaintiff be paid its taxable costs, and such reasonable counsel fees as may be allowed to it, out of the fund; that the balance of the fund be paid to the claimant, Martin T. V. Bowman; and that said Bowman recover his taxable costs of the defendant Titcomb, who may have them allowed to him upon the settlement of his account as executor.

Decree accordingly.

DAISY FITCH *vs.* JAMES SIDELINGER.

Knox. Opinion December 20, 1901.

Practice. Continuance. New Trial.

Before the trial of a cause the defendant's counsel presented to the court a written motion to have the action dismissed, alleging that a new declaration, setting out a different cause of action, had been substituted for that originally filed with the writ, without the knowledge or permission of the court. It appeared from the exceptions that the defendant "offered to support the same by evidence and asked for a postponement of the trial for that purpose." The presiding judge overruled the motion and required the defendant to proceed to trial. It did not appear, however, that the defendant offered, or was prepared, to present any evidence at that time, but his motion was for a "postponement of the trial for that purpose."

Held; that the ruling of the presiding justice denying this motion for a postponement, was clearly a matter of discretion, and in the absence of anything tending to show that this discretion was not properly exercised the ruling was not subject to exceptions.

The conclusion is irresistible that the defendant knew before the trial what the witness Orff, whose evidence was alleged to have been newly-discovered would testify to or by the exercise of due diligence might have known it. Furthermore, her testimony was for the most part essentially cumulative, and after a careful reading of all the evidence in the case it does not seem probable that her testimony would have changed the result. Under such circumstances a new trial should not be granted.

Testimony of witnesses, whose evidence is alleged to have been newly-discovered, irregularly taken cannot be considered by the court.

A motion for a new trial on the ground of newly-discovered evidence will not be entertained unless accompained by a statement under oath comprising the names of the witnesses whose testimony is desired and the particular facts they are expected to prove, with the grounds of such expectation. Evidence taken without such reasonable notice and information to the opposing party, will not be received in support of such a motion.

Motion and exceptions by defendant. Overruled.

Action for trespass to the person.

The case is stated in the opinion.

L. M. Staples, for plaintiff.

M. A. Johnson and O. D. Castner, for defendant.

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

WHITEHOUSE, J. This is an action to recover damages for a trespass upon the person. The jury returned a verdict for the plaintiff for $319.58, and the case comes to this court on exceptions and a motion for a new trial on the ground of newly-discovered evidence.

I. The exceptions. Before the trial of the cause at the December term, 1900, the defendant's counsel presented to the court a written motion to have the action dismissed, alleging that a new declaration, setting out a different cause of action, had been substituted for that originally filed with the writ, without the knowledge or permission of the court. It appears from the exceptions that the defendant "offered to support the same by evidence and asked for a postponement of the trial for that purpose." The presiding justice overruled the motion and required the defendant to proceed to trial. It does not appear, however, that the defendant offered, or was prepared, to present any evidence at that time, but his motion was for a "postponement of the trial for that purpose." The ruling of the presiding justice denying this motion for a postponement, was clearly a matter of discretion, and in the absence of anything tending to show that this discretion was not properly exercised the ruling was not subject to exceptions.

II. The motion. It appears from the testimony of Mrs. Orff, whose evidence is alleged to have been discovered after the trial in

December, that she was a near neighbor of the defendant and had known him from childhood. She further testifies, inter alia, that she was summoned to appear at the December term of court when the case was tried, but the night before received word that the writ had been changed and that they didn't need her evidence. She also states that the defendant called at her house to see her just before the December court, and told her that he wanted her to come over.

It is true that the witness elsewhere states that she was summoned in another case, and denies that she had told the defendant before the trial that she knew anything about this case. But she nowhere retracts the statement that the defendant called to see her in December before the trial, or explains her testimony that she was summoned to appear at court in December and the night before "got word that the writ had been changed and they didn't need her evidence."

There is no intimation that the writ had been changed in any other case in which she had been summoned, and the conclusion is irresistible that the defendant knew before the trial what the witness would testify to, or by the exercise of due diligence might have known it. Furthermore, her testimony is for the most part essentially cumulative, and after a careful reading of all the evidence in the case it does not seem probable that the testimony of Mrs. Orff would have changed the result. Under such circumstances a new trial should not be granted. *Woodis* v. *Jordan*, 62 Maine, 490; *Marden* v. *Jordan*, 65 Maine, 9; *Greenleaf* v. *Grounder*, 84 Maine, 50; *Michaud* v. *Can. Pac. Ry. Co.*, 88 Maine, 381.

The testimony of the other witnesses whose evidence is alleged to have been newly-discovered, was irregularly taken and cannot be considered by the court. A motion for a new trial on the ground of newly-discovered evidence will not be entertained unless accompanied by a statement under oath comprising the names of the witnesses whose testimony is desired and the particular facts they are expected to prove, with the grounds of such expectation. Evidence taken without such reasonable notice and information to the opposing party will not be received in support of such a motion. *Gilbert* v. *Woodbury*, 22

Maine, 246; *Merrill* v. *Shattuck*, 55 Maine, 374; *Gifford* v. *Clark*, 70 Maine, 94.

Exceptions and motion overruled.

FREDERICK H. NOBLE *vs.* LEONARD L. BUSWELL.

Penobscot. Opinion December 20, 1901.

Sale. Rescission. Time. Demurrage. Recoupment.

The plaintiff bargained with the defendant for a quantity of hay and straw, which was subsequently shipped to him according to order. He paid the freight, and, without examination of the hay, caused one load of it to be removed from the car to his barn. After examination, the same day, he became satisfied that the hay was not of so good quality as the contract called for, and he so notified the defendant immediately, adding, "The car is on the track at your risk." Six days later the plaintiff returned the the load of hay taken to the car, which in the meantime had become subject to demurrage. The plaintiff has sued to recover the freight paid, and the defendant has filed an account in set-off for the price of the hay and straw.

Held; that if the hay was not as good as the contract called for, the plaintiff might have declined to accept the hay; and that after he received a part of the hay, under the circumstances, he had a right to rescind the contract; that to rescind the contract he must restore the hay within a reasonable time; that the delay in this case was unreasonable; and, hence, that the attempted rescission was ineffectual. It follows that the title to the hay and straw remained in the plaintiff, and he cannot recover back the freight paid.

Held; that the defendant may recover on his account in set-off. But as it is evident that the hay received was of a poorer quality than that which the defendant agreed to deliver, the plaintiff may recoup. The defendant is entitled to recover only the actual value of the hay.

On report. Judgment for defendant.

Assumpsit for freight and cartage paid by plaintiff on a carload of hay and straw, shipped him by defendant. Plaintiff claimed the quality of the hay was poorer than he ordered and sought to rescind the sale. Defendant filed a set-off for the price of the hay and straw.

The case is stated in the opinion.

H. H. Patten, for plaintiff.

Hugo Clark, for defendant.

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

SAVAGE, J. This case comes up on report. We think the essential facts to be deduced from the evidence are as follows:

On September 15, 1900, the plaintiff wrote to the defendant, "You may ship me car of straw at price named $7.00 per ton in Bangor." Four days later the defendant wrote to the plaintiff, and after explaining his inability to ship a whole car of straw, said, "I don't see any other way to load the car but to make up with hay. The hay will cost you $13 in Bangor. Shall I ship it to you or not." On the same day, September 19, the plaintiff replied, "If your hay is extra nice, strictly No. 1, you may ship with the straw at that price, but if not, please ship the straw and I will pay the difference in freight on half car of straw." After some delay, but without additional negotiations, the defendant shipped to the plaintiff a car of straw and hay, which arrived in Bangor September 27. September 29, the plaintiff paid the freight, ten dollars, and without examination of the hay, caused one load of it to be removed from the car to his barn. After examination, the same day, the plaintiff immediately wrote and also telegraphed to the defendant that the hay was not "first class," that he did not want it. He added, "The car is on the track at your risk; what will you do about it?" This was Saturday. On the following Monday, October 1, the defendant called upon the plaintiff in Bangor. The plaintiff said he would not accept the hay, and demanded of the defendant the ten dollars paid for freight, and fifty cents paid for trucking the load which had been removed. The defendant offered to pay the ten dollars, which the plantiff declined. A little later, the plaintiff, speaking of the hay which had been removed, said to the defendant: "There it is out there in the barn. If you take it where it is, it will cost you ten dollars and fifty cents. . . . . If I put it back, it will cost you eleven dollars." Still later in the day the defendant notified the plaintiff that the hay on the car was at his risk and disposal. The plaintiff replied that he would not take it. On the fifth day of October the plaintiff returned to the car the hay which had been removed, and notified the defend-

ant that the carload of hay was at his risk and disposal. The reason assigned was that the hay was not of the kind or quality which had been purchased.

The plaintiff now brings this action to recover the ten dollars paid for freight, and one dollar for truckage of the load removed and returned, fifty cents each way. The defendant has filed in set-off an account for the contract price of the hay and straw sold.

We are satisfied that the hay in question was not "extra nice, strictly No. 1" in quality, as stipulated in the order given by the plaintiff. Inasmuch as there was no opportunity for inspecting the hay before delivery, the defendant, by accepting the plaintiff's order and shipping the hay, impliedly agreed that the hay was of the quality specified in the plaintiff's order. The hay not being of that quality, there was a breach of the defendant's implied agreement, and the defendant accordingly would have been justified in declining to accept the hay. But he removed one load, which, under the circumstances, was an acceptance, unless rescinded. Nevertheless, he had a right to rescind the contract. To rescind the contract, he must restore the hay. *Pratt* v. *Philbrook*, 33 Maine, 17. To make the rescission effective, the restoration must be within a reasonable time. *Wingate* v. *King*, 23 Maine, 35. The plaintiff did claim to rescind the contract, and he restored the hay to the car from which he took it. If this was done seasonably, the title in the hay would then be in the defendant, and the plaintiff may recover the amount he advanced for freight.

The case at this point turns upon the answer to the question whether the hay was restored within a reasonable time. We think it was not. A party desiring to rescind must use proper diligence. *Cutler* v. *Gilbreth*, 53 Maine, 176. The plaintiff began unloading the hay Saturday, September 29. It was not restored to the car until Friday, October 5. We think that this delay in itself was unreasonable. But aside from that, while the plaintiff was delaying the restoration of the hay, the car upon which the remaining hay and straw was loaded had become subject to demurrage. The defendant was thereby made liable for extra expense. Merely restoring the hay did not place the parties in statu quo. *Potter* v. *Titcomb*, 22

Maine, 300. Therefore the attempted rescission was ineffectual. The title to the hay and straw remained in the plaintiff. He cannot recover back the freight paid in pursuance of his contract of purchase. He must pay for the hay and straw. But he is entitled to show, by way of recoupment, that the hay received was of a poorer quality than that which the defendant agreed to deliver. *Morse* v. *Moore*, 83 Maine, 473, 23 Am. St. Rep. 783, 13 L. R. A. 224. And the reduction in damages should be the difference between the value of the hay and straw delivered and that of the hay and straw contracted for.

Applying this rule, the evidence satisfies us that the defendant should recover only seventy-five dollars on his account in set-off.

Judgment for the defendant for seventy-five dollars and interest from the date of the writ.

CHARLES F. FROST

vs.

THE WASHINGTON COUNTY RAILROAD CO.

Washington. Opinion December 23, 1901.

Waters. Const. Law. Commerce. Railroads. Spec. Laws, 1893, c. 454. Act of Congress, April 12, 1900, c. 187. U. S. Const. Art. 1, § VIII, Par. 3.

1. Under the commerce clause of the United States Constitution, Art. 1, § VIII, par. 3, Congress has the power in the interests of commerce to authorize the obstruction and even closing of the navigation of a tide-water channel.

2. Congress having by an Act, approved April 12, 1900, "declared to be a lawful structure" the trestle built and maintained by the Washington County Railroad Company across the tide-water channel between Pleasant Point and Carlow Island in the town of Perry, the court cannot now consider the question whether the trestle is "so constructed as not unnecessarily to obstruct the navigation" of that channel as required by the Act of the State Legislature authorizing the construction of the trestle.

3. The proviso in the Act of Congress, "Provided that such modifications are made in the trestle's present position, condition and elevation as the Secretary of War may order in the interests of navigation," is of the nature condition subsequent, and the trestle must be regarded by the court as a lawful structure until the Secretary of War shall order modifications which the company shall neglect to make. It does not appear in this case that any modifications have been ordered.
4. The right of navigation in a tide-water channel is not an individual private property-right, protected from governmental action by the constitutional provision prohibiting the taking of private property without just compensation. It is a public right only, which may be abridged or extinguished at the pleasure of the sovereign acting for the public, and without making compensation to those who were wont to use it. The right is always subject to be thus extinguished, and individuals should not assume it to be permanent.
5. The fact that the building and maintenance of the trestle and the consequent closing of the channel by the railroad company under the authority of the Legislature and of Congress, has seriously damaged the business of the plaintiff and the selling value of his property adjoining the channel, does not entitle him to compensation from the railroad company, none of his property having been entered upon or used by the company. It is the common case of damnum absque injuria. The company has not wronged the plaintiff.

On report. Judgment for defendant.

Action on the case brought to recover damages claimed to have been sustained by plaintiff by reason of the building and maintenance, by the defendant company, of a trestle for its railroad across the channel leading to a tide-water cove in Passamaquoddy Bay, whereby access was cut off from plaintiff's store and mill to the high seas.

It was admitted that the railroad was duly located and the location filed with and approved by the Board of Railroad Commissioners, and that that body had granted a certificate to operate the road over the trestle.

The cove was closed to vessels by reason of the trestle May 20, 1898, and has remained so ever since. An Act of Congress, approved April 12, 1900, declared the trestle to be a lawful structure. Plaintiff introduced a certified copy of this act as reported back to the Senate from committee, with alterations showing that the bill was not enacted in its original form. The following words were stricken out, viz:—"In their present position, condition, and elevation, and

shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding;" also the whole of § 2, viz:—"That the Washington County Railroad Company, its successors or assigns, is authorized to have and maintain its said trestles at their present site and elevation and in their present condition," and in place of the stricken portions was inserted the proviso at the end of the bill as printed in the opinion.

The changes in the bill were on the recommendation of the War Department.

G. M. Hanson, *A. St. Clair*, and *L. H. Newcomb*, for plaintiff.

The right which a riparian owner has in a navigable stream when traveling upon it . . . must be distinguished from his right to reach navigable water from his own land. The former right is one which belongs to him as one of the public. The latter is a private one incident to the ownership of the adjoining property. If it is taken for the benefit of the public he is entitled to compensation.

In *Rose* v. *Groves*, 5 M. & G. 613, an inn-keeper recovered damages against the defendant for wrongfully preventing the access of guests to his house, situated on the river Thames, by placing timbers in the river opposite the inn. Tindal, C. J., said: "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house on the river."

In *Lyons* v. *Fishmongers' Company*, 1 App. Cases, 662, Lord Cairns said:—"As I understand the judgment in *Rose* v. *Groves*, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with. . . . . Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land into a highway is something quite different from the public right of using a highway."

Plaintiff had all the rights to use the waters of the cove and channel in common with the public, and in the same manner; but in addition he had a right of navigation of a very different character connected with an exclusive right of access to and from a particular wharf, which was not a right in common with the rest of the public, for other members of the public had no access at this particular

place. This becomes a form of enjoyment of the land, a disturbance of which may be vindicated in damages.

Legislative authority has been exercised as far as impeding or impairing navigation, but no case justifies destroying navigation.

The altered appearance of the bill, as finally enacted, shows the futility of plaintiff's attempt to legalize the structure, as it existed, and that some act by the Secretary of War pursuant to the bill was necessary.

"No intention to completely obstruct navigation appears in either act. The fact that a bridge is a public benefit will not prevent its being a nuisance if it obstructs navigation." *Devoe* v. *Penrose Bridge Co.*, 3 American Law Register, 79.

G. A. Curran and *B. B. Murray*, for defendant.

Bridges which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation as well as navigable waters, and the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. Ancient Charters, etc., 148; *Gilman* v. *Phila.*, 3 *Wall.*, 725; *Pound* v. *Turck*, 95 U. S. 462; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Willamette Iron Bridge Co.*, v. *Hatch*, 125 U. S. 8.

It is competent for the legislature to give retrospectively the capacity it might have given in advance. Cooley's Const. Lim., p. 455, 6th Ed.; *Single* v. *Supervisors of Marathon*, 38 Wis. 363; *Allen* v. *Archer*, 49 Maine, 346; *Oriental Bank* v. *Freese*, 18 Maine, 109, 36 Am. Dec. 701.

For any lawful acts done by the defendants in the construction of their road the plaintiff will not be entitled to recover damages, although he may have been indirectly injured. *Rogers* v. *Kennebec & P. R. R. Co.*, 35 Maine, 319; *Spring* v. *Russell*, 7 Greenl. 273; *Callender* v. *Marsh*, 1 Pick. 418; *Gowen* v. *Penobscot R. R. Co.*, 44 Maine, 140. To sustain his action plaintiff must show that the damage he has sustained, if any, "is not common to others", to use the expression of Lord Coke. *Stetson* v. *Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Low* v. *Knowlton*, 26 Maine, 128, 45 Am. Dec. 100; *Brown* v. *Watson*, 47 Maine, 161, 74 Am. Dec. 482; *Holmes* v. *Corthell*, 80 Maine, 31.

Plaintiff does not show that the injury to him is different in kind than that suffered by other members of the public; simply that the present consequential damage to him may be greater in degree than to others. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land. *Blackwell* v. *Old Colony R. R. Co.*, 122 Mass. 1; *Davidson* v. *Boston & Maine R. R.* 3 Cush. 92; *Willard* v. *City of Cambridge*, 3 Allen, 574; Wood on Nuisances, Vol. 1, p. 14; Waite's Actions and Defenses, Vol. 4. p. 730; Wood on Railroads, Vol. 2, p. 1127; Cooley on Torts, 731.

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

EMERY, J. A small tide-water bay or cove makes westerly from Passamaquoddy Bay into the land in the town of Perry. The entrance to this cove from the Bay is a navigable channel between Pleasant Point on the mainland on the north and Carlow Island on the south, and this channel for the purposes of this case may be regarded as the only practicable passage by water in and out of the cove. For several years prior to 1898, and since, the plaintiff has owned a tract of land on the shore of this cove about three-quarters of a mile up the cove from the entrance. On this tract of land prior to 1898, he had built a wharf into the cove and had built a grist mill, and was carrying on a business of buying, grinding and selling grain, etc., and also was dealing in wood, country produce, etc. The most of his transportation of the merchandise of his business was by water to and from his wharf, in and out of the cove, through the entrance above described. From this wharf and cove vessels and boats could proceed by sea to other coast states and to the coasts of foreign nations.

The plaintiff had been carrying on this business in this manner through this navigable channel for several years prior to 1898, when the Washington County Railroad Company, in building its railroad into Eastport, built and has since maintained and now maintains a trestle across this channel between Pleasant Point and Carlow Island

for the passage of its trains. This trestle practically prevents any navigation of that channel and any transportation by water in and out of the cove. This event has greatly injured the plaintiff's business and the value of his wharf and mill, although the railroad company has not taken nor trespassed upon any of his land or other property, but only interfered with his right of navigation through the channel into the bay and sea. He has brought this action on the case against the railroad company to recover compensation for the injury thus done him by the company's acts in building and maintaining that trestle.

I. The first question is, whether the defendant company has any legal right to build and maintain a trestle of that character at that place with such effect. It was authorized by its charter (Special Laws of 1893, ch. 454) to locate, construct, maintain and operate a railroad from some point on the Maine Central Railroad in Hancock County to Calais, including a branch to Eastport. It was also empowered by its charter (section 5) "to erect and maintain bridges across tide waters . . . which its railroad may cross; provided they shall be so constructed as not unnecessarily to obstruct the navigation of such waters."

Under this charter the defendant company duly located its branch line to Eastport across this channel where the trestle now is, and this location was duly filed with the Railroad Commissioners and the County Commissioners and was duly approved by them. The defendant company thereupon, in 1898, built the trestle on the line of the approved location to support its railroad track and now maintains it as a part of its through railroad from Eastport to its connection with the Maine Central Railroad and with the railroad system of the United States and Canada. The Railroad Commissioners gave authority to the company to operate its railroad over the trestle as now constructed.

The plaintiff, however, contends that all this gave the defendant company no authority to construct and maintain the trestle it has; viz:—a trestle so constructed that it unnecessarily obstructs and even entirely prevents the navigation of this channel and cove. He claims

that the proviso above quoted in § 5 of its charter limits its authority to build bridges and trestles to those of such character and construction as will not unnecessarily obstruct navigation as described, to his detriment,—and hence this trestle is, as to him at least, an unlawful structure not authorized by the company's charter.

To meet this contention of the plaintiff's, the defendant relies upon an act of the Congress of the United States, approved April 12, 1900, (ch. 187) of the following tenor, viz:—"Be it enacted etc.: That the trestle on the Eastport Branch of the Washington County Railroad Company, being the property of the Washington County Railroad Company, and running from the extreme point of land south of Pleasant Point in the town of Perry county of Washington and State of Maine to the extreme northern end of Carlow's Island in the town of Eastport in said county and State; and a certain other trestle, also the property of said railroad company, in the East Machias River in said county of Washington and State of Maine, at the extreme end of said river near the village of East Machias in said county and State, be, and both of said trestles hereby are, declared to be lawful structures: Provided, That such modifications are made in their present position, condition, and elevation as the Secretary of War may order in the interests of navigation." It is not disputed that the trestle first described in the above act is the trestle in question.

We have now to consider the effect of this act of Congress upon the question whether the trestle as now built and maintained is a lawful or unlawful structure as to the plaintiff. Under the commerce clause of the constitution of the United States (Art. 1, § VIII, par. 3.) Congress undoubtedly has full and exclusive jurisdiction over navigation and commerce in this channel whenever it chooses to exercise that jurisdiction. Whatever navigability existed in this channel and cove to and from the plaintiff's wharf, was directly available to commerce with other States and foreign nations over the waters of the cove, channel, bay and the great highway of the ocean. "Commerce among States does not stop at a state line. Coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as

far as navigation is practicable." *Gilman* v. *Philadelphia*, 3 Wall. p. 725. In *Cardwell* v. *American River Bridge Co.*, 113 U. S. 205, the American River, a small branch of the Sacramento, though entirely within the State and navigable only by barges and small steamboats, was yet said to be a navigable water of the United States and as such under the control of the government of the United States, as to its navigation. So Grand River, though wholly within the State of Michigan and flowing into Lake Michigan, was held to be within the commerce clause of the U. S. Constitution. *The Daniel Ball*, 10 Wall. 557. When, therefore, Congress acts and so far as it acts in the premises, the jurisdiction of the State government, judicial as well as legislative, recedes. If Congress declares a bridge or other structure over or on navigable waters to be an unlawful structure, the State legislature cannot make it lawful nor can the State court declare it to be lawful. So, if Congress declares the structure to be lawful, neither the State legislature nor the State court can, even upon the most plenary proof, declare it unlawful as interfering with navigation. The judgment of Congress is conclusive, not to be questioned by any court. In the *Wheeling Bridge* case, 18 Howard, 421, the U. S. Supreme Court had, upon allegation and proof, adjudged the Wheeling Bridge across the Ohio River to be an unlawful structure as obstructing the navigation of the river, and had decreed that it should be removed or elevated so as to permit free navigation of the river. Then Congress passed an act declaring the bridge to be a lawful structure in its then position and elevation. The court held that this act of Congress conclusively determined this bridge to be a lawful structure at its then elevation, and that the court could not proceed further in the matter. In the *Clinton Bridge* case 10 Wall. 454, the plaintiff sought to prove that the bridge across the Mississippi River was a serious and dangerous obstruction to navigation to his special detriment. After the erection of the bridge, Congress passed an act declaring that the bridge (describing it) "shall be a lawful structure." The court held that the act of Congress took the question from the court. The action was thereupon dismissed without hearing any evidence. In *Miller* v. *The Mayor of New York*, 13 Blatchford, 469, a case concerning the Brooklyn

bridge, the U. S. Circuit Court considered the effect of an act of Congress declaring a bridge over navigable waters to be a lawful structure, and after reviewing the authorities, said: "It results from the cases considered, that the authority of Congress is paramount in the regulation of commerce under the constitution; and that its determination in respect to interference with navigation by obstructions thereto is conclusive. What it authorizes may be justified upon its authority. What it forbids is necessarily unlawful. Nor is it to be forgotten that this power of Congress is at all times capable of exercise. If it should turn out that the judgment of Congress has been mistaken and that navigation is injuriously affected, it can by law require the bridge to be altered or removed and can adapt its regulation of commerce to its view of the public interests." This language was quoted with approval by the New York Court of Appeals, in *People ex rel. Murphy* v. *Kelley*, 76 N. Y. 475, and the decision was affirmed in *Miller* v. *Mayor*, 109 U. S. 385.

It must be apparent from the foregoing authorities, and from the nature of the case, that if Congress has declared this trestle, as now constructed and maintained, to be a lawful structure, this court cannot hear the plaintiff to complain that it unlawfully impedes him in navigating the channel and cove. In such case, the question of lawfulness or unlawfulness of the structure has been taken from the court.

But the plaintiff contends that the act of Congress has not declared the trestle to be a lawful structure in presenti, but only in futuro, in case and when the defendant company shall perform the condition of the proviso of the act, viz:—"Provided that such modifications, are made in their [its] present position, condition and elevation as the Secretary of War may order in the interests of navigation." He says, and truly, that it does not appear that the defendant company has made any such modifications, and he urges that such modifications are a condition precedent to the trestle becoming a lawful structure. But it does not appear, either, that the Secretary of War has ordered any modifications, or that he deems any to be necessary in the interests of navigation. The proviso is evidently a condition subsequent only. The trestle is declared to be a lawful structure in pre-

senti. It is made such, until the defendant company shall fail to make the modifications ordered by the Secretary of War. If the Secretary does not order any modifications, and apparently he has not, then the trestle remains a lawful structure if kept up in its then present condition. It was competent for Congress to thus fix the matter, *Miller* v. *Mayor of N. Y.*, etc. 109 U. S. 368; *South Carolina* v. *Georgia*, 93 U. S. 13; and Congress having done so, persons desiring the removal or modification of the trestle as an obstruction to navigation should apply to Congress or to the Secretary of War. The courts have now no jurisdiction in the matter.

II. The plaintiff further contends that even if the trestle in its present condition is a lawful structure, and is lawfully maintained by the defendant company, he has nevertheless suffered much pecuniary loss from the action of the defendant company in building and maintaining it and should be re-imbursed therefor by the company. He concedes that the company has not taken, nor even touched, any of his tangible property, real or personal. The trestle is three-fourths of a mile distant from the property described in this suit. But the closing of the channel by the trestle has undoubtedly reduced the earning powers and selling value of his property on the cove, and has lessened the profits of the business he was carrying on there. He claims he has a cause of action against the railroad company for the injury thus done to his property and business.

This claim cannot be sustained. The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased or inherited. He did not earn it, create it or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. The plaintiff only shared in the public right. He had no right against the public. The sovereign had the absolute control of it and could regulate, enlarge, limit or even destroy it, as he might deem best for

the whole public, and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. The sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights. If, in the evolution of life and commerce, the sovereign comes to believe that the public good will be increased by the creation of some new or additional means of communication and commerce at the expense or even sacrifice of some older one enjoyed merely as a public right, the sovereign can so ordain, even to the detriment of individuals. If, in the judgment of the sovereign, a railroad across a navigable channel of water and completly obstructing its navigation is of more benefit to the public than the navigation of the channel, he has the unrestricted power to thus close the channel to navigation, without making compensation to those who had been wont to use it. Every individual making use of a merely public privilege must bear in mind that he may be lawfully deprived of that privilege whenever the sovereign deems it necessary for the public good, and he must order his business accordingly. Unless the person authorized by statute to obstruct or close a navigable channel is required by the statute to make compensation to persons injured by such action, he is under no legal obligation to do so. In such case the inconvenience and loss however great are damnum absque injuria. The company has damaged the plantiff but it has not wronged him. The defendant company has not interfered with the private property nor private rights of the plaintiff. It has lawfully, by express authority from the sovereign, merely abridged the use of a public right which was within the exclusive control of the sovereign. For this lawful act it is not obliged to make any compensation to the plaintiff any more than to all other persons who might have occasion, however seldom, to navigate the channel.

The authorities which support the foregoing statement of the law are numerous and uncontradicted. We cite a few only: *Spring* v. *Russell*, 7 Maine, 273; *Rogers* v. *K. & P. R. R. Co.*, 35 Maine, 319; *Gowen* v. *Pen. R. R. Co.*, 44 Maine, 140; *Brooks* v. *Cedar Brook, etc.*, 82 Maine, 17, 17 Am. St. Rep. 459, 7 L. R. A. 460;

Miller v. *Mayor of N. Y.* 109 U. S. 385; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Hamilton* v. *Vicksburg R. R. Co.* 119 U. S. 280; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *Am. River Bridge Co.*, 113 U. S. 205; *Scranton* v. *Wheeler*, 179 U. S. 141.

It follows that the plaintiff has no legal claim to compensation and cannot sustain the action. We regret that the plaintiff has been damaged by this new railroad being lawfully built across the channel he was wont to use, but he is only one of many thousands who are being individually damaged every day by the frequent lawful changes in the means and methods of manufacture and commerce, and yet cannot be said to be wronged by illegal acts.

Judgment for the defendant.

IDA CAMPBELL *vs.* HORACE G. HARMON, and another.

Androscoggin. Opinion December 20, 1901.

Civil Damage Act, R. S., c. 27, 49. Scienter of Owner. Exemplary Damages.

Revised Statutes, c. 27, 49, gives a new cause of action where none before existed at common law, but makes no change in the rules governing the recovery of exemplary damages. It simply places this new class of wrongs, created and defined by the statute, upon the same footing and subject to the same rules as to damages as other actionable torts.

Where in an action under that statute the seller of intoxicating liquor and the owner of the building are joined as defendants, and a wilful and wanton violation of law in utter disregard of the consequences which may follow is shown on the part of both, the jury may, in the exercise of a sound discretion, award exemplary damages, not as a matter of right on the plaintiff's part, but as a protection to the public and an example to the wrong-doer.

Motion by defendants for new trial. Overruled.

Action on the case under R. S., c. 27, § 49, the civil damage act.

The defendants were owners in common of a building in Lisbon Falls. Plaintiff claimed that one of the defendants sold liquor to her husband, and that he, while intoxicated from drinking it, inflicted injuries upon her person, and for a long time failed to provide her

with means of support. Plaintiff claimed that the liquor was sold with the knowledge of the other defendant.

The plea was the general issue. There was a verdict for plaintiff for $500.

The case is stated in the opinion.

R. W. Crockett and *R. S. Springer*, for plaintiff.

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

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

POWERS, J. This is an action under the civil damage act, R.S., c. 27, § 49, by the wife, who claims to have been injured in her person and means of support through the intoxication of the husband, caused by one of the defendants selling him intoxicating liquors, the other defendant being one of the owners of the building in which the liquor was sold. The case comes before the law court upon motion to set aside the verdict, which was for the plaintiff for five hundred dollars, on the ground that it is against evidence, and that the damages are excessive.

Upon the first ground it is sufficient to say that the evidence was conflicting as to whether the intoxication of the husband was caused by liquor sold to him by the defendant Horace Harmon. His liability was established if the jury believed the evidence of the plaintiff and her husband, and on examination of it we cannot say that they were not justified in so doing. There was also evidence from which the jury would be warranted in inferring that the other defendant, Reuben Harmon, knew that intoxicating liquor was sold in the building.

The defendants' principal contention is that the damages are excessive; that they are plainly more than compensatory; and that there are no such circumstances in this case as afford a ground for exemplary damages. The act of 1872, c. 6, § 4, now R. S., c. 27, § 49, gives a new cause of action where none existed before at common law, and expressly provides that in such actions both actual and exem-

plary damages may be recovered. By this the legislature did not intend to make any change in the rules governing the recovery of exemplary damages. It did not intend that such damages might be recovered in all such actions, without regard to the circumstances attending and accompanying the wrongful act of the defendant; but simply to place this new class of wrongs, created and defined by the statute, upon the same footing and subject to the same rules of damages as other actionable torts. *Reid* v. *Terwilliger*, 116 N. Y. 530.

Applying this construction of the statute to the case at bar, we find such circumstances of aggravation, showing a wilful and wanton violation of the law by the defendants, without regard to the rights of others or the consequences which might follow their illegal acts, as would justify the jury, in the exercise of a sound discretion, in awarding exemplary damages. The sales to the husband were unlawful. It was not an isolated case. The defendant, Horace Harmon, had been engaged for many months in the business of selling intoxicating liquors, in the same building, in violation of law and for pecuniary gain. He states that his sales in a single month might have aggregated hundreds in number, and hundreds of dollars in amount. Where the evidence shows such a wilful and wanton violation of the law, such reckless and illegal acts and conduct, in utter disregard of the consequences which may follow, punitive damages may be allowed, for the benefit of the community and as an example to others. *Kennedy* v. *Sullivan*, 136 Ill. 94, 36 Ill. App. 46; *Betting* v. *Hobbett*, 142 Ill. 70; *New* v. *McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89. True, such circumstances on the part of one defendant would not warrant the assessment of punitive damages against the other defendant, who is joined as owner of the building, unless the proof connects the owner with these circumstances. Here the defendants were brothers. They owned the building and premises together, Reuben renting his interest to Horace for a monthly rent. He lived in the same village, and but a short distance from the premises where the business was carried on. He was repeatedly and frequently in the shop. From these circumstances the jury might well find that he knew the nature of the business in which his brother was engaged, and knowingly permitted the building to be used for that purpose.

Such a continued violation of law on his part would place his conduct in the same category with his brother's, and equally subject him to exemplary damages, not as a matter of right on the plaintiff's part, but, should the jury in the exercise of a sound discretion see fit to award them, as a protection to the public, and an example to the wrong-doer.

Motion overruled.

WILLIAM P. YATES *vs.* CHARLES E. GOODWIN.

York. Opinion December 30, 1901.

Bills and Notes. Indorser. Demand and Notice. Time. Estoppel.

A corporation March 16th, 1894, hired money of a person for which it gave its note payable to its own order, on demand, and indorsed by it in blank. Upon the back of the note, under the name of the maker the defendant had put his own name. *Held*; that the defendant was an indorser only, and liable only on proof of demand and notice.

The person to whom the note was given died July 4th, 1894, without having made demand for its payment. In September following, the defendant was appointed one of the administrators of his estate. Nov. 13, 1894, the defendant wrote upon the back of the note these words: —"Demand made for payment Nov. 13, 1894." The defendant was also treasurer of the corporation maker of the note. The defendant claims that no demand was in fact made. *Held*; that the very act of the defendant in writing these words may properly be regarded as a demand by himself as administrator upon himself as treasurer, and that as indorser he necessarily had notice thereof.

Morever, the defendant having turned over the note with the foregoing statement of demand upon it, to certain of the heirs as a part of their inheritance, and under circumstances from which the court is of opinion that it may be assumed that the heirs relied upon the statement, *it is held*; that the defendant is estopped to deny that there was a demand as stated, or that there he had notice, which follows necessarily.

The court is of opinion that the note sued upon was intended to be a continuing security, an investment of a more or less permanent character, and that it was not intended by the parties that an immediate or early demand for payment should be made. It is therefore *held* that the delay in making demand was not unreasonable and the defendant was not released from his liability as indorser by reason of the delay.

While demand for payment of a demand note must be made within a reasonable time in order to hold indorsers, what is a reasonable time may depend upon many circumstances, among which are the purpose of the note and the intention of the parties respecting it. If it be given for a loan of money, and be on interest, especially if the rate of interest specified be less than the statutory rate, these facts are regarded as having a strong tendency to show that the note was intended to be a continuing security, and that immediate or early demand for payment was not intended. And in such case, failure to make an immediate or early demand is not unreasonable.

On report. Judgment for plaintiff.

Assumpsit on a promissory note set out in the opinion, which states the case.

F. W. Hovey and *B. F. Cleaves*, for plaintiff.

Enoch Foster and *O. H. Hersey; H. Fairfield*, for defendant.

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

SAVAGE, J. Action against the defendant as indorser of the following note.

"$1500. Biddeford, March 16, 1894.

On demand for value received, the Ensor Remedy Company of Biddeford promises to pay to its own order the sum of fifteen hundred dollars with interest at the rate of four per cent per annum.

The Ensor Remedy Co.
By C. E. Goodwin,
Treas."

The Ensor Remedy Company indorsed and negotiated this note to Luther Bryant, upon or after its date. Before negotiation, the defendant and others put their names upon the back under the name of the original maker and indorser. It is settled law, and is conceded here, that when a note is made payable to the order of the maker and is by him indorsed in blank, it is in effect a note payable to bearer. And any person who puts his name upon the back, under the indorsement of the maker becomes an indorser only, and is liable only on proof of demand and notice. *Stevens* v. *Parsons*, 80 Maine, 351.

Accordingly, the defendant was an indorser, and was entitled to have demand made upon the principal and notice given to himself as a condition precedent to his liability. He denies his liability in this action, because, as he claims, there was no such demand and notice.

Mr. Bryant, the indorsee or holder, died July 4, 1894, and in September following, the defendant and Rishworth Jordan were appointed administrators of his estate. It must be noticed that at this time the defendant was treasurer of the corporation maker of the note, indorser on the note, and administrator of the estate of the owner of the note. He was, at that time, the person, as administrator, whose duty it was to demand payment of the note; he was the person, as treasurer, upon whom demand for payment should properly be made; and he was the person, as indorser, to whom notice of dishonor should be given, that is, notice of demand by himself, upon himself, for payment, and refusal by himself to pay himself. On November 13, 1894, the defendant wrote upon the back of the note these words:— "Demand made for payment Nov. 13, '94." The defendant testifies that no demand was actually made. But we think that the very act of the defendant in writing these words may properly be regarded as a demand by himself as administrator, upon himself as treasurer. The various entities of the defendant cannot be separated. It was his duty to make demand, and undoubtedly the writing of the words was to serve the purpose of a demand, as between Goodwin, treasurer, and Goodwin, administrator. It was to be understood that a formal demand had been made. That was equivalent to a formal demand. Moreover, Goodwin, indorser, was there also, and knew of the demand made. That was notice. Notice need not be in writing. It may be oral. *Ticonic Bank* v. *Stackpole*, 41 Maine, 321, 66 Am. Dec. 246; 2 Daniel on Negotiable Instruments, § 1005. What the defendant knew as administrator and treasurer, he knew as indorser. He had no need to give himself further notice as indorser. To have gone through the form of so doing would have been silly and meaningless. We hold, accordingly, that demand and notice on November 13, 1894, have been satisfactorily proved.

But there is another road that leads to the same result. In the settlement of the estate of Mr. Bryant, the defendant, as administrator,

turned over this note to certain of the heirs, who received it for value, as a part of their inheritance. The note then had upon it, in the defendant's own handwriting, the written representation of "Demand made for payment Nov. 13, '94." And, as it appears that the note was uncollectible as against the maker, we think it may be assumed, in the absence of evidence to the contrary, that these heirs relied upon the representation, which, if true, made the defendant, at least, holden as indorser. He cannot now be heard to say that the representation was not true. He is estopped. He is not only estopped to deny the demand which he represented had been made, but also he is estopped to deny notice to himself, for that, as we have already seen, was necessarily involved. Such a representation of demand as he made on the note, under the circumstances carried also a representation as to notice. This ground of liability is not affected by the fact that the note came into the hands of the heirs when long overdue, and when, for that reason, they might be charged with notice of infirmity. It rests solely upon the familiar principles of estoppel.

But the defendant says further, that even if there were demand and notice, still the demand was not seasonable. And it is too well settled to require the citation of authorities, that payment of a demand note must be demanded within a reasonable time, or the indorsers will be released.

There is no evidence of any demand by Mr. Bryant in his lifetime, a period of three months and a half. Nor is there any evidence of demand after his death until November 13, a period of nearly four and one-half months. During the first two months of this latter period, however, there were no administrators, and therefore no one authorized to make demand.

What is a reasonable time within which payment must be demanded, in order to hold an indorser, is a matter of law. *Goodwin* v. *Davenport*, 47 Maine, 112, 74 Am. Dec. 478. It is likewise a matter of no little difficulty. Said Justice RICE, in *Goodwin* v. *Davenport*, supra, "the precise number of days, weeks or months, even, which will constitute a 'reasonable time' has never been, although a question of law, judicially determined, but is made to depend upon circumstances as variable and uncertain as are the transactions and

characters of men." Periods ranging from a few days to many months have severally been held to be a "reasonable time," while in other cases by the lapse of similar periods without demand, indorsers have been released. "It depends upon so many circumstances, to determine what is a reasonable time in a particular case, that one decision goes but a little way in establishing a precedent for another." Shaw, C. J., in *Seaver* v. *Lincoln*, 21 Pick. 267.

The purpose of the note, and the intention of the parties respecting it, are important factors. Was the note given in payment of indebtedness in the current course of business? If so, the natural presumption would be that it was expected to be paid without long delay. Or was the note given for a loan, and with interest? If so, it is held that the indorser remains liable without immediate presentment. 3 Randolph Commercial Paper, p. 82; 1 Daniel on Negotiable Inst. p. 451. The parties do not expect immediate or early demand. Such a demand, if complied with, would defeat the very object of the loan. It is held also that the provision in a demand note for the payment of interest is material, as raising the presumption that immediate payment was not intended by the parties. 3 Randolph on Commercial Paper, 83. These views are well supported by authority. *Lockwood* v. *Crawford*, 18 Conn. 361; *Wethey* v. *Andrews*, 3 Hill, 582; *Chartered Mercantile Bank* v. *Dickson*, L. R. 3 P. C. 574; *Cate* v. *Patterson*, 25 Mich. 191; *Gascoyne* v. *Smith*, 1 McC. & Y. 338; *Merritt* v. *Todd*, 23 N. Y. 28, 80 Am. Dec. 243; *Parker* v. *Stroud*, 98 N. Y. 379, 50 Am. Rep. 683.

The note in question here was given for a loan, and it bore interest. The interest was at lower rate than would have been recoverable had no mention been made of the rate of interest. This fact is itself significant. For if it was expected that the note was to be demanded within a short time, would the parties have been likely to stipulate a less rate than the statute rate? Besides, the maker was a corporation borrowing money. The indorsers, some or all of them, were the officers of the corporation. Such was the defendant. It can hardly be supposed that this money was hired with the expectation on the part of any one concerned that payment of the note was to be immediately demanded or made, or, indeed, within any short period.

We think, on the contrary, that the note given for a loan was intended to be a continuing security, an investment of a more or less permanent character. Being on demand, the holder might, if he chose, demand payment at any time, but it was not expected that he would make immediate or early demand. We think that he was not required to do so, to hold the indorsers. In this view of the case, the failure by Mr. Bryant to make demand in his lifetime was not unreasonable. Nor did the defendant, as administrator, knowing as we think he did that the note was intended as a continuing security, delay an unreasonable time in waiting until November 13, about two months after his appointment, before making demand. And it is fair to assume that the defendant did not deem the delay unreasonable, when he made the indorsement, "Demand made for payment, Nov. 13, '94". It would be singular indeed if it should be necessary to hold that the defendant, whose duty as administrator it was not to let himself escape liability as indorser, has escaped that liability by neglect of duty as administrator. So long as he stood in the threefold capacity as treasurer, administrator and indorser, he should not be said to have waited an unreasonable time, for every interested party, so far as concerns this case, assented to the delay.

Defendant defaulted.

Rumford Falls Boom Company

vs.

Rumford Falls Paper Company.

Cumberland. Opinion January 6, 1902.

Accruing of Action. Assumpsit. Rent. Boom Privilege. Specialty. Auditor. R. S., c. 94, § 10. Spec. Laws, 1887, c. 124; 1891, c. 148.

By an instrument under seal, the parties made an alternative contract with each other, relative to sorting, booming, holding and delivering the defendant's logs which should from time to time come into the plaintiff's boom. By one alternative, it was provided that under certain contingencies, the defendant should have the right, if it so elected, to take possession and exercise control of the boom, piers and boomage rights of the plaintiff, and "operate the business of receiving, sorting, holding and delivering logs and lumber in the same manner as said Rumford Falls Boom Company is now required to carry on said business." The contract further provided that in the event of the defendant's "exercising the rights aforesaid, then it shall collect the expense of receiving, holding, sorting and delivering such logs and lumber from such other firms and corporations" as have acquired rights relative to such booming business, "which expense shall include the matters and things only for which said Rumford Falls Boom Company would have been permitted to charge in the event of its operating said business, and said Rumford Falls Paper Company shall pay said Rumford Falls Boom Company its proportionate part of said 10 per cent upon said capital stock." Elsewhere in the contract it appears that "said 10 per cent of said capital stock," meant 10 per cent each year on the capital stock of the plaintiff company, which it was agreed should at all times equal, but at no time exceed, the net cost of the plaintiff's booms, piers, and so forth, including renewals, improvements, and additions, but excluding ordinary repairs. The term "proportionate part of said 10 per cent" is elsewhere defined to be a proportion determined by the proportion which the defendant's logs and other lumber handled at that boom in any year bore to the whole amount of logs and other lumber so handled. The defendant, by virtue of the contract, operated the booms in 1893, 1894, 1895 and 1896. In 1894 and in 1895 all the logs and lumber handled belonged to the defendant. In 1893, two-thirds and in 1896, nine-tenths of the logs and lumber handled belonged to the defendant. The plaintiff's boomage works were already completed when the contract was made, but no renewals, improvements or additions were made by it subsequently.

Held; that by virtue of R. S., c. 94, § 10, an action of assumpsit will lie to recover the unpaid rental, though the parties have never been able to agree upon the items which constitute the "net cost;" also that an action begun in 1898 is not premature, though there had been no "determination" by the parties of the net cost of the works or of the proportion of rent chargeable to the defendant.

An auditor to whom the case was referred found that the net cost of the works was $29,300. The court is of opinion, that as to this matter, the report of the auditor, which is prima facie proof, has not been impeached, rebutted, disproved or controlled by the other evidence in the case, and that it must stand as decisive.

Held; that the plaintiff is entitled to recover of the defendant the full ten per cent of the "net cost," or $2930, for each of the years 1894 and 1895, when the defendant owned all of the logs handled, and two-thirds of the ten per cent, or $1953.33, in 1893, and nine-tenths of the ten per cent, or $2637, in 1896, these being the "proportionate parts," ascertained from the proportions which defendant's logs bore to all the logs handled in those years; and that the defendant is entitled to no more rental. Such is the effect of the explicit language of the contract.

Held; that the contract, properly construed, furnishes no basis for the recovery by the plaintiff on account of its claim for annual depreciation of the booms. The plaintiff had agreed with its predecessor in title at all times to "maintain in good order and repair said booms and piers" substantially as they were constructed. The plaintiff had also agreed with its predecessor that it would "without discrimination or preference receive, sort, hold, boom and deliver the logs and other lumber of all persons" at all times thereafter. The defendant, however, in these respects had agreed with the plaintiff only to "operate said business as said Rumford Falls Boom Company is now required to carry on said business." *Held;* that the defendant's agreement related only to the latter duty owed by the plaintiff to its predecessor, viz: the operating of the business, and not to the maintenance of the booms and piers in good order and repair. And were it otherwise, the plaintiff's remedy for this alleged breach of contract would be covenant broken, and not assumpsit, as in this case.

On report. Judgment for plaintiff.

Assumpsit on account annexed under R. S., c. 94, § 10, for rent of the booms and boom privileges of the plaintiff corporation at Rumford Falls on the Androscoggin river. There were items of 12 1-2 per cent for depreciation, and also items of interest.

The contract under which defendants had occupied and operated the booms was under seal. The case was sent to an auditor, at the hearing before whom defendant did not appear. The report found $34,140.30 in favor of the plaintiff. The auditor also found the net

cost of the boom works was $29,300. Defendant filed exceptions to the report in which was incorporated a motion to set it aside. In this court below, the general issue was plead by defendant with a brief statement containing several items, among which was one setting out in effect that the matters referred to in the writ were embraced in a sealed instrument in which no liquidated sum was stated as rental; and that, therefore, plaintiff should be confined to his action on the covenant for damages to be determined according to the terms of the agreement, the remedy in assumpsit being misconceived.

There was also an item in the brief statement setting out in effect that said sealed instrument contained no provision for payment of anything to plaintiff for depreciation of said boom, but that ten per cent on the net cost of said boom including repairs, etc., was specified in said contract as the only pay the plaintiff was to receive as liquidated and stated rental or any rental of said boom.

Incorporated with the brief statement was a motion for a non-suit and one to set aside the auditor's report.

Those portions of the contract concerning the construction of which there was any controversy are set forth in the opinion.

J. W. Symonds, D. W. Snow, C. S. Cook, C. L. Hutchinson; H. B. Cleaves, C. S. Perry; George D. Bisbee, for plaintiff.

Defendant had no right of exception to the auditor's report. By R. S., c. 82, § 7, an auditor's report may be re-committed, and the auditor may be discharged and another appointed. The parties to the suit have no power in the premises. Whatever action is taken under this statute must be ordered by the presiding justice within his discretion.

In the present case the defendant is not a party aggrieved under R. S., c. 77, § 51, because he voluntarily and unconditionally suffered a default before the auditor, and cannot, therefore, take exceptions to the auditor's action or to the ruling of the presiding justice thereon. *Woodman* v. *Valentine,* 22 Maine, 401; *Patten* v. *Starrett,* 20 Maine, 145, 147.

The commission under which the auditor acted follows the language of R. S., c. 82, § 69, and he was not called upon to state matters of law or evidence in his report. *Jones* v. *Stevens,* 5 Metcalf,

373; *Newell* v. *Chesley*, 122 Mass. 522. The action was properly brought in assumpsit under R. S., c. 94, § 10.

The auditor's report makes out a prima facie case for the plaintiff which must be overcome by evidence produced by the defendant. The defendant has failed to do this and the auditor's report should stand.

W. H. Clifford, E. C. Verrill, Nathan Clifford; Benj. Thompson, for defendant.

The action must be dismissed. It is assumpsit when it should have been covenant. The amount was not liquidated. Counsel cited: 1 Chitty on Pleading, 16th Am. Ed. 13, 116, 121, 129, 132. *Hinkley* v. *Fowler*, 15 Maine, 285; *Dunn* v. *A. E. Motor Co.*, 92 Maine, 165; *Manning* v. *Perkins*, 86 Maine, 419; *Pope* v. *The Machias Water Power Co.*, 52 Maine, 535.

Plaintiff should be non-suited. *Webber* v. *School District*, 45 Maine, 299; *Whittemore* v. *Merrill*, 87 Maine, 456.

Motion for non-suit may be made after defendant has introduced evidence. *White* v. *Bradley*, 66 Maine, 254; *Cooper* v. *Waldron*, 50 Maine, 80, 82.

The plaintiff has blended in the same count covenant and assumpsit and it would be erroneous to give judgment for plaintiff thereon. Gould's Pleading, pp. 214, 215, 219, 289, 290; Chitty on Pleading, pp. 199, 222, 315, 353*, 469*, 475. *Richardson* v. *Welcome*, 6 Cush., 331; *Moore* v. *Knowles*, 65 Maine, 497.

When the plea sets up misconception, abatement is unusual and unnecessary. *Benthall* v. *Hildreth*, 2 Gray, 288; *Franklin Savings Institution* v. *Reid*, 125 Mass. 365, 367.

The points of a brief statement are equivalent to one or more special pleas in bar. *Potter* v. *Titcomb*, 16 Maine, 425; *Moore* v. *Knowles*, 65 Maine, 497.

Any charge for depreciation is excluded by the terms of the covenant into which the parties entered relative to use of boom by defendant.

Even if the action were sustainable, the plaintiff could only recover—not ten per cent of the cost of booms and piers, etc., which he has sued for,—but only such proportion of ten per cent of such cost as the covenant provides defendant shall pay.

Supposing, for the sake of this point, that the action could be maintained, plaintiff cannot recover on the merits because he has failed to show in his evidence the net cost of booms and piers yearly and the proportion of ten per cent on cost of booms and piers that defendant should pay, and has failed to show that the same has ever been determined.

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

SAVAGE, J. Assumpsit for the recovery of the rental of plaintiff's boom for the seasons 1893, 1894, 1895 and 1896, and twelve and one-half per cent of the net cost of the booms for depreciation each year. The case was first sent to an auditor, who reported in favor of the plaintiff for the full amount of the claims sued, with interest, amounting in all to $30,641.94 at the date of the writ, January 12, 1898. The case now comes before us on report of the evidence below, including the report of the auditor. That report affords prima facie proof that the plaintiff is entitled to recover the full amount in suit, and unless impeached, rebutted, disproved or controlled, it should be decisive. *Howard* v. *Kimball*, 65 Maine, 308. And we think that the auditor's report, in so far as it depends upon a correct determination of the facts, is not impeached, rebutted or disproved by the evidence. But in so far as it depends upon the correct construction of the contract on which this right of action is based, we think it is controlled and should be modified in certain particulars.

The rights of the parties depend upon and are controlled and limited by the provisions of a certain contract, under seal, entered into between them on July 25, 1893. Previous to that time, in 1887, and in 1891, the legislature had given to Hugh J. Chisholm and Charles D. Brown and their assigns the right to build dams, piers and booms in the Androscoggin River above and below the Great Falls at Rumford, for booming and holding booms, spars and other lumber, and to demand and receive a reasonable toll from the owners of logs boomed by them. Private and Special Laws of 1887,

c. 124; Private and Special Laws of 1891, c. 148. In 1890, Chisholm and Brown conveyed these boomage rights to the Rumford Falls Power Company, and in 1892-1893, that company built the piers and booms which are in controversy in this suit. After they were completed, the Rumford Falls Power Co., July 12, 1893, conveyed them, with boomage rights and privileges, to the plaintiff. Then, thirteen days later, the plaintiff and defendant entered into the sealed contract which is now before us for construction.

By one set of its provisions, the plaintiff agreed to boom, sort, hold and deliver all of the defendant's logs which came into the plaintiff's boom; and in consideration thereof, the defendant agreed to pay annually to the plaintiff "the net expense of delivering its logs and other lumber as herein provided, and its proportion of the net expense of holding, sorting and booming all logs and other lumber coming or driven into said booms each year plus its proportion of ten per cent upon the capital stock of the Rumford Falls Boom Company then issued and outstanding, which capital stock shall at all times equal, but not at any time while this agreement is in force, exceed the net cost, including renewals, improvements and additions, but excluding ordinary repairs of said booms and piers, such proportion to be determined by the proportion which its logs and other lumber handled at Rumford Falls that year bears to the whole amount of logs and other lumber handled by plaintiff in these booms."

By a further provision in the contract, it was agreed that if the defendant should, in any one season, own or control the largest quantity [that is to say, larger than the quantity of any other log owner] of logs and lumber to be received, held, sorted and delivered at these booms, then for that season, and for subsequent seasons, so long as the same condition continued, the defendant should have the right, if it so elected, to take possession and exercise control of the boom, piers and boomage rights of the plaintiff, and "operate the business of receiving, sorting, holding and delivering logs and lumber in the same manner as said Rumford Falls Boom Company is now required to carry on said business."

It is conceded that the condition provided for in this last paragraph did arise, and that the defendant did take possession and exercise

control of the plaintiff's piers and booms, and did operate the boom business in said booms, for the seasons of 1893, 1894, 1895 and 1896.

And the contract further provided that in the event of the defendant's "exercising the rights aforesaid, then it shall collect the expense of receiving, holding, sorting and delivering such logs and lumber from such other firms and corporations" as have acquired rights relative to receiving, sorting, holding and delivering logs and lumber, "which expense shall include the matters and things only for which said Rumford Falls Boom Company would have been permitted to charge in the event of its operating said business, and said Rumford Falls Paper Company shall pay said Rumford Falls Boom Company its proportionate part of said 10 per cent upon said capital stock." This last provision clearly relates back to the earlier clause in the contract touching the compensation to be paid by the defendant in case the plaintiff operated the business.

This contract as a whole is in the alternative. It provided for a contingency when the boom business might be operated by the plaintiff, and for another contingency when it might be operated by the defendant. We are only concerned with the latter contingency. It did arise, and the defendant did take possession and carry on the business. When this contingency arose, and the defendant exercised the option of taking possession and operating the business, the contract, as we construe it, became effective as a lease. The plaintiff was the lessor, the defendant was the tenant, and the agreed rental was a proportional part of ten per cent of the net cost of the booms, piers and other boomage works of the plaintiff, including renewals, improvements and additions, but excluding ordinary repairs, which proportional part was to be determined by the proportion which the logs and lumber of the defendant bears in any year to the whole amount of logs and other lumber handled at Rumford Falls that year in and by such boom.

Such being the rights of the parties with respect to rental, and the rent not having been paid, is the plaintiff pursuing a proper remedy? The learned counsel for the defendant strenuously urges that this action is both misconceived and premature; that the action should have been covenant broken rather than assumpsit; and that even if

assumpsit might in general lie for the recovery of rent, under R. S., c. 94, § 10, yet that it will not lie in this case until the net cost of the plaintiff's works has been determined by mutual agreement, and so likewise of the proportionate share of the ten per cent to be paid; that the determination of these facts is a prerequisite to a right of action in assumpsit, and that in case of failure of such determination, the plaintiff's only remedy is by action for damages for breach of covenant. The defendant further contends that until such determination there is nothing due *as rent*, and that the statute does not apply unless the rent due is a definite and liquidated sum.

On the contrary, we think the statute referred to is applicable to the facts of this case. It provides that "sums due for rent on leases under seal or otherwise may be recovered in an action of assumpsit." To be sure, the recovery must be for a "sum due." And it may be conceded, following the analogy of actions of debt for rent reserved in leases under seal, that the sum must be certain, or one that can be made certain. Taylor's Landlord and Tenant, 6th Ed. § 616. But that does not mean that the actual amount due must have been agreed upon. It is sufficient if the definite elements of which it is composed are agreed upon, or if a certain basis of computation is agreed upon. What remains will be merely a computation. Nor does the basis become indefinite or uncertain, in legal contemplation, because the parties may afterward disagree about the items which composed it.

In this case the basis for rental agreed upon was certain, or could be made certain by computation. It was ten per cent of the net cost of the boomage works then just completed. When this contract was made, every pier had been laid, every boom stick had been strung, every dollar had been expended. The net cost was then ascertainable by computation. True the parties might afterwards dispute about what items should enter into the net cost. The lessor might claim more than the tenant would be willing to allow. Controversy and litigation might ensue. But that would not alter the fact. The net cost had become fixed, and was subject to no contingencies. And the "net cost," which was the basis for computation of rent at the date of the lease, remained unchanged during the entire period of the defendant's occupancy. It does not appear, and it is not claimed

that "any renewals, improvements and additions" were made at the expense of the lessor during the tenancy. There was, therefore, no uncertainty in this respect in any year's rental.

But the proportion which the defendant's logs bore to the whole amount of logs handled differed from year to year. Still, if, as the defendant claims, it is liable in any event only for its proportion of the ten per cent of the net cost, that proportion was easily ascertainable by count or measurement. In that case the rent would be fixed each year by an ascertainable, computable proportion. We, therefore, think that this ground of defense fails, and that assumpsit is maintainable.

Nor is the action premature. There is nothing in the contract which can be construed as requiring a "determination," by mutual agreement, of the net cost of the works, or of the proportion of rent chargeable, as a prerequisite to right of action. The contract uses the word "determine" or an equivalent expression only once, and that is when it says that the defendant's proportion of the net expense of booming and of the ten per cent of the net cost are "to be determined by the proportion" which its logs bear to the whole amount of logs handled. The word here means simply ascertained or computed. It certainly does not imply any mutual action or agreement by the parties. It was agreed that settlements were to be made on or before the first day of December in each year. The annual rental became due, therefore, on the first day of each December, and suit begun afterwards would not be premature.

The right to maintain the action being settled, the remaining question is, how much is recoverable. The first disputed element in the amount of rental is the net cost of the construction of the booms and piers. The auditor must have found the net cost to be $29,300, of which ten per cent would be $2930. We do not think the prima facie effect of this finding is overcome by any evidence in the case.

We will notice some of the objections. Among other things, the defendant objects to the allowance of the cost of a stiff boom, on the ground apparently that it was or became useless. This boom, however, was a part of the structure when it was leased to the defendant, and its cost necessarily entered into the entire net cost. The con-

tract did not exclude from the net cost, the cost of such things as did not turn out to be useful.

Again, the defendant objects to the price charged for stone used in filling certain piers, on the ground that the Rumford Falls Power Company, which built the piers, had taken the stone from an excavation which they made in building the dam at Rumford; that the stones excavated and afterwards used in the piers, represented a part of the expense of building the dam, and should not be charged to the booms. But from whatever source the Rumford Falls Power Company obtained these stones, it does not appear that they have charged more than it would cost to obtain other stone for the same purpose, or more than they were fairly worth, under the circumstances. Had there been no use for these stones, they might have been worthless, or even it might have cost the company something to get them out of the way. But a use for them appeared, and the company had a right to take advantage of it.

Again, the defendant objects to a charge of engineering, on two grounds; first, that the work was not well done, and secondly, that the engineer was the regular engineer of the Rumford Falls Power Company in its other business, and received a stated salary from them, and that nothing extra was paid to him on account of engineering done for the boom. Neither ground is tenable. The work had all been done before this contract had been made, and, good or bad, had entered into the net cost. And if the Power Company employed its regular engineer in this outside, extra work, it surely may charge this extra service on the booms to the boom account.

Such are the chief objections offered to the net cost as found by the auditor. It is not necessary that we should discuss the other objections specifically. We have carefully examined them, and we find them unavailing.

It is plain that the entire annual rental of the booms and piers was conceived to be ten per cent of their net cost. If the plaintiff operated the business, the defendant was to pay its proportion of the ten per cent, and presumably the other log owners using the boom would pay the remainder. So if the defendant operated the

business, it was to pay its "proportionate part of said ten per cent." What is that proportionate part?

Now the case shows that the defendant owned all of the logs handled in 1894 and 1895, but not all in 1893 and 1896. Nevertheless, the plaintiff contends that it is entitled to recover the entire ten per cent of the defendant for the years 1893 and 1896, as well as for the years 1894 and 1895. The plaintiff's theory is that the contract fairly construed means that when the defendant was sole tenant and in sole possession and operation of the booms, and when it alone was entitled to collect payment from the other owners of logs, the "proportionate" part of the ten per cent would be the whole, that any other construction would put the booms and piers in the possession of the defendant, with authority to collect from the owners of logs boomed, and leave the plaintiff no remedy whatever. This construction, unfortunately for the plaintiff, has little in the contract to stand upon, and we cannot extend or enlarge the contract. The contract contemplates that if the defendant took possession at all, it was to take sole possession, and that its right to take possession was not to be deferred until it owned all of the logs to be handled, but only until it owned the major part of them. By taking possession, it assumed, so the contract in substance provides, the duties incumbent upon the Boom Company, of booming the logs of other owners. It was obliged to receive, sort, hold and deliver their logs and lumber. Now all through this contract the elements of expense to the log owner are twofold; first, the net expense of operating for that year, and secondly, ten per cent of the capital stock, or net cost of structures. Such would have been the basis of settlement between these parties, in the event that the plaintiff had operated the business. But when the defendant took possession, it paid all operating expenses, and so was entitled to collect from others their shares of the operating expenses. As the contract says, it "shall collect the expense of receiving, holding, sorting and delivering such logs and lumber from such other firms and corporations." That is, it could so reimburse itself for expenses incurred on account of the logs and lumber of others. This language by its very terms relates to current operating expenses. It relates to the expense of receiving, holding,

sorting and delivering logs and lumber. It does not authorize the defendant to collect from others any part of the ten per cent, for that is not an operating expense, but is an increment to capital. Nor can this construction be enlarged by the sentence in the same paragraph which reads, "which said expense shall include the matters and things only which said Rumford Falls Boom Company would have been permitted to charge in the event of its operating said business." This is an expression of limitation, rather than enlargement. If any doubt remains, we think it should be removed by a consideration of the final clause of this paragraph, the clause which embodies the defendant's agreement to pay rent. What is that clause and what is that agreement? It is this:—"And the said Rumford Falls Paper Company shall pay said Rumford Falls Boom Company its proportionate part of said ten per cent upon said capital stock as aforesaid." This is express, and clear, and definite. As the defendant is not bound, or even authorized by the contract, to collect proportionate parts of the ten per cent from others, so it has not bound itself to pay any more than its own proportionate part of the ten per cent. Had it appeared, however, that the defendant had actually received proportions of this ten per cent from others, there is no doubt it might have been liable for it in this action under the count for money had and received. But that fact does not appear. The contrary, rather, does appear.

We do not need here to consider how the plaintiff is to collect the balance of the ten per cent. The original charter authorizes the collection of a "reasonable toll," but how so much of "reasonable toll" as exceeds current operating expenses may be collected of other log owners during the existence of this contract, is not before us now.

The contract defines "proportionate part" to mean the proportion which the defendant's logs bore to all the logs. The evidence is not full or satisfactory as to what that proportion was, but it is all that the parties have given us. One witness, introduced by the plaintiff, swore that in the season of 1893 two-thirds of the logs handled belonged to the defendant, and one-third to others; that in 1894 and 1895 all belonged to the defendant; and that in 1896 nine-tenths belonged to the defendant and one-tenth to others. Although this

was merely an estimate of the witness, it appears that this witness was in position to be able to make a fair estimate. Besides, his estimate is not disputed in this case. For these reasons, we assume it to be true.

Accordingly, the plaintiff is entitled to recover upon its items of rent as follows:—

For the season of 1893, two-thirds of $2930,	$1,953.33
For the season of 1894,	2,930.00
For the season of 1895,	2,930.00
For the season of 1896, nine-tenths of $2930,	2,637.00
	$10,450.33

Upon these sums, we think the plaintiff may recover interest from the times they severally became due under the contract, namely, December first each year. *Swett* v. *Hooper*, 62 Maine, 54; *Maine Central Institute* v. *Haskell*, 73 Maine, 140; Taylor's Landlord and Tenant, 6th Ed., § 615.

The plaintiff has also sued to recover for depreciation of the booms each year. And it bases its right to recover for depreciation upon the clause in the contract which provides that the defendant "shall have the right if it so elects to take possession and exercise control of the booms and piers and other property and rights of said Rumford Falls Boom Company and *operate said business as said Rumford Falls Boom Company is now required to carry on said business.*" What was the manner in which the Rumford Falls Boom Company was required to carry on said business? In answer, the learned counsel for the plaintiff call our attention to a provision in the deed of these piers and booms from the Rumford Falls Power Company to the plaintiff, which reads as follows:—"This deed is made, given and accepted upon the express condition that said Rumford Falls Boom Company, its successors and assigns, shall and will at all times hereafter maintain in good order and repair said booms and piers substantially as at present constructed, and will and shall at all times hereafter, and without discrimination or preference, receive, sort, hold, boom and deliver the logs and other lumber of all persons, firms or corporations doing business at Rumford Falls upon the

request of such persons, firms or corporations." The plaintiff claims that the covenant relied upon in the contract relates to the duty imposed upon the plaintiff by the deed to keep the booms and piers in good order and repair. The argument of the plaintiff seems to be that by allowing the booms to grow old and depreciate, the defendant has not kept its agreement, and that damages for the breach are recoverable.

Even if the plaintiff's premises are correct, we think it would be a sufficient answer to say that the remedy for such a breach would be covenant broken, and not assumpsit. *Dunn* v. *Auburn Electric Motor Co.*, 92 Maine, 165. But as the question has been fully argued, we go farther, and say that we think that the construction placed by the plaintiff on this clause in the contract is not the correct one. By the deed referred to, the plaintiff was placed under two obligations. One was to maintain the booms and piers in good order and repair, and the other was to receive, sort, hold, boom and deliver logs and other lumber without discrimination or preference. The latter relates to the manner of operating the business. The clause in the contract relied upon by the plaintiff seems to relate specifically to this latter duty. It says in so many words, that the defendant shall "operate the business of receiving, sorting, holding and delivering logs and lumber in the same manner as said Rumford Falls Boom Company is now required to carry on said business." There are no apt words by which this obligation can be extended to the duty of keeping the booms in good order and repair. We do not think such a construction is permissible. The auditor, therefore, erred in allowing the items for depreciation, and his report must be controlled by the true construction of the contract. The plaintiff is entitled to recover only for the rent and interest thereon, as hereinbefore stated.

Judgment for plaintiff for $10,450.33, and interest, on the several instalments of rent from the times they respectively became due, viz: on $1953.33 from Dec. 1, 1893; on $2930 from Dec. 1, 1894; on $2930 from Dec 1, 1895; and on $2637 from Dec. 1, 1896.

The Milbridge & Cherryfield Electric R. R. Co., Appellants.

Washington. Opinion January 6, 1902.

Location of Street Railroad. Appeal from Municipal Officers. Ways. Easements. Eminent Domain. Stat. 1893, c. 268, § 6. Stat. 1899, c. 119, § 2.

1. In an appeal based upon the alleged neglect or refusal of municipal officers to approve the proposed route of an electric railroad company, under the provisions of c. 268, § 6, of the Public Laws of 1893, as amended by c. 119, § 2, Public Laws of 1899, relating to the organization of street railroad companies, it is necessary that enough should be alleged to show that the court has jurisdiction and that the appellant had the right to apply to the municipal officers for an approval of its route. But it is not necessary to allege all the steps by which the appellant obtained that right. The statute gives that right to every "corporation organized" thereunder. Under the statute as it existed when the appellant company was organized, as preliminary to organization, it was necessary that the Railroad Commissioners should determine that public convenience required the construction of the railroad. But it is unnecessary to allege specifically in an appeal like this one, that the railroad commissioners had so determined, for it is necessarily implied in the expression "corporation organized" or in any expression meaning substantially the same, as in the one used in this appeal.
2. It being argued that § 1 of c. 119 of the Laws of 1899 is unconstitutional, the court without considering that question, holds that whatever might be the construction of that section, with respect to the mooted question of constitutionality, section two of the same chapter upon which the application and appeal in this case are based, stands in full force.
3. The court holds that c. 119, § 2, of the Public Laws of 1899, relating to the route and location of street railroads in the ways and streets of a town, to the approval thereof by the municipal officers, and to appeals from their action or refusal to act, is not unconstitutional as being beyond legislative authority or as being arbitrary and unjust, or as permitting the property of towns to be taken for street railroad purposes without just compensation. The public has a mere easement in land taken and condemned for a highway, or townway. It has the right to use it in certain ways. Within the scope of the easement, the public which acts through the legislature, may regulate and control, may extend or diminish the public uses, as it sees fit.

The legislature has authority even to regulate and control towns themselves. For towns are but subdivisions of political government created by the

legislature. The operation of a street railroad is an appropriate public use of a street.

While a town is charged with the performance of many duties with respect to roads, and possesses a qualified control over them, it does not own them. When the legislature authorizes a new method of use of the public easement in a way, a town has no such property interest in the way, as will entitle it to pecuniary compensation, nor has an injury been done to it, of which it can properly complain.

Exceptions by appellees. Overruled.

This was a complaint under Stat. 1893, c. 268, § 3, as amended by Stat. 1899, c. 119, § 1, on appeal from the municipal officers of the town of Milbridge, who, it was alleged, refused and neglected to approve the route and location of the appellant's street railroad in the streets and highways of the town of Milbridge in the county of Washington for more than thirty days after the railroad company's application to them therefor was presented.

The municipal officers of Milbridge filed a demurrer to the complaint. The demurrer was overruled at nisi prius and appellees took exceptions.

H. H. Gray, for appellees.

The complaint must allege that all steps leading up to the appeal and essential to it have been taken. Such matters are jurisdictional.

The complaint is defective because it nowhere alleges that the railroad commissioners found that public convenience required the construction of the road.

If the statute is construed to give to any board or committee the absolute power, against the wishes of the town, to locate a railroad in its streets, making no provision as to compensation or expense of repairs of the streets and without right of appeal, then it is unconstitutional. Constitution of Maine, Art. 1, §§ 20, 21. Boone on Corporations, § 11, and cases cited.

E. A. Hubbard, *F. I. Campbell* and *J. O. Bradbury* for appellant.

The important facts to be alleged in the complaint are the request to the town officials for approval of location and their refusal, and a description of the route granted, defined by certain roads and streets.

There must be some tribunal to finally settle all the matters, and the rights of the public are well protected by the tribunal established by law.

A street railroad is as much for public convenience and public interests as for corporate profit. The public interests are well protected by the action of a lawfully constituted tribunal like that provided by the statute.

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

SAVAGE, J. This is an appeal based upon the alleged neglect or refusal of the municipal officers of Millbridge to approve of the proposed route and location of the appellant company in certain streets and ways in the town of Millbridge, and is controlled by the provisions of chap. 268, § 6, Public Laws of 1893, as amended by chap. 119, § 2, Public Laws of 1899, relating to the organization of street railroad companies.

The appellees have demurred. And they seek to sustain their demurrer first upon the ground that it is nowhere alleged in the appeal that the railroad commissioners had determined that public convenience required the construction of the railroad. The appellees' position is that such determination is a necessary prerequisite to any proceedings by the railroad company under charter or certificate of organization; that without such determination the company obtained no franchise, and no right to call upon the railroad commissioners or the municipal officers of Millbridge for an approval of its route and location; that the municipal officers of Millbridge had no jurisdiction in the premises, and no authority to act upon the railroad company's application to them; and that this court has no jurisdiction on appeal. In short, the appellees say that the determination by the railroad commissioners that public convenience requires the construction of the railroad is an essential jurisdictional fact, and, hence, that it must be averred.

It is undoubtedly true that in proceedings of this character enough must be directly alleged to show that the court has jurisdiction, *Pet-*

tengill v. *County Commissioners of Kennebec*, 21 Maine, 377; and if there be an omission to allege any fact without which the court would not have jurisdiction, advantage may be taken of the omission by demurrer, or upon a motion to dismiss. *Rines* v. *Portland*, 93 Maine, 227. It is also true that, under the statute in question, it was essential that the railroad commissioners should find that public convenience required the construction of the railroad, before the railroad company could do any business. It was preliminary even to complete organization. *Portland Railroad Extension Co., Appellants*, 94 Maine, 565. The amendments to this statute, chap. 187, Public Laws of 1901, do not affect this case.

Now while it is necessary for the appeal to allege enough to show that the appellant had the right to apply to the municipal officers for an approval of its route, it is not necessary to allege all the steps by which the appellant obtained that right.

The statute regulating such an application and appeal, Public Laws 1899, c. 119, § 2, gives that right to every "corporation organized" under the provisions of chapter 268 of the Public Laws of 1893. It does not require the appeal to set forth the steps which led up to the organization. It would have been sufficient for the appellant to have alleged simply that it was a "corporation organized" under the statute referred to. Under such an allegation, all things essential and preliminary to lawful organization would be presumed, so far as averment is concerned, and no specific allegation would be necessary. *McClinch* v. *Sturgis*, 72 Maine, 288.

As preliminary to the organization of such a corporation under the statute of 1899, it was essential that the railroad commissioners should find not only that public convenience required the construction of the railroad, but that all the provisions of §§ one and two of Public Laws of 1893, chap. 268, had been complied with, that is, that at least five persons, of whom a majority were citizens of this state, had made and signed proper articles of association, that not less than four thousand dollars of capital stock for every mile of road proposed to be constructed had been subscribed for in good faith by responsible parties, and five per cent paid thereon in cash to the directors, and that a majority of the directors had made the affidavit

required by section two. The determination of all of these facts was preliminary and essential to the organization of the company. But in an appeal like this it is no more necessary to allege as to the finding of public convenience than as to any other of the findings. They are all implied in the expression "corporation organized."

The appeal before us not only alleges that the appellant is a "corporation duly organized and established in conformity to the laws of the state of Maine," in the year 1900, but it also sets forth at length the Secretary of State's official certificate of its organization. This certificate is the official evidence that the appellant is a "corporation organized" under chap. 268 of Public Laws of 1893, and hence authorized to make application to the municipal officers for approval of a proposed route, and to appeal, if they neglect or refuse to act. Moreover, the allegation that this electric railroad company was "duly organized and established in conformity to the laws of the State," in 1900, necessarily means that it was a "corporation organized" under the statutes of 1893 and 1899, already referred to, because there were no other laws in force at that time under which an electric railroad company could be organized. This contention of the appellees fails.

In the next place, the appellees contend that the provisions in § 3, of c. 268, of the Public Laws of 1893, as amended by § 1, of c. 119, of the Public Laws of 1899, relating to appeals from the railroad commissioners on the question of "public convenience," were unconstitutional, and upon this hypothesis their learned counsel argues that the whole section, so far as it requires the railroad commissioners to make any finding upon the question of public convenience, was inoperative and void. Without assenting to this proposition in the least, and without any consideration whatever of the constitutional question suggested, it is only necessary to say that, if the appellees' conclusion were correct, it would furnish one more reason for omitting from this appeal any specific reference to any finding respecting public convenience. If the commissioners were not authorized to determine whether public convenience required the construction of the railroad, certainly no allegation concerning it, specific or implied, was necessary in the appeal from the action or

non-action of the municipal officers. Besides, whatever might be the construction of § 1, c. 119, of the Laws of 1899, upon the questions mooted, § two of the same chapter, upon which the application and appeal in this case are based, stands in full force.

Lastly, the appellees claim that the statute, Public Laws 1899, c. 119, § 2, is "arbitrary, unjust, unconstitutional and void" in that it gives a street railroad company "the right to locate in the streets of a town with no provision for compensation," to the town, "and no provision for the protection of the town in reference to laying tracks, expense of repairs, widening the streets and clearing of snow; and also gives a committee of three men power against the wishes of a town to locate in any of its streets, in any position of the street, with no right of appeal." The authorities cited by the appellees do not sustain this contention, nor do we think any can be found that will. This claim arises, probably, from a misconception of the relation which a town bears to the public ways within it. When land is taken and condemned for a way, it becomes subject to a public easement or servitude, while the title remains in the original owner. The public has entire control of the easement thus acquired, and may regulate and extend the public use, within the scope of the easement, in whatever manner it pleases. The public acts through the legislature. The legislature may thus regulate not only the method and extent of such lawful public uses of ways in towns, but it has the power to regulate and control even the towns themselves. It creates the towns as subdivisions of political government, and may dissolve them. It bestows upon them certain powers. It charges them with certain duties. These duties may be enlarged or diminished, and these powers may be increased or restrained, in accordance with the judgment of the legislature. These principles are of general acceptation. *No. Yarmouth* v. *Skillings*, 45 Maine, 133, 71 Am. Dec. 530. A town is charged with the performance of many duties with respect to roads, and it may possess a qualified control over them, but it does not own them. The legislature may increase its duties and its burdens with respect to them; it may diminish its power of control. These are matters of public policy, of which the legislature is the judge. And when the legislature

authorizes a new method of use of the public easement in such a road, a town has no such property interest in the road as will entitle it to pecuniary compensation, nor has an injury been done to it, of which it can justly complain.

It is too well settled to be questioned that the ordinary operation of a street railroad, which is a quasi public use, is a use of the street appropriate to the character of the easement or servitude which the public holds. It imposes no additional burden upon the abutter, and is no new taking of land for which he may recover additional compensation. *Briggs* v. *Lewiston & Auburn Horse Railroad Co.*, 79 Maine, 363, 1 Am. St. Rep. 316; *Taylor* v. *Portsmouth, Kittery & York Street Railway*, 91 Maine, 193, 64 Am. St. Rep. 216. It is entirely competent for the legislature to authorize such a use, and prescribe its method and extent.

While the objections to the statute which are now under consideration for the most part involve questions of policy rather than those of constitutional law, it is not improper to observe that although it is the privilege of a street railroad company to select its proposed route and location, that selection is of no avail unless it is approved by the municipal officers; or if they fail to perform their duty, and neglect and refuse to act, still the selection of the railroad company goes for naught, unless it is approved by an independent, impartial tribunal appointed by the court. Even then the selection is not effective until approved by the railroad commissioners. Public Laws of 1899, c. 119, § 2. There is no merit in this contention of the appellees.

Exceptions overruled.

Bodwell Water Power Co. *vs.* Old Town Electric Co.

Penobscot. Opinion January 8, 1902.

Electricity. Forcible Entry and Detainer. Lease. Fixtures. Quasi Public Corporations. R. S., c. 94, § 1.

R. S., c. 94, § 1, which provides that an action of forcible entry and detainer may be maintained against a tenant holding under a written lease, "at the expiration or forfeiture of the term, without notice, if commenced within seven days from the expiration or forfeiture of the term," is applicable where such tenant is a quasi public corporation, engaged in the business of supplying electricity, for lighting and other purposes, to municipalities and their inhabitants.

The lease, in this case, from the landlord to the tenant, contained this provision: "At the termination of this lease the said Bodwell Water Power Company (the landlord) shall at its option either buy or allow to be removed the property of said Old Town Electric Company."

Held; that the only purpose or effect of this provision was to give the tenant a right to remove its property after the term provided in the lease had expired, unless the landlord exercised its option to purchase, a right which, without this clause, the tenant would not have had; that it did not postpone the expiration of the term beyond the time provided in the lease, nor prevent the maintenance of this action of forcible entry and detainer commenced within seven days from the expiration of such term.

On report. Judgment for plaintiff.

Forcible entry and detainer brought to recover possession of a mill-site adjacent to the dam of the plaintiff company on the Penobscot river at Milford.

The case came to this court below on appeal from the Old Town Municipal Court.

Defendant company had erected its own building on the demised premises and placed therein its own machinery of the usual kind for generating electricity, which it was engaged in supplying for lighting and power purposes in Old Town, Milford and vicinity.

By a clause in the lease the plaintiff company was given the option

at the end of the term to buy the defendant company's property or allow it to be removed.

Prior to the commencement of this suit no steps had been taken by plaintiff company under this clause.

C. H. Bartlett, for plaintiff.

It was the option of plaintiff to buy, not that of defendant to retain possession.

The action is not premature. *Franklin Land, Mill and Water Company* v. *Card,* 84 Maine, 528.

Until the defendant set a price on its property, it is submitted that the plaintiff could not know whether it would buy or not. Therefore plaintiff could not give a notice that it was willing to buy.

The service of the writ was notice to the defendant that plaintiff did not care to buy.

The election by plaintiff not to buy was final and cannot be revoked. *Bryant* v. *Erskine,* 55 Maine, 153.

The landlord never agreed to purchase at all, but only agreed to allow the tenant to remove its property at the termination of the lease.

W. H. Powell; Alphonso A. Wyman of the Boston bar, for defendant.

Defendant is a quasi public corporation and the law puts upon it unusual and extraordinary burdens to serve the public faithfully and impartially and at reasonable rates. And this is a duty the performance of which may be enforced by the courts. *The Brunswick Gas, Light and Power Co.* v. *The United Gas, Fuel and Light Company,* 85 Maine, 532, 35 Am. St. Rep. 385.

The action is prematurely brought. A lease is construed in favor of the lessee when words are doubtful. *Sweetser* v. *McKenney,* 65 Maine, 225; *Cook* v. *Bisbee,* 18 Pick. 527.

What would be a reasonable time for removal would depend upon all the circumstances in the case, the character of the business of the defendant company, and the season of the year when the lease expired. *Howe* v. *Huntington,* 15 Maine, 350; *Saunders* v. *Curtis,* 75 Maine, 493; *Chapman* v. *Dennison Co.,* 77 Maine, 205; 1 Washburn on Real Property, 292.

Under the clause in the lease it devolved upon plaintiff to notify the defendant of its election not to buy and request the removal.

Counsel also cited *Holsman* v. *Abrams*, 2 Duer, (N. Y.) 435.

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

WISWELL, C. J. Action of forcible entry and detainer.

By a written lease dated Dec. 1, 1889, the plaintiff leased to the defendant the premises, possession of which is sought to be recovered in this action, for a term of ten years from that date. During the continuation of the term of the original lease, the parties by an indenture extended the term for one year from Dec. 1, 1899, subject to all the terms, provisions, restrictions and agreements of the original lease. The extended term, therefore expired on Dec. 1, 1900.

On Dec. 7, 1900, within seven days from the expiration of the term, this process was commenced by the plaintiff. By R. S., c. 94, § 1, it is provided that the process of forcible entry and detainer may be maintained, "against a tenant holding under a written lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, without notice, if commenced within seven days from the expiration or forfeiture of the term."

It is urged in defense that this process cannot be maintained, or that it was prematurely commenced, for two reasons. First, because the Oldtown Electric Company, the defendant, is a quasi public corporation, being engaged in supplying electricity to the city of Oldtown and the towns of Milford and Orono, and that inasmuch as the law puts upon such corporations unusual and extraordinary burdens, this statute, which allows the commencement and maintenance of this process against a tenant holding under a written lease, without notice, if commenced within seven days from the expiration of the term, does not apply when the tenant is a corporation of this character. We are unable to read into the statute any such exception, and we know of no reason why the owner of land leased to such a corporation should not have the same rights as other landlords. If, however, there is any such reason it should be made to appear to the legislature and not to the court.

Next, it is urged that this process was prematurely brought because of the following clause in the original lease, which, of course, was equally in force during the extended term: "At the termination of this lease the said Bodwell Water Power Company, shall at its option either buy or allow to be removed the property of said Old Town Electric Company." It is urged that by reason of this provision the term of the lease did not expire until after the Bodwell Water Power Company had exercised its option either to buy or allow the property of the Electric Company to be removed.

In support of this position the case of *Franklin Land, Mill and Water Company* v. *Card*, 84 Maine, 528, is relied upon and claimed to be directly in point. But we do not think that the case is applicable; the clause of the lease construed in that case was: "At the expiration of this lease said Franklin Land, Mill and Water Company are either to renew the same for another term of years at the present, or a then fair rate, that the respective parties may agree upon, or the said parties are to buy said mill at such price as they, the parties of the second part may agree upon," etc. The court held that the terms of the lease implied a continual tenancy until the defendant should be paid his authorized outlay in the construction of the mill which the landlord agreed to purchase if it did not renew the lease.

In this case there is no such implication. The lease contains no covenant, conditional or absolute, upon the part of the landlord to renew the lease. It seems to us very evident that the whole purpose and effect of this clause was to give the tenant a right to remove its property after the expiration of the term provided in the lease, unless the landlord exercised its option to purchase, a right which, without this clause, the tenant would not have. While a tenant at will, occupying for an uncertain period, has a right to remove fixtures within a reasonable time after the termination of the tenancy, *Sullivan* v. *Carberry*, 67 Maine, 531, in the case of a tenant under a written lease for a fixed and definite time, this right of removal must be exercised during the continuation of the term, and if it is not done the right to remove is lost. *Davis* v. *Buffum*, 51 Maine, 160.

By reason of this provision, then, the tenant acquired the important right to remove its property, unless the landlord saw fit to purchase,

after the expiration of the term. In our opinion the clause had no other effect and does not prevent the commencement and maintenance of the forcible entry and detainer process, as provided by statute.

Judgment for plaintiff.

STATE OF MAINE BY COMPLAINT *vs.* PETER BRADLEY.

Cumberland. Opinion January 8, 1902.

Constitutional Law. Intoxicating Liquors. Search and Seizure. Complaint. Arrest. Art. 1, § 5, Maine Constitution. R. S., c. 27, § 39.

That portion of R. S., c. 27, § 39, which authorizes an officer to seize intoxicating liquors without a warrant and to keep them in some safe place for a reasonable time until he can procure a warrant, gives no new or additional authority to search premises. It merely authorizes a seizure without a warrant when such seizure can be made without the unreasonable search which is prohibited by the constitution. To this extent the statute is constitutional and has been frequently upheld by this court. In the present case it does not appear that any search was made, consequently the seizure without a search was unobjectionable.

Upon the trial of a respondent upon the charge contained in a search and seizure complaint and warrant of keeping intoxicating liquors in the place described in the complaint, intended for unlawful sale in this State, if some of the liquors mentioned in the complaint and warrant were found and seized in the place therein described, and were kept there by the defendant intended for unlawful sale, it is immaterial that other liquors were described in the complaint or were seized by the officer and included in his return upon the warrant.

If, in the case of a seizure of intoxicating liquors without a warrant, a respondent is arrested at the time of the seizure and before the issuance of the warrant, even if such arrest is illegal, it in no way affects the validity of the complaint and warrant, and cannot be taken advantage of by a respondent charged with having intoxicating liquors in his possession for an unlawful purpose, either before or after conviction.

Exceptions by respondent. Overruled.

This case came up from the Superior Court of Cumberland county.

April 17, 1901, deputy sheriffs of Cumberland County twice

searched the premises on Commercial street in Portland known as the "Old Dyer House," for intoxicating liquors intended for illegal sale, as empowered by the latter portion of R. S., c. 27, § 39, intending to procure a warrant later.

On the following day, April 18, a complaint was made to the Portland Municipal Court, which, in addition to the usual form in use in cases where the warrant is obtained prior to the seizure, contained the following allegation, viz:—

"And the said Obed F. Stackpole on oath further complains that he, the said Obed F. Stackpole, at said Portland, on the seventeenth day of April, A. D. 1901, being then and there an officer, to wit, a deputy sheriff, within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale and the vessels containing them, by virtue of a warrant therefor, issued in conformity with the provisions of law, did find upon the above described premises:

One jug containing about one gallon of whiskey;

Nine bottles each containing about one-half pint of whiskey;

Three bottles each containing about one pint of whiskey;

Intoxicating liquors as aforesaid and vessels containing the same then and there kept, deposited and intended for unlawful sale as aforesaid, within the State by said Bradley, and did then and there by virtue of this authority as a deputy sheriff as aforesaid, seize the above described intoxicating liquors and the vessels containing the same, to be kept in some safe place for a reasonable time, and hath since kept and does still keep the said liquors and vessels to procure a warrant to seize the same."

Upon this complaint a warrant was issued and returns were made thereon under the date of April 17, 1901, showing the seizure of the liquors described in the complaint and the arrest of the respondent on that day.

There was a conviction in the Municipal Court and an appeal to the Superior Court of Cumberland county, where the respondent was tried before a jury and found guilty.

The judge's charge in the Superior Court contained the following:

"The point has been raised by the attorney for the respondent

that, included in that warrant, were other liquors which were seized somewhat later than the liquors seized at the first visit. . . . . Now, as I say, even though other liquors may have been included, if the return covers the liquors that were seized on the first visit, the return is sufficient, because the greater includes the less."

After the verdict against him, there was a motion by respondent in arrest of judgment, claiming that the complaint was not sufficient; was not in legal form; was bad for duplicity; that it showed on its face no authority by which it was issued; and that the return was double, uncertain and defective.

The motion in arrest was overruled, and the exceptions relied upon were to this ruling and the foregoing instruction to the jury.

R. T. Whitehouse, county attorney, for State.

D. A. Meaher, for respondent.

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

WISWELL, C. J. A deputy seized certain intoxicating liquors in a dwelling-house, without a warrant. Upon the next day, and within twenty-four hours thereafter, he made complaint to a municipal court having jurisdiction and obtained a warrant against the liquors previously taken, and then held by him, until he could obtain the warrant. The respondent was tried in the municipal court upon the charge of keeping these intoxicating liquors in the place described in the complaint, intended for unlawful sale in this state. He was found guilty by that court and appealed to the Superior Court in that county. At the trial in the latter court, where he was also found guilty by a jury, he took exceptions to certain instructions of the presiding justice, to his refusal to give certain requested instructions and to the overruling of his motion in arrest of judgment.

It appears from the bill of exceptions, that the complainant, together with another officer, made two visits to the dwelling-house on the night preceding the issuance of the warrant; that upon one of these visits certain of the intoxicating liquors mentioned in the complaint and warrant and in the officer's return upon the warrant were

taken from the person of the defendant, while the other liquors mentioned in the complaint and in the return upon the warrant were found in the place described in the complaint and taken by them. For this reason, the respondent requested the presiding justice to instruct the jury that if the return was made of two seizures, the complaint and warrant became invalid if not amended, and that the warrant was unauthorized, illegal and void as a matter of law. The court refused to give these instructions, but did instruct the jury as follows: "Now as I say, even though other liquors may have been included, if the return covers the liquors that were seized on the first visit, the return is sufficient, because the greater includes the less." The liquors seized on the first visit, referred to in the foregoing instruction, were those found upon the premises.

The respondent was tried upon the charge contained in the complaint of keeping intoxicating liquors in the place described in the complaint, intended for unlawful sale in this state. If some of the liquors mentioned in the complaint and warrant were found and seized in the place therein described, and were kept there by the defendant intended for unlawful sale, he was guilty of the charge. It makes no difference that other liquors were described in the complaint, or were seized by the officer and included in his return, so far as this proceeding is concerned, provided that some of the liquors mentioned in the complaint and warrant were found and seized, or had been previously found and seized by the officer, before obtaining the warrant, in the place described in the complaint. The rulings therefore in this respect were correct.

In the defendant's argument it is urged that a search without a warrant is in violation of our constitution. But the case does not show that any search was made. That portion of R. S., c. 27, § 39, which provides that, "in all cases where an officer may seize intoxicating liquors or the vessels containing them, upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such a warrant," gives no new or additional authority to search premises. It merely authorizes a seizure without a warrant when such seizure can be made without the unreasonable search which is prohibited by the

constitution. To this extent the statute is constitutional and has been frequently upheld by this court. *State* v. *McCann*, 59 Maine, 383; *State* v. *LeClair*, 86 Maine, 522.

Again, it is argued that the respondent was arrested at the time of the seizure and before the warrant was obtained. If this was so, and if such arrest was illegal, it can in no way affect the validity of the complaint and warrant, and it cannot be taken advantage of by a respondent charged with having intoxicating liquors in his possession for an unlawful purpose, either before or after conviction. There was no reason why the defendant's motion in arrest of judgment should have been sustained.

Exceptions overruled.

CHARLES A. GOUD *vs.* THE CITY OF PORTLAND.

Cumberland. Opinion January 8, 1902.

Public Officer. Harbor Master. Compensation. Spec. Laws, 1849, c. 233.

In an action to recover compensation for the plaintiff's services as Harbor Master of Portland harbor, *held;*

That this position is a public office created by legislative enactment and by an ordinance of the city council of the city of Portland, passed in accordance with the act of the legislature; and that, during the plaintiff's incumbency of this position, he was a public officer, not a mere agent or employee of the city:—

That as such public officer the plaintiff had no contractual relations with the city of Portland, and cannot recover upon an implied promise to pay what his services were reasonably worth, because his services were not rendered to, nor for the benefit of, the city. He was entitled to such compensation as might be established by the city council and none other:—

That the plaintiff has failed to show that any salary was established by the city council of Portland for the office of Harbor Master for the period that he was an incumbent of this office.

Upon the contrary, the case shows that during the year prior to the plaintiff's election to the office, the city council passed an order to the effect that after the expiration of that municipal year there should be no separate salary attached to this office, but that the compensation for the services

of this officer should be included in the amount paid for the maintenance of a fire-boat; that during all the time that the plaintiff held the office of Harbor Master he was also captain of the fire-boat and received compensation for his services in the latter capacity, and that when he accepted the position of captain of the fire-boat and the office of Harbor Master, he was aware of the order passed by the city council to the effect that there should be no salary for the latter office and that his compensation as captain of the fire-boat was to include his salary as Harbor Master.

The plaintiff consequently is not entitled to recover upon any ground.

On report. Judgment for defendant.

Assumpsit for services as harbor master rendered the city of Portland. The case appears in the opinion.

E. E. Heckbert; E. Foster and O. H. Hersey, for plaintiff.

C. A. Strout, city solicitor, for defendant.

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

WISWELL, C. J. The plaintiff was harbor master of Portland harbor from Sept. 2, 1895, until May 9, 1899. In this action he seeks to recover compensation for his services in that capacity.

This position was a public office; during its incumbency by the plaintiff, he was a public officer, not a mere employee of the city. The office was created by legislative enactment, (chap. 233 Private Laws of 1849) and by an ordinance of the city council of the city of Portland passed in accordance with this act of the legislature. This ordinance provided for the annual election of a harbor master; that he should hold office until his successor was appointed, except in the case of a removal; that he should be sworn to a faithful performance of his duties, and that he should receive such compensation for his services as the city council should establish. These are all characteristic features which distinguish an office from a mere employment. This office was the creation of the law for the purpose of carrying into effect the will of the sovereign power for the common good. See *Opinion of the Justices*, 3 Maine, 481; *Cobb* v. *City of Portland*, 55 Maine, 381, 92 Am. Dec. 598; *Hafford* v. *City of New Bedford*, 16 Gray, 297, and the very full collection of authority upon this subject in the note to *State* v. *Hocker*, 39 Fla., 477, in 63 Am. St. R., 174.

As such public officer the plaintiff had no contractual relations with the city of Portland. He was not its servant, agent or employee. He cannot recover upon an implied promise to pay what his services were reasonably worth, because his services were not rendered to, or for the benefit of, the city. He was entitled to such compensation as might be established by the city council, and none other. *Farwell* v. *Rockland*, 62 Maine, 296; *Prince* v. *Skillin*, 71 Maine, 361, 36 Am. Rep. 325; *Sikes* v. *Hatfield*, 13 Gray, 347.

The plaintiff has failed to show that any salary was established by the city council of Portland for the period that he was an incumbent of this office. In fact, the case shows that some time prior to the plaintiff's election to the office, the city council voted that after the expiration of the municipal year of 1894, there should be no separate salary attached to the office, but that the compensation for the services of this officer should be included in the amount paid for the maintenance of a fire-boat: the idea evidently being that the captain of the fire-boat should be harbor master and that the compensation for his services, in the former capacity, should include his salary in the latter office.

Prior to this, by a vote of the city council passed April 2, 1894, the salary of the harbor master was established at the sum of $450 per annum. But on Dec. 11, 1894, this order was passed by the city council: "Ordered, that the committee on fire department be and hereby is authorized to contract for the services of responsible parties to act as captain, engineer and fireman of the steamer Chebeague for a term not exceeding three years, and for a sum not exceeding $182.50 per month, during the continuance thereof. After the expiration of the present municipal year said sum to include the salary of harbor master, and when expended to be charged to the appropriation for fire department salaries." Subsequent to the passage of this order no salary for the office of harbor master was established by the city council.

Accordingly the predecessor of the plaintiff in office, one Chas. H. How, in the spring of 1895, following the passage of the foregoing order, was elected harbor master and captain of the fire-boat and held both positions until his resignation of both on Sept. 2, 1895.

He received no separate and additional salary as harbor master. During this period the plaintiff was engineer of the fire-boat under Capt. How, and was cognizant of the fact that the latter received no separate salary for his services as harbor master.

Just prior to the plaintiff's election as harbor master he was also appointed captain of the fire-boat and held both positions concurrently.

During that period he received his pay as captain of the fire-boat at the rate of $67.50 per month until May 18, 1896, and after that date at the rate of $75 per month. When he accepted the position of captain of the fire-boat and the office of harbor master, he must have been aware of the order above quoted to the effect that there should be no salary for this office, that no separate salary had been established therefor and that, in accordance with the intention of the city council, as expressed in this order, his compensation as captain of the fire-boat was to include his salary as harbor master.

The plaintiff was under no obligation to accept the office of harbor master. After his acceptance he was at liberty at any time to resign, but having accepted the office and continued in it under these circumstances, he cannot now recover any compensation upon any ground.

Judgment for the defendant.

HERBERT BOWDEN *vs.* CITY OF ROCKLAND.

Knox. Opinion January 14, 1902.

Way. Towns. Negligence. Municipal Officers. R. S., c. 18, § 61.

1. It is within the statutory duty and power of a street or road commissioner to re-build upon a larger scale a retaining wall for a public street, when the larger wall is necessary to make the street safe and convenient, and when the municipality has provided the land and the funds therefor.
2. In re-building such retaining wall the street or road commissioner acts as a public officer and not as an agent of the municipality, unless it is made to appear that the municipality assumed itself the direction of the work and of the commissioner.
3. Unless it is shown that the municipality has assumed the direction of the work and of the commissioner, it is not liable to third parties, including employees, for any negligence of the commissioner in the prosecution of the work.
4. That the mayor and members of the committee on streets of the city council advised the street commissioner of the city, that it was within his statutory power and duty to re-build on a larger scale a retaining wall which had given way, and urged him to do so with the assurance that "it would be all right," does not show that the city assumed control of the work and of the commissioner.
5. That the city engineer made plans and specifications for re-building a retaining wall upon a larger scale and delivered them to the street commissioner who proceeded to re-build the wall according to such plans and specifications, does not make the city responsible for the negligence of the commissioner in carrying on the work thus planned.
6. Where the street commissioner in re-building a retaining wall under the above circumstances set up a derrick so negligently that by reason of such negligence a laborer on the work was injured, the municipality is not responsible.

On report. Plaintiff nonsuit.

Action on the case against the city of Rockland to recover damages for injuries, which the plaintiff claims he received while he was at work on a derrick, within the city limits and employed under the road commissioner in repairing the highway. The facts will be found in the opinion.

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

Counsel argued: That the work being done was outside the limits of the street and therefore outside of the jurisdiction of the road commissioner, as a public officer; that the work was being done by the road commissioner, upon the order of the mayor and the committee on streets; that all of the committee either gave instructions or ratified the instructions given prior to the actual beginning of the work at the place where the wall was located. In any event prior to the injury to this plaintiff; that these instructions to the road commissioner were by the duly constituted authorities of the city; that the work was done upon private property and the materials therefor taken from said property under a consent from the owners, giving the city permission to do so; that the wall was built outside the limits of the street and under the regularly constituted city authorities for the financial benefit and advantage of the city in performing its duty of keeping the street in repair; that no specific vote was passed by the city council instructing the road commissioner to do the work according to the plans, with the material and at the place provided by the city. If the defendant city can escape liability, it must be for no other reason except that the city council failed to pass such positive vote.

Towns and cities liable when individuals would be. *Peck* v. *Ellsworth*, 36 Maine, 393; *Eastman* v. *Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Pratt* v. *Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691. This was a ministerial act and therefore one for which the city was responsible, if the city was the party performing the work. *The Rochester White Lead Co.* v. *The City of Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Stone* v. *Augusta*, 46 Maine, 127; 2 Dillon Mun. Corp. 3rd ed. p. 1075, note. The road commissioner, so far as that particular work was concerned, was the agent of the city. If it does not appear in what capacity an officer performs a service, "the law will regard him as acting in the capacity in which he lawfully might perform the duty." *Jones* v. *Jones*, 18 Maine, 308, 36 Am. Dec. 723; *New Portland* v. *Kingfield*, 55 Maine, 172; *Treat* v. *Orono*, 26 Maine, 217. The road commissioner, under the charter and ordinances of the city of Rockland, is primarily agent of

the city. If he is acting upon his own authority and under the general statutes as a highway surveyor, he is then his own master. He is independent of the city or the city council. If he is not so acting his acts which are properly done must be done by virtue of his authority as agent of the city. The portions of the Rockland charter to judge from the opinion in the case of *Waldron* v. *Haverhill*, 143 Mass. 582, are very much like the portions of the charter of the city of Haverhill in relation to the acts of the road commissioner. In that case it was held that the road commissioner or as it is termed "superintendent of highways" was the agent of the city. The road commissioner of the city of Rockland is "under the direction and subject to the approval of the city council or such committee as they may appoint," and only a very small part of his authority is a delegation of a portion of the sovereign power." His position is principally an employment and not an office. *Walcott* v. *Swampscott*, supra; *Woodcock* v. *Calais*, 66 Maine, 235. Dillon in his work on Municipal Corporations under the head of respondeat superior, 3rd edition, page 977, says: "It may be observed, in the next place, that when it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of respondeat superior applies." *Woodcock* v. *Calais*, supra; *Pratt* v. *Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691; *Tindley* v. *Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Inman* v. *Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *City of Dayton* v. *Pease*, 4 Ohio State, 97. No direct vote of the city council necessary. *Hanson* v. *Dexter*, 36 Maine, 516; *Boothby* v. *Troy*, 48 Maine, 560, 77 Am. Dec. 244; *Sullivan* v. *Holyoke*, 135 Mass. 273; *Waldron* v. *Haverhill*, 143 Mass. 582.

C. M. Walker, for defendant.

The two phases of character represented by the decisions, and the

peculiar liabilities in reference to the different capacities of officers, whether as agents of the town, or public officers, are fully recognized and established in this and other States. As to the first may be noted, *Anthony* v. *Adams*, 1 Met. 284; *Seele* v. *Deering*, 79 Maine, 343, 1 Am. St. Rep. 314; *Hawks* v. *Charlemont*, 107 Mass. 414; *Deane* v. *Randolph*, 132 Mass. 475; *Waldron* v. *Haverhill*, 143 Mass. 582; *Doherty* v. *Braintree*, 148 Mass. 495. As to the second, *Small* v. *Danville*, 51 Maine, 359; *Mitchell* v. *Rockland*, 52 Maine, 118; *Cobb* v. *Portland*, 55 Maine, 381, 92 Am. Dec. 598; *Woodcock* v. *Calais*, 66 Maine, 234; *Farrington* v. *Anson*, 77 Maine, 406; *Bulger* v. *Eden*, 82 Maine, 352, 9 L. R. A. 205; *Goddard* v. *Harpswell*, 84 Maine, 499, 30 Am. St. Rep. 373, and many other cases. *Small* v. *Danville*, 51 Maine, 359; *Mitchell* v. *Rockland*, 41 Maine, 363, 66 Am. Dec. 252. Street commissioners, when making, repairing, or otherwise performing their official duties upon highways and streets, are in the performance of their public duties, beyond the control of the corporation; and hence third persons injured thereby, cannot invoke against the corporation. *Pratt* v. *Weymouth*, 147 Mass. 254; *Bulger* v. *Eden*, supra; *Bryant* v. *Westbrook*, 86 Maine, 450. On the other hand, in the latter case in the same State, *Prince* v. *Lynn*, 149 Mass. 193, 14 Am. St. Rep. 404; *Hennessey* v. *New Bedford*, 153 Mass. 260. In the 86 Maine, 539 and 540, *Gilpatrick* v. *Biddeford*, a case similar to the one at bar, the court says:— "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, and also placing that officer under the "supervision of the committee on streets and sewers," obviously was not designed as an attempt to usurp the powers vested in the mayor and aldermen by the general statute."

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

EMERY, J. Where a public highway in Rockland passed along the brink of a deep lime-rock quarry it had been supported on the quarry side by a retaining wall. This wall proved insufficient and

collapsed, and it became necessary to re-build with a new and thicker wall at that place to make the highway safe and convenient within the statute. To do this, required the wall to be built partly at least upon land outside of the located limits of the highway upon that side. The owners of the land, the quarry, sent to the city council a written license to build and maintain such a wall on this land and to take the materials therefor from the quarry. The street railway company using that highway also stipulated in writing with the city council to bear part of the expense. The city engineer made a plan for what he deemed would be a sufficient wall to make the highway safe and convenient and gave to the street commissioner. This latter officer thereupon undertook the work of building the wall according to the plan, and partly, at least, upon the land of the quarry owners, and with material from the quarry. He procured men and teams and the necessary tools and appliances. Among other appliances he hired a derrick (not owned by the city) and caused it to be set up under his supervision to facilitate the work. This derrick was set up in such a way that, in operating it, the boom slipped from the mast and injured the plaintiff, who was at the time employed in the same work by the street commissioner.

The plaintiff claims that the boom slipped and his injury resulted from the negligence of the street commissioner in setting up the derrick. He further claims that in setting up the derrick the street commissioner was the agent of the city, and was not then acting as a public officer in the performance of official duty.

The re-building the retaining wall on a larger scale than the old, that being necessary to make the way safe and convenient, was clearly within the statutory powers and duties of the street commissioner, at least after the city had provided funds and a place therefor. He was expressly directed by statute R. S., c. 18, § 18, to cause sudden injury to ways and bridges to be repaired without delay. By section 11 of the charter of Rockland the street commissioner has "charge of all the work and expenditures upon the streets." No ordinances of the city can limit these statutory powers and duties. It is well settled, by decisions too numerous and familiar to require citation, that a highway surveyor or street commissioner in repairing ways is, and

acts as, a public officer; and the municipality, within whose limits he acts and which appointed him and furnished him funds for the work, is not liable for his torts, unless it has interfered and itself assumed control and direction of the work, and of the surveyor or commissioner. Has the city thus interfered and assumed control and direction in this case is the pivotal question.

While some persons, probably city officers, in behalf of the city procured the written license of the quarry owners for the use of their land and material, and also a stipulation from the street railway company to bear part of the expense of re-building the wall, it does not appear that the city council ever passed any vote in the matter, or that its committee on streets ever had any meeting or as a committee gave any instructions in the matter. No directions appear to have been given by vote of the city council, or the committee on streets, to the city engineer to prepare plans. So far as appears he did so suo motu as part of his regular work, or at the request of some officers. The plaintiff, however, claims that the mayor and one or more of the committee on streets gave the street commissioner orders to build the wall, and that he acted under those orders, and not under his statutory authority. We do not think the plaintiff's own evidence shows so much. There appears to have been some question in the mind of the street commissioner as to his authority to re-build the wall as street commissioner, in view of all the circumstances. He consulted the mayor, the city solicitor and members of the committee on streets, and they assured him he had authority as street commissioner and told him to go ahead and build the wall. He then proceeded with the work as above described.

It must be apparent that this is not enough to show that the city assumed the control and direction of the work and of the commissioner, reducing him from a public officer to a mere employee of the city. It must be apparent that such evidence does not bring this case within the principle of *Woodcock* v. *Calais*, 66 Maine, 234, and kindred cases, where the town in town meeting, or the city in meeting of city council, specifically voted to assume charge of the work and to direct what should be done and who should do it; nor within the case of *Waldron* v. *Haverhill*, 143 Mass. 582, where the city

council had purchased and set up a rock-crusher on its own land and directed the street commissioner to use it in crushing stone for the streets, and the dust therefrom injured the plaintiff's premises; nor within the case *Butman* v. *Newton*, 179 Mass. 1. At the most, the various officials with whom he talked merely assured the commissioner he had the authority and duty to re-build the wall, and told him to go ahead and exert his authority and do his duty, "and it would be all right". This case is more within *Barney* v. *Lowell*, 98 Mass. 570, and *Prince* v. *Lynn*, 149 Mass. 193, in which cases the city was held not liable for the negligence of the street commissioner, though he was acting under the city charter.

That the city obtained the license from the quarry owners to use their land and materials was not a usurpation of the street commissioner's authority, and did not oust him from the control and direction of the work of re-building, no more than if the city had condemned the land and material. The arrangement for the street railroad company to bear part of the expenses had no effect upon the status of the street commissioner, no more than an arrangement to raise the money by loan or tax. That the plan for the wall was made by a city employee, the city engineer, did not make the city the owner or director of the work. The builder is not ipso facto the agent of the architect. There is no suggestion that anything in the plan hindered the commissioner in choosing and properly setting up proper appliances.

We do not say that if the mayor, city solicitor, or members of the committee on the streets, or all combined, acting of their own volition without a vote of the council, had specifically assumed control and direction of the work, and of the commissioner, such acts of their's would have made the commissioner a mere agent of the city, and the city his principal, answerable for his torts. It was said in *Woodcock* v. *Calais*, 66 Maine, 234, on page 236 citing *Haskell* v. *New Bedford*, 108 Mass. 208, that the orders which the street commissioner may have received from the mayor or city solicitor could not affect his relative status to the city and could not bind the city in respect to the commissioner's acts. In *Goddard* v. *Harpswell*, 88 Maine, 228, it was held that the selectmen without vote of the town

authorizing it, could not make themselves agents of the town in the matter of highways.

In this case it is enough to say, that the evidence does not show that the city through the action of any legally constituted authority had so far assumed the control and direction of the work of re-building the wall, and of the street commissioner, as to make his negligence in setting up the derrick the negligence of the city.

Plaintiff nonsuit.

ALBERT WARD, Administrator,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion January 17, 1902.

Railroad. Negligence. Proximate Cause. Damages. Stat. 1891, c. 124.

It is too well settled in this state to permit of discussion, that whenever a plaintiff's want of ordinary care contributes as a proximate cause to the injury for which he brings suit, he cannot recover. In such case the degree of his negligence, or the extent of its effect, as one of the causes for the injury is of no consequence. More than this, the burden is upon him to show affirmatively that no want of ordinary care upon his part contributed in the slightest degree to the injury of which he complained.

But, it is equally well settled that this mere negligence will not prevent a recovery, unless that negligence contributed to some extent, however slight, as a proximate cause for the injury. So that, although a plaintiff may have been negligent, and his negligence may have afforded an opportunity for the injury, if it precedes the injury, which is caused by a defendant's subsequent and independent negligence, then such negligence upon the part of a plaintiff will not prevent a recovery by him. It is not a question of degree of care or extent of negligence. It is not enough that a defendant might by the exercise of due care upon his part have avoided the consequences of the plaintiff's negligence, when that negligence is contemporaneous with the fault of the defendant.

But, if a plaintiff's negligence is so remote as not to be a proximate cause contributing to the injury, then a defendant's failure to exercise due care to avoid the consequences of the plaintiff's earlier and remote negligence, when by the exercise of such care, it could have been avoided, will render

the defendant liable. This rule is firmly established in this state by a number of comparatively recent decisions, and we believe it to be a wise and salutory one when carefully and properly applied.

In an action against the defendant railroad, under Stat. 1891, c. 124, to recover damages for the death of the plaintiff's intestate, the following facts appear, after verdict for the plaintiff upon a motion for a new trial:

The defendant's passenger station building, at the Freeport station is between its main-line tracks on the south and its freight tracks on the north, and is about two hundred feet westerly of Bow Street, a street running southerly from the village of Freeport, and which crosses the railroad tracks at about a right angle. A platform extends from the station building, along one of the main tracks, westerly. Near by to Bow street between the northerly side of this platform and the nearest freight track, there is an open space extending from Bow street to the station building, nineteen and one-half feet wide at the street and thirty-two and one-half feet wide at the platform on the easterly side of the station building. This open space is used as a passageway and driveway for persons having occasion to drive to the station, and the whole of the space is open and suitable for this purpose. Access to this open space or driveway is had from Bow street, and also by driving over the freight tracks where there are plank-crossings, westerly of the street and nearer the eastern end of the station.

On the day of the accident, in the forenoon, the plaintiff's intestate drove along Bow street, southerly from the direction of Freeport village to the gate at the railroad crossing north of the freight track, in an open wagon with a barrel of potatoes in the wagon, back of the seat. When he reached the crossing this gate was down, a freight train having previously arrived from Portland, which at that time and before had been upon the different freight tracks, the trainmen being engaged in shifting cars and making up the train to proceed easterly. Just previous to this the locomotive had backed in westerly from the street towards the freight house west from the passenger station and the gatekeeper raised the gates upon both sides of the crossing to allow the deceased to pass upon the highway. The deceased drove across the freight track and then turned into the driveway to the station. After driving to within about ten feet of the platform on the easterly side of the station building, he backed his wagon up to the platform extending along the main track towards Bow street, for the evident purpose of unloading the barrel onto this platform. His horse's head therefore was towards the main freight track. Before unloading the barrel, he went forward towards the freight track so that he could look by the passenger station, undoubtedly for the purpose of seeing where the freight train then was and what was being done with it. About this time, the freight train started easterly on the main freight track in the direction of Bow street, making the usual noises caused by ringing the bell, the escape of steam, etc. Thereupon, the plaintiff's horse became to some extent frightened, and the deceased took hold of the horse's bridle and attempted to hold him. There is some differ-

ence in the description by the eye-witnesses as to the conduct of the horse and as to what extent he showed evidences of fright; some of the witnesses, those for the defense, say that the horse was all the time under control until the last plunge which resulted fatally for the deceased; and this is undoubtedly true to the extent that the deceased continued to keep his hold on the horse's bridle and to remain upon his feet; but beyond this it appears from the evidence that the horse had quite as much control over the man as the man did over the horse. He was moving about all of the time. As one witness expressed it, "the horse was in motion all the time, and was moving Mr. Ward [the deceased] first one way and then the other by his head." In further describing the scene, the same witness said: "The horse once made a plunge with Mr. Ward and came up so that once, as near as I could tell, his foot struck the rail, and he made a surge and drew his horse back again."

As soon as the engineer in his cab got abreast of the easterly end of the passenger station, and perhaps a little before that time, he could, and did, see the condition, whatever it was; he saw that there was some trouble, and shut off the steam, so that after that the train "drifted along," as he expressed it, without steam, and consequently without the noise caused by the escape of the exhausted steam from the cylinder, but the bell continued to be rung until just before the collision. The deceased's horse continued to show more or less signs of fright, and to move about more or less violently, until finally he made a plunge obliquely towards the track a few feet in front of the locomotive and threw the deceased onto the track. The engineer at once reversed his engine and gave it steam, but this was too late and the deceased was run over by the locomotive and immediately killed.

Held; that the deceased went there upon business connected with the railroad company, to leave the barrel of potatoes to be transported by the railroad company, and he was therefore properly there, and was not a mere licensee upon the premises for his own convenience.

Also; that even if the plaintiff's intestate was negligent, under all of the circumstances of the case, in driving up to the station platform, when a freight train was upon the track, still a recovery may be had by the plaintiff, notwithstanding that negligence, if subsequently, the deceased being in danger by reason of the fright of his horse, and this danger being apparent to the defendant's engineer, the latter failed to exercise that care which the situation demanded. Nor can it be said, after a verdict by the jury to the contrary, that it was negligence upon the part of the deceased not to have attempted to cross the tracks over the crossings near the eastern end of the passenger station and thus avoided the danger. This would depend upon many conditions and circumstances. It might have been an imprudent thing for him to have attempted to cross at this place in front of an approaching train with a frightened horse.

The question, then, for the jury being whether the engineer should have stopped his train, as it is admitted that he might have easily done,

before the horse finally threw the deceased upon the track in front of the locomotive, it is considered by the court that the finding of the jury was not manifestly so erroneous as to show that the jury in finding for the plaintiff was affected by sympathy, prejudice or some other improper motive; and that a jury would be authorized in finding that the deceased used the same degree of care that a reasonably careful and prudent man would have done in that situation.

While it is in the province of the jury to fix the amount of damages sustained by those for whose benefit this action may be maintained under the statute, "with reference to the pecuniary injuries resulting to them from such death," it is the duty of the court, if the amount awarded is clearly excessive, to set aside the verdict or to fix a sum for an amount beyond which the verdict may not stand. This sum is not necessarily what the court would award as the amount of damages, but the maximum amount which is authorized by the evidence. In this case, we think that such maximum is the sum of $1250.

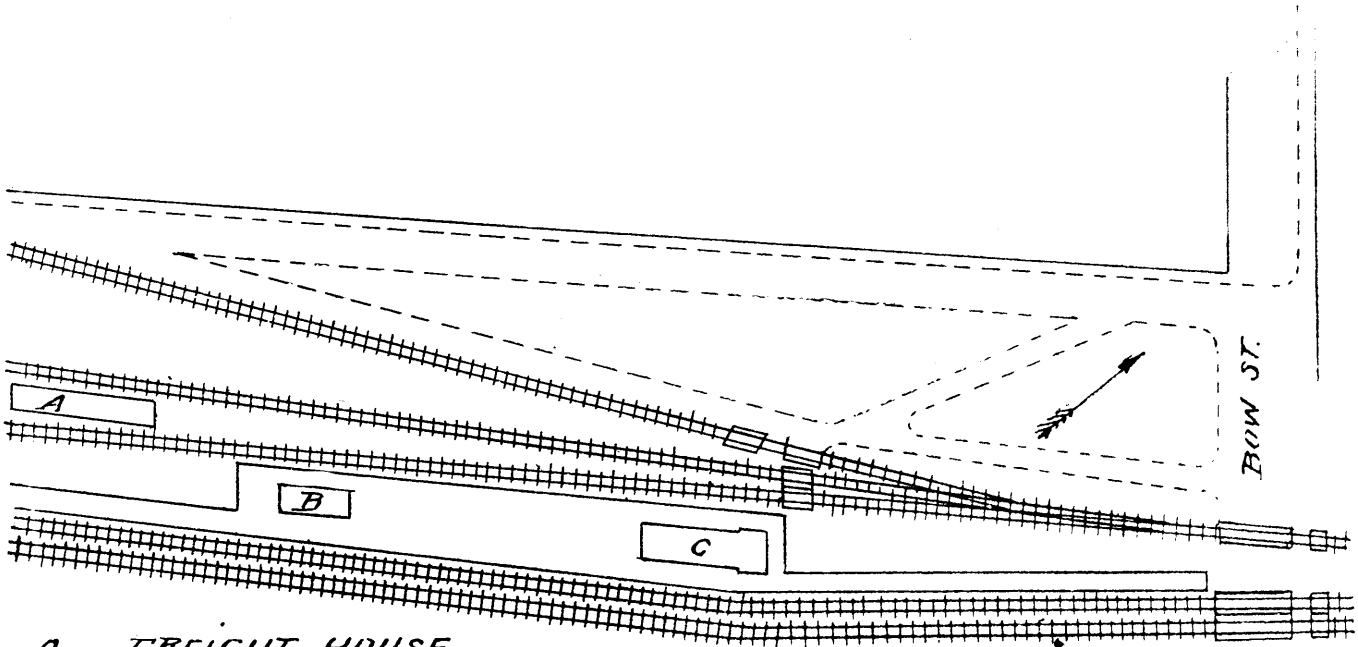
Case for negligence under stat. of 1891, c. 124, for causing the death of one Albion Ward upon the defendant's station grounds at Freeport village. The jury returned a verdict for $2,031.81. The facts appear fully in the opinion.

E. Foster, O. H. Hersey; H. E. Coolidge, for plaintiff.

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

Mr. Ward had a right to go down into that roadway if he saw fit to do so, but whether it was a prudent thing to do, whether he was in the exercise of due care in so doing, is another question. A much less degree of prudence than what we call ordinary care would have required him to wait until the engine had pulled out, and it was little less than recklessness for him to drive in there under such circumstances and with such a horse. *Flewelling* v. *Lewiston & Auburn Horse R. R. Co.*, 89 Maine, 585; *Keeley* v. *Shamley*, 140 Pa. St. 213; 23 Am. St. Rep. 228; *Louisville* v. *Nashville Ry.* v. *Schmidt*, 81 Ind. 264. Ward not only drove down to the station, but he refused to avail himself of a plain and easy method of escape after he had walked out and looked at the train. The company had a right to use this track No. 3 for the purpose of running its trains as it did upon that morning. It had a right to start the engine and cars from the freight house and run out through the yard with the reasonable and usual noises incident to their operation. If the horse

became frightened, the company was not responsible for that. So far as the conduct of the company and its servants in this case is concerned, it would have stood just the same if the horse had become frightened from some entirely independent cause. There is no allegation of any negligence in this respect, and no evidence to support any. Elliott on Railroads, § 1175. The plaintiff's want of due care must have been a proximate cause of his injury. It need not be the only proximate cause. A proximate cause is such an act, as a man might suppose, would naturally or probably produce a given result. Where such result happens, the act done by the party which he might naturally or probably have supposed would produce the result, is its proximate cause. Beach Contrib. Negligence, §§ 25 et seq. and 54 et seq. The negligence of Ward in driving in there with a horse of that character was not a remote, but a proximate cause of the accident. *Merrill* v. *North Yarmouth*, 78 Maine, 200, 57 Am. Rep. 794; *Higgins* v. *Boston*, 148 Mass. 484; *Davis* v. *Dudley*, 4 Allen, 557; *Titus* v. *Northbridge*, 97 Mass. 258, 93 Am. Dec. 91; Sherman & Redfield on Negligence, § 474; *P. W. & B. Railroad Co.* v. *Stinger*, 78 Pa. 219, 228; *Cleveland* v. *Bangor*, 77 Maine. 259; *Wardsworth* v. *Marshall*, 88 Maine, 263, 32 L. R. A. 588; *Dennett* v. *Wallington*, 15 Maine, 27; *Deville* v. *So. Pacific R. Co.*, 50 Cal. 383; *Murphy* v. *Deane*, 101 Mass. 455, 3 Am. Rep. 390. His want of due care was a proximate cause contributing to the result. *Neal* v. *Carolina Central R. Co.* (126, N. C. 634,), 49 L. R. A. 684; *Keefe* v. *Chicago & N. W. Ry. Co.*, 92 Iowa, 182, 54 Am. St. Rep. 542. Beach Contrib. Neg. § 35, c. IV. *Woodman* v. *Pitman*, 79 Maine, 456, 1 Am. St. Rep. 342, above cited. To hold otherwise would result in requiring the engineer to take better care of the man than the law required the man to take of himself as suggested in the last quotation. *Lucas* v. *New Bedford & Taunton R. R. Co.*, 6 Gray, 64, 66 Am. Dec. 406. Sometimes the conduct of the plaintiff justifies the action of the defendant at the time, even if it afterwards appears that he erred in judgment. *N. O. & N. E. Railroad Co.* v. *Jopes*, 142 U. S. 18; *Garland* v. *Maine Central Railroad Co.*, 85 Maine, 519.



A ~ FREIGHT HOUSE.

B ~ BAGGAGE ROOM.

C ~ PASSENGER STATION.

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

WISWELL, C. J. The defendant's passenger station building, at the Freeport station, is between its main line tracks on the south and its freight tracks on the north, and is about two hundred feet westerly of Bow street, a street running southerly from the village of Freeport, and which crosses the railroad tracks at about a right angle. A platform extends from the station building, along one of the main tracks, westerly nearly to Bow street. Between the northerly side of this platform and the nearest freight track there is an open space extending from Bow street to the station building, nineteen and one-half feet wide at the street and thirty-two and one-half feet wide at the platform on the easterly side of the station building. This open space is used as a passageway and driveway for persons having occasion to drive to the station, and the whole of the space is open and suitable for this purpose. Access to this open space or driveway is had from Bow street, and also by driving over the freight tracks where there are plank-crossings, westerly of the street and nearer the eastern end of the station.

On the day of the accident, in the forenoon, the plaintiff's intestate drove along Bow street, southerly from the direction of Freeport village to the gate at the railroad crossing north of the freight track, in an open wagon with a barrel of potatoes in the wagon, back of the seat. When he reached the crossing this gate was down, a freight train having previously arrived from Portland, which at that time and before had been upon the different freight tracks, the trainmen being engaged in shifting cars and making up the train to proceed easterly. Just previous to this, the locomotive had backed in westerly from the street towards the freight house west from the passenger station, and the gatekeeper raised the gates upon both sides of the crossing to allow the deceased to pass upon the highway. The deceased drove across the freight track and then turned into the driveway to the station. After driving to within about ten feet of the platform on the easterly side of the station building, he backed his wagon up to the platform extending along the main track towards Bow street, for

the evident purpose of unloading the barrel onto this platform. His horse's head therefore was towards the main freight track. Before unloading his barrel, he went forward towards the freight track so that he could look by the passenger station, undoubtedly for the purpose of seeing where the freight train then was and what was being done with it. About this time the freight train started easterly on the main freight track in the direction of Bow street, making the usual noises caused by ringing the bell, the escape of steam, etc. Thereupon, the plaintiff's horse became to some extent frightened, and the deceased took hold of the horse's bridle and attempted to hold him. There is some difference in the description by the eye-witnessess as to the conduct of the horse and as to what extent he showed evidences of fright; some of the witnesses, those for the defense, say that the horse was all the time under control until the last plunge which resulted fatally for the deceased, and this is undoubtedly true to the extent that the deceased continued to keep his hold on the horse's bridle and to remain upon his feet; but beyond this it appears from the evidence that the horse had quite as much control over the man as the man did over the horse. He was moving about all of the time. As one witness expressed it, "the horse was in motion all the time and was moving Mr. Ward [the deceased] first one way and then the other by his head." In further describing the scene, the same witness said: "The horse once made a plunge with Mr. Ward and came up so that once, as near as I could tell, his foot struck the rail, and he made a surge and drew his horse back again."

As soon as the engineer in his cab got abreast of the easterly end of the passenger station, and perhaps a little before that time, he could, and did, see the condition, whatever it was; he saw that there was some trouble, and shut off the steam, so that after that the train "drifted along", as he expressed it, without steam, and consequently without the noise caused by the escape of the exhausted steam from the cylinder, but the bell continued to be rung until just before the collision. The deceased's horse continued to show more or less signs of fright, and to move about more or less violently, until finally he made a plunge obliquely towards the track a few feet in front of the locomotive and threw the deceased onto the track. The engineer at

once reversed his engine and gave it steam, but this was too late and the deceased was run over by the locomotive and immediately killed.

Upon these facts, the plaintiff, claiming that her intestate's death was caused by the fault of the defendant, brought this action under chap. 124, Public Laws, 1891. The case comes to the law court upon the defendant's motion for a new trial, after a verdict for the plaintiff.

The questions for the determination of the jury at the trial were whether the danger to the plaintiff was so apparent to the engineer, while the latter was in sight of the deceased and his horse, that he was negligent in failing to take such measures as he might have to have prevented the accident; and whether the deceased was himself guilty of contributory negligence.

The defendant claims that the deceased was himself negligent in driving into this open space above described, and that this negligence was a proximate cause contributing to the injury, and that later, after the danger became more apparent to the deceased, he was negligent in not escaping therefrom by driving across the freight track over the crossings northerly of the east end of the station. That it was not necessarily an act of negligence upon the part of the deceased in driving up to the station platform, is apparent. This was the way provided for access to the station for those who had occasion to go there.

The deceased went there upon buisness connected with the railroad company, to leave the barrel of potatoes to be transported by the railroad company. He was therefore properly there, and was not a mere licensee upon the premises for his own convenience, *Plummer* v. *Dill*, 166 Mass. 426, although he may have been negligent in doing this, knowing that the freight train was in upon its track, if he also knew that his horse was usually frightened by trains, when in close proximity to them, to such an extent as to make it a hazardous thing for him to go there.

But, we do not think it necessary to decide this question, because even if it was a negligent act upon his part, we do not think that this negligence contributed directly as a proximate cause to the injury. It is too well settled in this state to permit of discussion, that whenever a plaintiff's want of ordinary care contributes as a proximate

cause to the injury for which he brings suit, he cannot recover. In such case the degree of his negligence, or the extent of its effect, as one of the causes for the injury is of no consequence. More than this, the burden is upon him to show affirmatively that no want of ordinary care upon his part contributed in the slightest degree to the injury of which he complained.

But, it is equally well settled that his mere negligence will not prevent a recovery, unless that negligence contributed to some extent, however slight, as a proximate cause for the injury. So that, although a plaintiff may have been negligent, and his negligence may have afforded an opportunity for the injury, if it precedes the injury, which is caused by a defendent's subsequent and independent negligence, then such negligence upon the part of a plaintiff will not prevent a recovery by him. It is not a question of degree of care or extent of negligence. It is not enough that a defendant might by the exercise of due care upon his part have avoided the consequences of the plaintiff's negligence, when that negligence is contemporaneous with the fault of the defendant. But if a plaintiff's negligence is so remote as not to be a proximate cause contributing to the injury, then a defendant's failure to exercise due care to avoid the consequences of the plaintiff's earlier and remote negligence, when by the exercise of such care, it could have been avoided, will render the defendant liable. This rule is firmly established in this state by a number of comparatively recent decisions, and we believe it to be a wise and salutory one when carefully and properly applied. *O'Brien* v. *McGlinchy*, 68 Maine, 557; *Pollard* v. *Maine Central Railroad Co.*, 87 Maine, 55; *Atwood* v. *Bangor, O. & O. Railway Co.*, 91 Maine, 399; *Conley* v. *Maine Central Railroad Co.*, 95 Maine, 149.

So that, even if the plaintiff's intestate was negligent under all of the circumstances of the case, in driving up to the station platform, when a freight train was upon the track, still a recovery may be had by the plaintiff, notwithstanding that negligence, if subsequently, the deceased being in danger by reason of the fright of his horse, and this danger being apparent to the defendant's engineer, the latter failed to exercise that care which the situation demanded. Nor can we say, after a verdict by the jury to the contrary, that it was negligence upon

the part of the deceased not to have attempted to cross the tracks over the crossings near the eastern end of the passenger station and thus avoided the danger. This would depend upon many conditions and circumstances. It might have been an imprudent thing for him to have attempted to cross at this place in front of an approaching train with a frightened horse.

The question, then, for the jury was, whether the engineer should have stopped his train, as it is admitted that he might have easily done, before the horse finally threw the deceased upon the track in front of the locomotive. This would of course depend entirely upon the conduct of the horse as the train was approaching, and upon what a reasonably prudent man in the position of the engineer would have been led to believe from what he saw. It has been argued with great force that there was nothing in what the engineer saw as to the fright of the horse to lead him to believe that there was any danger of such a serious character as to require him to reverse his engine and stop his train.

And if this question was to be decided by us it is not impossible that we might come to that conclusion. But, while this was the question submitted to the jury, the question presented for our determination is, whether or not the finding of the jury upon this question was so manifestly erroneous as to show that the jury, in finding for the plaintiff, was affected by sympathy, prejudice or some other improper motive. This was purely a question of fact. It is a question about which persons who have no other desire than to arrive at a true solution of the question, might reasonably differ. There is not so much difference in the testimony, although there is some, as there is as to the proper inferences that a jury would be authorized in drawing from the testimony, and especially as to what a reasonably careful and prudent man in that situation would have done. Upon the whole, although the case is not free from doubt and difficulty upon this question of fact, we do not feel disposed to say that the verdict upon this point was clearly and manifestly erroneous.

The defendant also claims that the amount of damages awarded by the jury was excessive. We think that this contention must be sustained, for this is a matter, under the evidence of this case, almost

entirely of mere computation. The deceased was sixty-four years of age. For two or three years prior to his death he had no steady employment, except that he worked upon his farm when he was not engaged in doing chance jobs. For some time he had not been earning more than $150 a year over the cost of his own support, and probably not so much as that. The earning capacity of a laboring man at the age of the deceased would continually diminish, while his own living expenses would naturally somewhat increase. While it is the province of the jury to fix the amount of damages sustained by those for whose benefit this action may be maintained, under the statute, "with reference to the pecuniary injuries resulting to them from such deaths," it is the duty of the court, if the amount awarded is clearly excessive to set aside the verdict, or to fix a sum for an amount beyond which the verdict may not stand. This sum is not necessarily what the court would award as the amount of damages, but the maximum amount which is authorized by the evidence. In this case, we think that such maximum is the sum of $1250.

Motion sustained, unless the plaintiff, within thirty days after the rescript is received by the clerk, remits all of the verdict over $1250, as of the date of the verdict.

WILLIAM E. HALE, Receiver, *vs.* HENRY L. CUSHMAN.

Androscoggin. Opinion January 23, 1902.

Limitations. Stockholders' Liability. Receiver. Foreign Judgment. R. S., c. 81, § 82.

1. The cause of action "on any contract or liability expressed or implied" (R. S., c. 81, § 82) does not accrue the moment the contract is made or the liability is incurred, but only when there is a breach of duty.
2. The statutory duty of a stockholder in a Minnesota corporation to contribute to the payment of the debts of the corporation does not arise at the time of the insolvency of the corporation, nor until it has been judicially determined that a resort to the liability of the stockholders is necessary and authority is given to enforce it. There is no breach of duty by the stockholders, and the cause of action upon such liability does not accrue until then.
3. Where a Minnesota corporation was adjudged insolvent May 20, 1893, but the fact and amount of the deficiency of the corporate assets to pay corporate debts were not adjudicated until Nov. 5, 1897, when a special receiver was appointed to collect the amount of such deficit from the stockholders, the duty of the stockholders to make contribution did not arise till the latter date, and an action begun within six years from that date, Nov. 3, 1897, is not barred by our statute of limitations.

Exceptions by defendant. Overruled.

Assumpsit by plaintiff as receiver, appointed by the District Court of Hennepin county, Minnesota, for the enforcement and collection of the liability of stockholders of the Northwestern Guaranty Loan Company, an amount equal to the par value of the shares in said corporation owned by said defendant.

The defendant plead the general issue and the statute of limitations among other things by way of brief statement.

The opinion states the case.

E. W. Freeman; M. H. Boutelle of the Minnesota bar, for plaintiff.

Counsel cited: *Childs* v. *Cleaves*, 95 Maine, 498; *Hale, Receiver*, v. *Hardon*, 95 Fed. Rep. 747; Wood on Limitations of Actions, 254; *Hale, Receiver*, v. *Hilliker*, 109 Fed. Rep. 273; *Howarth* v. *Ellwanger*, 86 Fed. Rep. 54; *Hawkins* v. *Glenn*, 131 U.

S. 319; *Glenn* v. *Liggett*, 135 U. S. 533; *Howarth* v. *Angle*, 162 N. Y. 179, 47 L. R. A. 725.

G. C. Wing, for defendant.

Counsel cited: *Howell* v. *Young*, 5 B. & C. 219; *Battley* v. *Faulkner*, 3 B. & Ald. 288; *Kerns* v. *Schoonmaker*, 4 Ohio, 331, 22 Am. Dec. 757; *Strasburg Railroad Co.* v. *Echternacht*, 21 Penn. 220.

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

EMERY, J. The Northwestern Guaranty Loan Company, incorporated under the laws of Minnesota and located and doing business in that State, was, on May 20th, 1893, adjudged insolvent by the proper court in Minnesota, and a receiver was appointed to collect and administer its assets. Later in these proceedings upon proper application to the proper court in Minnesota, it was found and adjudged on Nov. 3, 1897, that the assets were insufficient by the sum of $2,867,394.37 to pay the indebtedness of the corporation. Thereupon, upon the same day, the plaintiff was appointed by the court a special receiver for the special purpose of enforcing the statutory liability of the stockholders under the statutes of Minnesota for the benefit of the creditors of the corporation. The outstanding shares of the capital stock of the corporation at that date numbered 12,500 of the par value of $100 each. Of these the defendant held, and had held, 20 shares, and this action is against him to enforce his liability on such shares.

The question of the liability in this court of the stockholders in similar Minnesota corporations under the statutes of Minnesota as interpreted by the Minnesota courts, and the court proceedings leading to the appointment of a special receiver to enforce this liability, were all fully reviewed and considered by the court in the recent similar case of *Childs, Receiver*, v. *Cleaves*, 95 Maine, 498, and need not be again gone over here. Indeed, the defendant's counsel frankly and honorably concedes, what is true, that the case of *Childs* v. *Cleaves* is decisive against him of his liability in this suit, unless the action is barred by our statute of limitations, R. S., c 81, § 82, which provides

that "actions of assumpsit, or upon the case founded on any contract or liability expressed or implied," shall be commenced "within six years after the cause of action accrued and not afterwards." This action was begun March 9, 1901.

The defendant contends that his liability accrued at least as early as May 20, 1893, when the corporation was adjudged insolvent and put in charge of a receiver, and hence that the cause of action against him upon that liability accrued then, if not before, and became barred May 20, 1899, before this action was begun.

It does not follow, however, from the language of the statute that a cause of action accrues as soon as a contract is made or a liability is incurred. The obligation or liability, though existing, may yet be conditional with conditions precedent negativing any right of action until the conditions are all fulfilled. The contract or statute creating the liability may require the observance of many preliminaries before there shall be a right of action to enforce it. It may require a certain lapse of time after the liability is determined, before an action can be brought, as in the case of many insurance statutes and contracts. In fine, it may be stated as a general rule that no right or cause of action exists or accrues until there is a breach of duty.

The question, therefore, in this case is, when did the defendant first become delinquent in duty? It was held in *Childs* v. *Cleaves*, supra, that, under the statutes and judicial decisions of Minnesota, the liability of the stockholders to creditors of the corporation to make good the deficiency of corporate assets up to an amount equal to the par value of his shares, though a liability in existence, was in abeyance until the fact and extent of such deficiency were judicially ascertained and declared and a receiver appointed to enforce the liability of the stockholders. The liability is not primary, to be enforced as soon as a debt against the corporation matures; but is secondary, somewhat like that of a guarantor, to be enforced only when the inability of the corporation is judicially demonstrated, when the assets of the company are judicially found to be insufficient, and the amount of the deficiency definitely ascertained.

The liability is analogous to that of a stockholder to creditors for unpaid subscriptions for stock which the corporation itself is barred

from collecting. In such cases it has been held that no action can be maintained against the stockholder by a receiver or assignee for benefit of creditors, until the fact and extent of the deficiency of the corporate assets have been ascertained and declared by some competent authority. *Gillin* v. *Sawyer*, 93 Maine, 157; *Hawkins* v. *Glenn*, 131 U. S. 319.

The defendant in this case clearly did not become delinquent in duty, at least until the proper authority in Minnesota ascertained and declared there was occasion to resort to his liability, and authorized its enforcement. This, as already stated, was not until Nov. 3, 1897, when it was found for the first time what was the deficiency of corporate assets and how much would be required of the stockholders. The right or cause of action did not accrue before that day, and hence this action begun March 9, 1901, was seasonably begun.

Exceptions overruled.

STATE OF MAINE *vs.* FRED A. BUSHEY.

Kennebec. Opinion January 30, 1902.

Criminal Pleading. Conclusion of Law. Obstructing Officer. R. S., c. 122, § 21; c. 132, §§ 12, 13.

In an indictment under R. S., c. 122, § 21, for obstructing an officer in the service of process, it is not necessary that there should be an express allegation that the process was in the possession of the officer. It is sufficient if such is the fair inference from all the language used.

Such process when not civil must, by the statute, be "for an offense punishable by jail imprisonment and fine, or either." These words are descriptive of the offense, and they or their equivalent must be used in the indictment. An allegation that the process was a search and seizure warrant in and upon the premises of the defendant, situated in W., and occupied by him as a saloon, is not sufficient.

Such an indictment must specifically state by what act of the defendant he obstructed the officer in the service of the process.

Exceptions by defendant. Sustained.

Defendant was indicted and tried in the Superior court of Kenne-

bec county for obstructing an officer in the service of criminal process. There was a verdict of guilty by the jury.

Defendant moved in arrest of judgment and took exceptions to the overruling of his motion in the Superior court.

The case is stated in the opinion.

Thomas Leigh, county attorney, for State.

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

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

POWERS, J. Indictment under R. S., c. 122, § 21, for obstructing an officer in the service of process. The respondent was found guilty and moves in arrest of judgment for the following causes.

"First. There is no allegation in the indictment that Henry A. Hodges, the alleged constable, had in his possession any warrant or process, or that any process had been committed to him at the time alleged or stated in the indictment.

Second. The indictment does not allege or set forth that any crime or what crime or offense the supposed search warrant was based upon, or what the nature of the charge was.

Third. The indictment does not contain any allegation of the particular mode or how the defendant hindered or obstructed the constable, and does not state what acts the defendant did in this matter to prevent the constable from executing his legal power.

Fourth. There is no allegation in the indictment that the alleged search and seizure warrant authorized or directed the searching of the premises or saloon of the defendant, and for other manifest defects in said record appearing."

I. The indictment states that Hodges "being then and there a constable of the town of Vassalboro, legally authorized and duly qualified to dischage the duties of said office, and also being then and there in the due and lawful execution of the same, was in process of serving a search and seizure warrant issued by the judge of the municipal court for the city of Waterville." It is not necessary that there

should be an express allegation that the process was in the possession of the officer. It is sufficient if such is the fair inference from all the language used. *State v. Hooker*, 17 Vt. 658,668. How could Hodges be in the due and lawful execution of his office as constable, and in process of serving the warrant, unless he had it in his possession at the time? It is evident that he could not. His possession of the warrant, therefore, as plainly appears from the language of the indictment as if it had been directly alleged.

II. The offense is created and defined by the statute. The indictment should state all the elements necessary to constitute the offense, either in the words of the statute or in language which is its substantial equivalent. *State* v. *Hussey*, 60 Maine, 410, 11 Am. Rep. 209. In speaking of the process, the words of the statute are "process for an offense punishable by jail imprisonment and fine, or either." These words are descriptive of the offense, and they, or their equivalent, should be used in the indictment. Instead of this, however, the only description which is found of the process which the officer was obstructed in serving, is that it was a search and seizure warrant in and upon the premises of the defendant, situated in Waterville, and occupied by him as a saloon. Under our statute no warrant can issue to search for any person or thing except for an offense in relation thereto which is punishable by jail imprisonment or fine, or either. Such a warrant when lawful must specially designate the person or thing searched for, and allege substantially the offense in relation thereto. Upon it the person or thing searched for, if found, is seized, and together with the person in whose possession the same is found, returned before a proper magistrate. Upon it, if the offense is within the magistrate's jurisdiction, the person so returned is tried, and if convicted punished by jail imprisonment and fine, or either; and if not within the magistrate's jurisdiction, the proceedings are the same as in other similar cases. R. S., c. 132, §§ 12 and 13. If, therefore, there were any allegation that the search and seizure warrant was a lawful one, it might be said with some reason that such an allegation necessarily imported that it was for an offense punishable by jail imprisonment and fine, or either. There is in the

indictment, however, no allegation that the search and seizure warrant was lawful, or lawfully issued, and there is nothing describing the cause for which it issued, and showing that it was for such an offense as is within the definition of the statute. Not that there must necessarily be an allegation that the process was lawful. Our statute does not contain that word, and therein differs from the New Hampshire statute, under which the omission of that word was held fatal in *State* v. *Beasom*, 40 N. H. 367, and *State* v. *Flagg*, 50 N. H. 321. There must be, of course, proof that the process was lawful. The objection and the difficulty here is, that there is no direct allegation that the offense was within the statutory definition, that there is no description of the offense which, by showing what it is supplies the place of that definition, and permits the court and the accused to see that it was an offense punishable by jail imprisonment and fine, or either, as was the case in *State* v. *Cassidy*, 52 N. H. 500. In the absence of such allegation or description, and the further absence of any allegation that the search and seizure warrant was lawful, or lawfully issued, the description of the process found in the indictment is not equivalent to the words of the statute, and is insufficient. All that is charged in the indictment may have been proved, and yet the defendant may not have committed any offense.

III. The indictment follows the words of the statute and charges that the defendant did wilfully obstruct the officer in serving the process. If it stopped here, it could hardly be contended that it descended far enough into particulars to give the defendant notice of what particular act on his part was claimed to be criminal. Bishop's Crim. Prac. § 889. It goes on to say, therefore, that the defendant "did prevent the said Hodges from seizing a large quantity of intoxicating liquor intended for illegal sale upon said premises." This, however, is a mere conclusion. Upon what act of the defendant that conclusion is based nowhere appears in the indictment. The indictment should allege facts, not state conclusions. *People* v. *Reynolds*, 71 Mich. 343. The defendant is charged with obstructing and preventing, possibly with obstructing by preventing; but by what act he obstructed, by what act he prevented, in short with what criminal act

he is charged, the defendant is left solely to conjecture. The criminal act with which he is charged should be so specifically stated that he may prepare his defense, and if again prosecuted for the same offense may plead the former conviction or acquittal in bar. *State* v. *Lashus*, 79 Maine, 541; *State* v. *Hosmer*, 81 Maine, 506.

IV. There is no allegation in the indictment that the officer searched or attempted to search, or was obstructed in searching, either the premises or saloon of the defendant. It is therefore unnecessary that there should be any allegation in the indictment that the warrant authorized or directed such search.

For the second and third causes assigned the motion is granted and

Exceptions sustained. Judgment arrested.

JOHN B. KEHOE, in Equity, *vs.* JAMES S. AMES, and others.

Cumberland. Opinion January 31, 1902.

Will. Trust. Separated Family. Costs.

A testatrix devised certain property to a trustee to hold during the natural life of her nephew, J. S., for the benefit of the said J. S., "so that at the discretion of the trustee the net income, and where circumstances should demand, the principal might be applied to the comfort and support of the said J. S., and his family, and to relieve them from suffering and distress." She further provided in case of objection to the trustee by J. S., or her refusal to act, other trustees should be appointed "to carry out the provisions of such trust for the benefit of said J. S. and his family," with a devise over after the death of J. S., to his issue then living, and in default of such issue to another nephew. By other clauses of her will, specific and substantial devises and bequests were made to J. S., without mention of his family. The family of J. S., at the time of the making of the will consisted of his wife and daughter, but before the death of the testatrix they separated from him, and have not since lived or maintained family relations with him.

Upon a bill brought by the trustee to determine the construction of the will, and for directions as to the manner of executing the trust, *held;*

That the whole net income of the trust estate is not payable to J. S:—

That the wife and daughter are independent beneficiaries under the will, and that so much of the income as the trustee in his discretion, exercised in good faith, may determine, is either payable to the wife, or to be otherwise applied by him to the comfort and support of the wife and daughter:—

That their right to have said income so applied is not affected by their separation from J. S.:—

That there being no evidence of the abuse by the trustee of the discretion given him, the prayer of the wife and daughter to have the income of the trust estate apportioned and a specific part paid to them, should be denied.

On report. In equity.

Bill brought by the trustee under the will of Charlotte R. Shaw late of Portland, deceased, to determine its construction and obtain directions as to the manner of executing the trust.

Kate P. Trickey was named trustee in the will, but was succeeded by the plaintiff.

The facts were agreed and appear in the opinion.

John B. Kehoe, pro se, for plaintiff.

R. T. Whitehouse; J. C. and F. H. Cobb, for James S. Ames.

J. H. and J. H. Drummond, Jr., for others.

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

POWERS, J. This bill is brought by the trustee under the will of Charlotte R. Shaw for a construction of clause seventeen of the will, and for the direction of the court as to the manner of executing the trust therein created. Said seventeenth clause is as follows:

"Seventeenth. Eight shares of my stock in the New York, New Haven and Hartford R. R. Co.; my shares of stock in the Boston & Albany R. R. Co.; my house and lot on Casco Street in said Portland; and thirty-five two-hundredths (35-200) of my Merritt farm in Minnesota, more definitely named in the last preceding item of this will, I give, devise, and bequeath to the said Kate P. Trickey, to have and to hold to her, and her heirs, executors, administrators, and assigns, for and during the term of the natural life of James S. Ames aforesaid, but in trust nevertheless for the benefit of my nephew, James S. Ames aforesaid, and so that at the discretion of the trustee the net income from said trust estate shall from time to time be

applied to and for the comfort and support of the said James and his family; and further so that when circumstances shall demand so much of the principal part of said estate shall, at the discretion of said trustee, be applied and used as will save and relieve the said James and his family from suffering and distress. Provided, however, if said James S. Ames shall in writing duly made and presented by him to the judge of probate for said Cumberland county, object against said Kate P. Trickey acting as such trustee, or if for any cause she shall refuse to accept, or fail or cease to perform such trust, then in either such event, it shall be lawful and it is my will and I do hereby order and direct, that the judge of probate aforenamed shall appoint some other discreet, reliable, and responsible person as trustee to carry out the provisions of such trust for the benefit of said James S. Ames and his family as aforesaid. On the death of the said James S. Ames, said above created trust shall cease and thereby be determined. And thereupon I give, devise, and bequeath the said estate so hereinbefore given in trust, and the reversion and remainder thereof, in fee to such of the lawful issue of the said James S. Ames as shall then be living, and in default of such issue of the said James, then to such of the lawful issue of the said Robert P. M. Ames as shall then be living."

It is agreed that the family of James S. Ames at the time of the making of the will consisted, and now consists, of his wife and daughter, but that they have not lived with him, or maintained family relations with him since 1895, although there has been no divorce or separation by order of court, and that since the separation he has not contributed to their support. In determining whether the wife, Harriet E. Ames, and the daughter, Harriet E. Ames, Jr., are independent beneficiaries under the will, and as such entitled to any portion of the income of the trust fund, regard must be had to the words of the will itself in all its different parts. The construction placed by learned judges on expressions in other wills under other circumstances, differing from though somewhat similiar to those before us, throws little light upon the intention of the testatrix here. The trust is, in the first instance, expressly declared to be for the benefit of James, and it is claimed that the expressions which

immediately follow allowing the trustee in her discretion to apply the net income to and for the comfort and support of James and his family, and when necessary so much of the principal as will save and relieve the said James and his family from suffering and distress, are simply declaratory of the motive for the gift to James. Later on, however, in the same clause, in case of the refusal or failure of the trustee named to act, the testatrix provides for the appointment of other trustees "to carry out the provisions of such trust for the benefit of the said James S. Ames and his family as aforesaid." Here the testatrix expressly declares that the trust is for the benefit of the family as well as of James. If James is the only beneficiary of the trust fund, then the words "and his family" must be rejected. It is only by regarding the wife and daughter his family, as well as James, as beneficiaries of the trust fund, that full force and meaning can be given to all parts of the will. Such a construction is the only one which is consistent with the later declaration that the trust is for the benefit of James and his family. It is not inconsistent with the previous declaration that it is for the benefit of James, so that in the discretion of the trustee the income may be applied to the comfort and support of, and if necessary the principal, to relieve from suffering and distress "James and his family."

And we think this construction is strengthened by the fact that by the seventh, twelfth, and thirteenth clauses of the will specific and substantial bequests and devises are made directly to James S. Ames. By the ninth and eighteenth clauses he is one of the four residuary devisees and legatees of the real and personal estate. In none of these clauses is any mention made of the family. If what the testatrix had in mind was simply to benefit and provide for her nephew, James, leaving the comfort and support of his family entirely dependent upon his affection, or the performance by him of the obligations which the law imposed upon him to support his wife and daughter, it is difficult to understand why the family should be named in connection with the disposition of the trust fund and nowhere else. From the distinction thus made the conclusion is irresistible, that the testatrix intended the family of her nephew to have from the trust fund a direct beneficial interest, different from that which it would incident-

ally derive from the absolute gifts to him. *Loring* v. *Loring*, 100 Mass. 340.

We think these considerations outweigh any argument to be drawn from the fact that the trust was to continue only during James' life and the trust estate was then devised to his issue, and in default of such issue to the issue of another nephew, without making any further mention of James' wife. Such a gift to those alone who were related to her by consanguinity is not inconsistent with an intention, on the part of the testatrix, to give to the wife during her husband's life such an interest in the trust fund as would provide for her comfort and support, and relieve her from suffering and distress. If there were children, the estate would still continue in her family; and if there were none, and the wife survived the husband, the testatrix might then reasonably prefer her own relatives to the wife of a deceased nephew. Moreover, in making wills testators do not always foresee, and not foreseeing do not provide, for every possible contingency. If they did there would be less bills brought to determine the construction of their wills.

Neither do we think too great importance should be attached to the right given to James alone to object to the trustee named. He was the husband and father, the head of the family, which at the time of the making of the will was still united. The testatrix might well believe that he would act for the interest of that family; and that beyond that it was not desirable to invest either the woman or the child, who were to be the recipients of her bounty, with the unusual power of rejecting the trustee she had named, through whom that bounty was to be exercised.

It is suggested that the wife and daughter no longer belong to the family of James, and that while living separate and apart from him they have no right to participate in the benefits of the trust. There is nothing in the will indicating such an intention on the part of the testatrix. So far as they are concerned the declared purpose of the trust, their comfort and support and their relief from suffering and distress, might require that they should receive its benefits even more when living apart from, than when living with the husband and father. The separation took place more than a year before the death

of the testatrix, yet she made no change in her will on that account. We think she used the word "family" to designate the persons intended, and not for the purpose of imposing as a condition that those persons should reside with, or be entitled to support from, James S. Ames. The question of whose fault caused or continues the separation cannot affect the rights of the beneficiaries except so far, if at all, as it may influence the judgment of the trustee, to whose discretion is confided the application of the trust funds. With that discretion, honestly exercised, the court will not interfere, and there being no evidence of its abuse, the prayer of Harriet E. Ames and Harriet E. Ames, Jr., that the income of the trust estate be apportioned, and a specific part paid to them, is denied. *Veazie* v. *Forsaith*, 76 Maine, 172; *Smith* v. *Wildman*, 37 Conn. 384.

In answer to the questions submitted, our opinion therefore is, that the whole of the net income of the trust estate is not payable to James S. Ames; that so much of said net income as the trustee in his discretion exercised in good faith may determine, is either payable to Harriet E. Ames, or to be otherwise applied by the trustee to the comfort and support of herself and said Harriet E. Ames, Jr.; and that the right of said Harriet E. Ames and said Harriet E. Ames, Jr., to have such portion of said income so applied is in no way affected by their separation from James S. Ames, except so far, if at all, as it may properly influence the discretion of the trustee.

The costs of both parties are a proper charge upon the income, and are to be paid by the trustee.

Decree accordingly.

WILLIAM WELLS, Applt. from the decree of Judge of Probate.

Cumberland. Opinion January 31, 1902.

Will. Sanity. Evidence. Undue Influence. R. S., c. 103, § 14.

In order to establish a will it is not necessary that any of the subscribing witnesses should testify to the sanity of the testator. It frequently happens that the most satisfactory evidence of a person's state of mind is found in the mind's own action, as shown by his conversation, claims, declarations, and acts.

On the question of undue influence, the fact that the testatrix's nephew, who drew the will, was named an executor, and received a small legacy, is entitled to little weight, where the legacy is the same as that bequeathed to all her other nephews and nieces, and there is no evidence that he unjustly used the confidence reposed in him to influence or morally coerce the testatrix, but there is an entire absence of those suspicious circumstances which are usually found where one seeks to impose one's will upon another and overpower his mind and will, so that he is no longer left free to act intelligently and understandingly.

Motion for new trial. Sustained.

Appeal from the decree of the Judge of Probate of Cumberland county allowing the will of Frances H. M. Wells, late of Portland.

At the trial in the court below, the jury found the testatrix was not of sound mind, and executed the will under undue influence.

The case is stated in the opinion.

J. C. & F. H. Cobb, for appellant.

E. C. Reynolds, for appellee.

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

POWERS, J. This is an appeal from a decree of a judge of probate approving and allowing the will of Frances H. M. Wells. At the hearing in the appellate court two issues were submitted to the jury by the presiding justice, viz:

Question. Was the testatrix, Frances H. M. Wells, of sound

mind at the time she executed the instrument which purports to be her last will and testament? Answer. No.

Question. Was said testatrix induced to make and execute said instrument, purporting to be her last will and testament, by undue influence? Answer. No.

Whereupon the appellee moved to have the verdict set aside and a new trial granted.

An examination of the evidence satisfies us of the following facts. The testatrix and the appellant had been married something over twenty years. The first half of their married life had been pleasant, but about 1890 the testatrix became convinced, whether with or without sufficient grounds is immaterial, that her husband had formed an undue and unlawful intimacy with another woman. This conviction caused her a great deal of unhappiness. She at one time entertained the thought of obtaining a divorce, but after talking the matter over with her counsel, said that she would remain in the house—it was her home, and she would remain in the house, and the other woman should not come to the house while she was there. She frequently spoke of the affair to her counsel, and stated that she did not intend for her husband to have any considerable portion of her estate. On June 16, 1900, she was taken sick; the 19th she told her nephew, who had been her attorney since 1887, that she would like to have him prepare a will for her. At the same time she told him something as to the amount of her estate, where to find her bank books, to get them and take them to the city and get them balanced up, asked him to figure up her notes, and told him about her other property. On the following day, June 20th, having ascertained the amount of her property, she stated to him what disposition she desired to make of it. Her sister visited her the 23rd and remained with her until the 25th; and during this time she conversed rationally and intelligently about herself and her condition. The 24th the draft of the will was read to her, and she suggested some changes in it so that the share of her estate which was given to one of her brothers, who had had some financial difficulty, should not be subjected to the claims of his creditors. On June 26th, her nephew returned with the will in its final draft, read it to her, and she looked

it over and pronounced it all right. It was drawn in accordance with her instructions. By it she gave the bulk of her property to her heirs at law, her seven brothers and sisters, she being childless, one hundred dollars to each of her thirteen nephews and nieces, $100 to a lady friend stopping at the house at the time, her wearing apparel to her sister, her sewing machine to her sister-in-law, her watch to her husband's grandchild, and the remainder, some $400.00, to her husband.

Having looked the draft of the will over she stated whom she desired as witnesses, two of the neighbors and the nurse, and it was then duly executed and published as her last will and testament.

From that time until her death on July 17th, she continued to have callers and visitors, with whom she conversed in a manner which indicated that she had sufficient mind and memory to recall what she had done, what property she had, and to understand her relations to those who were the natural objects of her affection and bounty. The two neighbors who witnessed the will gave no opinion as to the mental condition of the testatrix, but stated that she signed the will, and when asked if that was her will, and whether she desired them and the nurse to witness it, she nodded her head in assent.

The case of the appellant rests almost entirely upon the testimony of the nurse. She attended the testatrix from June 18th to the time of her death, and states that during that entire time the testatrix was out of her mind, and wandering all the time, that she was flighty and would not answer, that she would get out on the floor at night, that she was hard to manage, that she would say all kinds of things, and imagine she was going and coming somewhere, that she would receive company, and that the day the will was made she was out of her mind all that day and that evening, and the night before. This witness, however, gives numerous instances of conversation between herself and the testatrix wherein the latter conversed intelligently about herself, her husband, her property, and various other matters, and wherein it is impossible to discover any indication of mental unsoundness. She further states that at the time the will was executed, when asked if she knew what was in it, the testatrix bowed her head; that the witness at that time picked up from the floor the envelope that belonged to the bank book and asked the testatrix if it was

any use, to which she replied, "It is the cover to the bank book." These are intelligent acts and statements at the very time of the execution of the will. The testimony in regard to them comes from the nurse herself, and does not comport with her opinion that the testatrix was out of her mind all that day. Moreover, this witness in some of her testimony shows a manifest bias, an inclination to volunteer and inject statements favorable to the appellant, and in other parts her evidence is discredited and overborne by the testimony of the opposing witness and the probabilities of the case.

The weight and value of a witness' opinion depends not only upon his means of observation and knowledge, but also quite as much upon his freedom from all bias and prejudice. In order to establish a will it is not necessary that any of the subscribing witnesses should testify to the sanity of the testator. While there is no presumption of sanity in these cases, and this is a fact to be affirmatively proved by the proponent, yet the opinion of these non-experts is allowed as an aid and not as an infallible guide to the jury. It frequently happens that the most satisfactory evidence of a person's real state of mind is to be gathered from the mind's own action as shown by his conversation, claims, declarations, and acts. Proven facts of this class carry greater weight than the opinion of witnesses. *Cilley* v. *Cilley*, 34 Maine, 162. It is a significant fact that the husband, the appellant, dwelling in the same house as the testatrix and in daily communication with her, testifies to no word or act of hers which can possibly afford any indication of mental unsoundness.

It does not require the highest kind of mental ability to make a valid will. A sound disposing mind exists when the testator can recall the general nature, condition and extent of his property, and his relations to those to whom he gives as well as those from whom he withholds his bounty. *Hall* v. *Perry*, 87 Maine, 569, 47 Am. St. Rep. 352. Neither in the present case is there any impeachment of the testatrix's testimentary capacity through the internal evidence afforded by the will itself. The bulk of her estate was given to her heirs at law and those who, from the claims of blood or affection, would be the natural objects of her bounty, with the exception of her husband. As to him, the will was in accord with a purpose she had

long cherished and frequently expressed, the motive for which plainly appears and is not difficult to understand. Our conclusion is that the finding of the jury upon the first question was plainly contrary to the evidence.

On the second question the burden was upon the appellant to establish undue influence. There was absolutely no evidence, either direct or circumstantial, to support the finding of the jury on this issue. The appellant relies upon the fact that the attorney who drew the will is named as executor, and received a legacy of $100.00, a relatively small portion of the estate. That circumstance is entitled to little weight under the circumstances of this particular case. *Post* v. *Mason*, 91 N. Y. 539, 43 Am. Rep. 689. He was her nephew, and received under the will the same sum as all other nephews and nieces of the testatrix. He had been her attorney for years. There is no evidence that he unfairly used the confidence reposed in him to influence or morally coerce the testatrix. She took the initiative in the preparation of the will, and it was drawn in accordance with the intelligent instructions which she had given. There was no secrecy attending its execution, and from beginning to end there is an entire absence of those suspicious circumstances which are usually found when one seeks to impose one's will upon another and overpower his mind and will, so that his mind is no longer left free to act intelligently and understandingly.

Motion sustained.
New trial granted.

OSCAR H. HERSEY, Admr., In Equity,

vs.

SELINA PURINGTON, Admx., and others.

Cumberland. Opinion January 31, 1902.

Will. Intention. Equitable Fee-Simple Conditional. Trust.

A testatrix bequeathed and devised her estate to her daughter, provided that her daughter died leaving issue, or did not die before reaching the age of twenty-one years. There was a devise over upon the happening of such contingency, unless the estate should have to be disposed of under the fourth clause of the will. By that clause the executrix was ordered and directed to apply all, or whatever was necessary of the rents, profits, and income of the estate to the support and education of the daughter, and should they prove insufficient, to sell the corpus of the estate and apply the proceeds to the same purpose.

Upon a bill of interpleader to determine the construction of the will:—

Held; That upon the death of the testatrix an equitable fee-simple conditional passed to and vested in the daughter, subject to be devested on her dying under twenty-one years of age, and without issue; which condition was itself subject to the condition that the estate had not already been disposed of for her maintenance and education, as provided in the fourth clause of the will.

The daughter died without leaving issue, and before attaining the age of twenty-one years.

Held; that the trust created by the fourth clause of the will terminated with the death of the cestui que trust:

That after the death of the daughter her guardian could not convey the estate:

That the court will not determine in this case the validity of such sales, if any, made by the guardian in the lifetime of his ward and while there was no one qualified to act as trustee, the persons claiming under such sales not being made parties to the bill.

On report. In equity.

Bill in equity to obtain the construction of the will of Helen J. Purington, late of Westbrook.

There was also a bill brought by William W. Cutter, one of the

defendants, against the plaintiff herein and others in which were involved much the same questions as are here decided.

The case was heard on bill and answers and is stated in the opinion.

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

L. T. Mason and G. N. Weymouth, for Selina Purington.

William Lyons, for William W. Cutter.

J. H. & J. H. Drummond, Jr.; F. M. Ray, for others.

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

POWERS, J. This is a bill in equity brought to obtain a judicial construction of the will of Helen J. Purington.

The first item of the will is as follows:

"First, I give, bequeath, and devise to my beloved daughter, Marie J. Purington, provided she dies leaving issue, or provided further that she does not die before she reaches the age of twenty-one years, all the rest, residue, and remainder of my estate, real, personal, and mixed, wherever found and wherever situated, but in case she should die before she reaches the age of twenty-one years and without leaving issue, then I dispose of my real and personal property as follows." The testatrix then proceeds by the second item of her will: "In case as above provided that my daughter Marie J. should die before she becomes twenty-one years of age, and without leaving issue", to devise her house and lot, situated at the corner of Main and Stroudwater streets in Westbrook, to Albert H. Burroughs, "unless it shall have to be disposed of as hereinafter provided." By the third item of the will "should my daughter Marie J. die as above stated, under twenty-one years of age and without issue," the residue of the estate is bequeathed and devised to Dora Purington, sister of the testatrix's deceased husband, "should it not have to be disposed of for the purposes hereinafter provided."

"Fourth, I order and direct my executrix herein named to apply all or whatever is necessary of the rents, profits and income of my real and personal estate to the support and education of my said daughter Marie J. Purington, giving her a high school, and if she

desires, a seminary or collegiate education, and should the rents, profits and income of my estate, real and personal, prove insufficient for that purpose, I order and direct the executrix to first sell the real estate situated on the westerly side of Spring street, in said Westbrook, and after the proceeds of the same shall have been applied to the support, clothing and education as aforesaid of my said daughter, Marie J., and should they prove insufficient," the testatrix orders and directs her executrix to next sell the other parcels of real estate, naming the order in which they are to be sold, that devised to Albert H. Burroughs being last, and apply the proceeds as above, "and it is my wish and desire, and I so order and direct, that nothing contained in the second provision herein made shall prevent, or in any way interfere in my executrix disposing of the whole of my estate, real, personal, and mixed, for the support, clothing and education as aforesaid of my daughter Marie J. Purington." She then authorizes her executrix, should she find that the rents, profits, and income of the estate are more than is necessary for the support and care as aforesaid of Marie, in her own judgment and discretion to erect suitable grave stones, or a family monument to her late father, mother, and herself, and concludes by appointing Dora Purington sole executrix.

The will bears date Nov. 12, 1891, and the testatrix died June 9, 1892. Dora Purington qualified as executrix, but died Nov. 16, 1893, and there was from that time no legal representative of the estate of Helen J. Purington until the plaintiff was appointed July 17, 1900. Marie J. Purington died April 17, 1900, at the age of nineteen, and without leaving issue.

The court is asked to determine what estate the daughter, Marie, took under the will, and whether this estate could be sold by her guardian for the purposes of her maintenance and education.

If the first article of the will stood alone, there could be no question but that the daughter took a contingent estate only. The word "provided" is an apt and appropriate word to indicate an intention to give contingently; yet words literally contingent in their meaning and import, must bend to the construction in favor of vesting the estate or interest, if the will in its other parts and features shows that

such was the intention of the testator. It is the testator's intention collected from the whole will, "from the four corners of the instrument", considered together, and not from detached portions, considered separately, which governs. Such an intention, if consistent with the rules of law, overrides all technical rules relating to the construction of isolated words and phrases. Technical words are presumed to be used in their settled legal meaning, but where a different intention is fairly deducible from the whole will the technical meaning must yield to the apparent intention. Again, it is a settled rule of construction that the predominant idea which the testator had in his mind in making his will is to be carried into effect, as against doubtful or even conflicting provisions which might defeat it. Here the predominant idea of the testatrix is manifest. It was to provide for the support and education of her daughter. Her entire estate, real and personal, if required, was to be devoted to that purpose. She expresses her wish and desire, and orders and directs that nothing contained in the second provision of her will devising the land to Albert H. Burroughs, shall in any way interfere with carrying out that purpose. The limitations over in both the second and third items of the will are made not only upon the condition that her daughter dies before she becomes twenty-one years of age, without leaving issue, but also expressly "unless the estate should have to be disposed of as hereinafter provided," and "for the purposes hereinafter provided" in the fourth clause.

The law favors the vesting of estates when the manifest purpose of the will cannot be thereby subverted. "When, therefore, the devise is to a person, where or if he shall live to attain a certain age, or at a certain age, this standing alone would be contingent; yet if it be followed by a limitation over, if he shall die before a certain age, this is regarded as explanatory of the nature of the estate which it was intended the devisee should take upon arriving at the age named; i. e., that it should then become absolute and indefeasible; the interest, therefore, in such cases, is held to vest upon the decease of the testator. And a devise over always supplies an argument in favor of the prior devisee or devisees taking a vested interest. Where the devise over is made dependent upon the first devisee dying

before he comes of age, or without issue, or any similar event, it is considered that the devise is equivalent to a provision that the first donee shall take an immediate vested interest, liable to be defeated by the happening of the contingency named; or if it do not happen the estate then to become absolute and indefeasible." 2 Redfield on Wills, 224 (2nd Ed.) In the will under consideration there was a present and not a future gift to the testatrix's daughter. She had a present right of future enjoyment of the estate, liable to be defeated by the happening of the contingency. *Buck* v. *Paine*, 75 Maine, 582.

This conclusion is strengthened by the fourth provision of the will, devoting to the support and education of the daughter the income and principal of the entire estate, if required for that purpose. Judge Redfield states it as the result of all the cases that where the income of the estate is given to the donee, in the meantime, it affords the most satisfactory evidence that the testator intended to give the corpus of the estate, but only deferred the time of coming into possession; and where a portion of the interest only is given, or a sum sufficient for the support and education of the donee in the discretion of the trustees, it affords a less conclusive ground of inference in favor of the estate vesting, but still one of considerable weight. 2 Redfield on Wills, 233, note. In such cases, though time is annexed to the gift, it is not annexed to the substance of the gift as a condition precedent. This distinction is recognized in *Brown* v. *Brown*, 44 N. H. 281, cited by the plaintiff. Our conclusion is that on the death of the testatrix an equitable fee-simple conditional passed to and vested in Marie J. Purington, subject to be devested on her dying under twenty-one years of age, and without issue; which condition was itself subject to the condition that the estate had not already been disposed of for her maintenance and education, as provided in the fourth item of the will.

The trust there created is an active trust. The trustee is to apply all, or whatever is necessary, of the rents, profits, and income, and if need be the corpus of the estate, to the support and maintenance of the daughter. This is not a mere naked power. Active duties are imposed upon the trustee. In order to carry out the purposes of the trust and apply the rents, profits, and income, it is necessary that she should have such legal control and management of the property

as will enable her to receive them. In such a case it is not necessary that there be any express devise to the trustee. If the duties imposed upon the trustee be such that they cannot be discharged without a right to control the fee, the legal estate passes to him by implication. *Deering* v. *Adams*, 37 Maine, 264. The trustee was to apply the rents, profits, and income to the support and education of the cestui que trust. She therefore took a fee-simple in trust. The legal estate vested in her, although the entire equitable and beneficial estate vested in the cestui, subject to being devested upon the happening of the contingency. The trust so created terminated with the death of Marie J. Purington. Every purpose contemplated by it had then been fulfilled. It is therefore unnecessary to determine whether the duty of administering the trust might under other circumstances have devolved upon the administrator de bonis non with the will annexed. This trust had terminated by its own limitations before he was appointed.

In reply to the question as to the power of the guardians of Marie J. Purington to make sale of the real or personal estate of the testatrix, so far as relates to future sales we answer that they could not. While the vested equitable estate which passed to Marie was inheritable, devisable, and alienable, yet it was an estate subject to a contingency, and the contingency having happened nothing remains to convey. As to past sales by the guardians, the bill contains no allegation that any such have been made. If such have been made we do not think this the proper time to pass upon their validity. In *Jackson* v. *Thompson*, 84 Maine, 44, it was held that upon a bill brought by executors to obtain a construction of a will, the court would not decide questions relating to the validity of assignments made by beneficiaries under a will. In that case the assignees of the legatee were made parties, but in this case if such sales have been made those claiming under them, and who are directly interested in the subject matter, are not made parties, nor represented in these proceedings.

Each party is entitled to recover his costs to be paid by the administrator out of the estate.

Decree accordingly.

STATE OF MAINE *vs.* JAMES A. CONWELL, JR.

Cumberland. Opinion January 31, 1902.

Warrant. Lord's Day. Stat. 1901, c. 201. R. S., c. 27, § 40.

A search and seizure warrant issued under R. S., c. 27, § 40, on the Lord's day, before the enactment of statutes 1901, c. 201, was not thereby rendered invalid.

The act of the magistrate in issuing such a warrant under that section is ministerial and not judicial.

Exceptions by respondent. Overruled.

Complaint and warrant in the usual form, issued thereon by the judge of the municipal court for the city of Portland on Sunday, December 23, 1900, for search of a dwelling-house on Spring street in Portland, and seizure of intoxicating liquors alleged to have been kept there intended for sale in violation of law.

The case comes to this court from the Superior court of Cumberland county to which respondent appealed, on exceptions by respondent to the overruling of his demurrer to the complaint.

R. T. Whitehouse, county attorney, for State.

D. A. Meaher, for respondent.

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

POWERS, J. This was a search and seizure warrant issued under R. S., c. 27, § 40, before the enactment of c. 201 Public Laws, 1901. The respondent excepts to the overruling of his demurrer, and the only question involved is whether the fact that the warrant was issued upon the Lord's day, renders it invalid.

There is no statute in this State which declares such a warrant void. Works of necessity are expressly excepted from the prohibition against labor and business contained in R. S., c 124, § 20. Whatever is necessary to prevent crime and apprehend persons charged with its commission is within that exception. *Keith* v. *Tuttle*,

28 Maine, 326. Whether the issuing of a warrant in any case is a work of necessity is a question which cannot be raised upon demurrer. If it could, and if "the object of such legislation has been to secure to private citizens the quiet enjoyment of Sunday as a day of rest, and to encourage the observance of moral duties on that day," as stated by Mr. Justice WHITEHOUSE in *Cleveland* v. *Bangor*, 87 Maine, 259, 47 Am. St. Rep. 326, it is difficult to conceive of any thing more conducive to that object than the prevention of the illegal sale of intoxicating liquor; and it would seem a perversion of the spirit of the statute to hold that a violation of it, which is so well calculated to make it effectual.

It is only the service of civil process on the Lord's day that is prohibited by R. S., c. 81, § 81. And the execution of a search warrant on Sunday was valid at common law. *Wright* v. *Dressel*, 140 Mass. 147; *Pearce* v. *Atwood*, 13 Mass. 324. In the case last cited, Parker, C. J., in delivering the opinion of the court states that warrants may also be issued upon that day, "for if the arrest is authorized by law, the order to make such arrest is lawful." The same considerations of necessity and public policy which will justify the arrest, or search and seizure upon the Lord's day, will equally justify the taking on that day of any preliminary steps necessary to make the arrest, or search and seizure.

The legality of search warrants was first established by Lord Hale on the ground of public necessity, because without them felons and other malefactors would escape detection. 1 Chit. Crim. Law, 64. The same ground would furnish a strong argument in favor of their legality when issued on Sunday, as a delay of one day would frequently allow the guilty party to escape.

By the commonlaw Sunday is dies non juridicus, and all judicial proceedings upon that day are void, but ministerial acts could always be performed on that day. *Pearce* v. *Atwood*, supra; *Johnson* v. *Day*, 17 Pick. 106.

The statute under which these proceedings were commenced, R. S., c. 27, § 40, declares that "if any person, competent to be a witness in civil suits, makes sworn complaint before any judge of a municipal or police court, or trial justice . . . . such magistrate shall issue

his warrant." Here is nothing judicial to be done by the magistrate, nothing left to his judgment or discretion. The statute is mandatory, and the act of the magistrate ministerial. Mr. Justice WHITEHOUSE in discussing this very question in *State* v. *LeClair*, 86 Maine, 522, says, "It might well be claimed that the act of the clerk in issuing the warrant in question was purely ministerial." While that case was decided upon another ground, yet we see no reason to dissent from the reasoning there employed, or the conclusion there reached upon this subject. See also *Com.* v. *Clifford*, 8 Cush. 215.

Exceptions overruled. Judgment for the State.

ALVIN T. WALSH, and others, *vs.* ANDREW C. WHEELWRIGHT.

Hancock. Opinion February 24, 1902.

Will. Adverse Possession. Evidence. Declarations. Deed.

1. In a real action by the heirs of one who died seised, evidence that a will was left by the deceased without any evidence of its contents does not defeat the action.
2. When a party, to prove title by adverse possession, introduces evidence of occupation by one whom he had placed in possession as a purchaser under oral contract and who had in fact paid for the land, but was deceased before obtaining a deed, the declarations of such deceased occupant made on or near the land during his occupation to the effect that such occupation was not adverse to the owner by record, are admissible evidence upon the issue whether the possession was adverse.
3. The rule that actual adverse occupation of part of a tract of land under a recorded deed is a constructive adverse occupation of the whole tract covered by the deed, does not apply to a record owner none of whose land is thus occupied. Unless some part of his own land is adversely occupied, the record owner is not affected by the fact that his land is included with other land in a deed between strangers followed by an adverse occupation of some part of the other land not his. The case *Noyes* v. *Dyer*, 25 Maine, 468, is overruled so far as it conflicts with this decision.

Exceptions by defendant. Overruled.

Writ of entry for the recovery of a parcel of land in Northeast Harbor on Mt. Desert Island, described as follows:—

"Beginning at a large rock marked with a cross near the county road below house formerly of William Roberts; thence running west seventeen degrees south eleven rods; thence south a little eastwardly to a fir tree on the beach at the mouth of Northeast Harbor; thence eastwardly by the shore to a fir tree near the county road, spotted on four sides; thence northerly to the first mentioned bound, containing one acre more or less, together with all the privileges to the same."

Defendant plead the general issue. The verdict was for plaintiffs and the defendant alleged the following bill of exceptions:—

The said one acre was part of lot No. 69, according to the Peters plan of Mt. Desert, containing one hundred acres, more or less. It was admitted that Harriet Pung acquired title to the whole of lot No. 69, conveyed to her in description by metes and bounds under deed from the trustees of the Bingham estate, dated November 1, A. D. 1841, recorded November 2, A. D. 1841, in the registry of deeds for Hancock county, Maine, in Vol. 70, page 515.

The plaintiffs, or demandants, claimed title to said one acre as heirs at law of Edward Walsh, and under deed from Harriet Pung to Edward Walsh of her right, title and interest in and unto the lot described as in the declaration. Deed dated May 2, A. D. 1842, recorded May 4, A. D. 1842, in said registry, in Vol. 272, page 268.

The tenant, or defendant, claimed title by adverse possession or prescription (by himself and his predecessors) and through occupation with color of title under the following deeds:

(1) Quit-claim deed, Harriet Dodge (the Harriet Pung above mentioned) and her husband, Gideon Dodge, to James Bartlett, Jr., dated October 23, A. D. 1844, recorded January 6, A. D. 1845, in said registry, in Vol. 75, page 396.

(2) Mortgage, said James Bartlett to Samuel Langly, Franklin Greene and Henry Ward Greene, copartners as Langly, Greene & Company, dated October 14, A. D. 1847, recorded November 1, A. D. 1847, in said registry, in Vol. 82, page 355.

(3) Assignment of said mortgage by said mortgagees to Cornelius Wasgatt, dated March 26, A. D. 1851, recorded April 1, A. D. 1851, in said registry, in Vol. 89, page 478.

(4) Foreclosure of said mortgage by said Cornelius Wasgatt, by publication; notice dated April 1, A. D. 1851, last publication being April 22, A. D. 1851. Notice recorded in said registry, April 29, A. D. 1851, in Vol. 90, page 329.

(5) Quit-claim deed, said Cornelius Wasgatt to Joseph H. Curtis and John T. R. Freeman, dated December 2, A. D. 1880, recorded December 15, A. D. 1880, in said registry, in Vol. 176, page 18.

These instruments introduced by the defendant covered all of lot 69 in description by metes and bounds.

(6) Warranty deed, said Joseph H. Curtis and said John T. R. Freeman to Andrew C. Wheelwright, the defendant, dated September 17, A. D. 1881, recorded October 1, A. D. 1881, in said registry, in Vol. 179, page 215.

This deed contained in description by metes and bounds twenty-five acres, more or less, and included the one acre specified in the declaration.

(7) Quit-claim deed, said Joseph H. Curtis and John T. R. Freeman, to Andrew C. Wheelwright dated December 12, A. D. 1881, recorded December 16, A. D. 1881, in said registry, in Vol. 179, page 498.

This last named deed was confirmatory of the previous warranty deed between the same parties, and evidently given after permanent monuments were placed at various points in the lines of the twenty-five acre lot.

The plaintiffs claimed as heirs at law of Edward Walsh, offered the testimony of Mr. Charles A. Walsh, the youngest son of said Edward Walsh, who testified in substance that said Edward Walsh died in 1890, and that the plaintiffs were the heirs at law of said Edward Walsh. Following this testimony, he also testified, on direct examination, relative to the will of said Edward Walsh, as follows:

Q. Did Edward Walsh leave any will that is probated in this State? A. He left a will.

Q. Is it probated in this State? A. That I could not say, I do not think so.

The court ruled, subject to seasonable exception of the defendant, as follows:

"It not appearing by any other evidence, or by this evidence, that the will of Edward Walsh has been probated in this state, I instruct you that these plainitffs, they being, if they are, the heirs at law of Edward Walsh, may maintain this action so far as the question of his having left a will is concerned."

It appeared from the testimony that lot 69 was known as the "Pung lot" and also later as the "Wasgatt lot." Upon the lot, but not upon the one acre, were dwelling-house, barns, fish house, etc. A portion of the lot, but not including the pasture, was cultivated and used as a farm field. The acre in question appears to have been within the limits of that portion of lot 69 which the defendant and those under whom he claimed, occupied as a pasture, that portion of the lot used for farming purposes, and upon which the dwelling-house and out buildings and fish house were located, being enclosed with a fence, and the pasture adjacent thereto, and including the one acre, being also fenced. A fence separated the mowing-field from the pasture land. The testimony tended to show this sort of occupation down to the time that Cornelius Wasgatt sold to Curtis and Freeman in 1880. After Curtis and Freeman sold to Andrew C. Wheelwright the twenty-five acres in 1881, Mr. Wheelwright built thereon a summer cottage, and kept his lot, including the one acre, enclosed. His house, however, was not on the one acre in question.

Cornelius Wasgatt, under whom the defendant claimed, appears to have acquired his mortgage of the Pung lot, or Wasgatt lot, in 1851, and made conveyance in 1880, as above noted. During part of the time he appears to have claimed under the foregoing instruments, he placed his brother, Thomas Wasgatt, in charge of his property under an arrangement disclosed by the testimony of Cornelius Wasgatt, as follows:

TESTIMONY OF CORNELIUS WASGATT.

Q. When did you first have any knowledge of the property, that has been spoken of in this suit as the Wasgatt farm or Wasgatt place, at Northeast Harbor? A. It was before 1852, but I couldn't tell

only as I heard the depositions here and saw the records; because I know I went away in the fall of 1852. I supposed it to be about 1850, but I see by the records it is 1851.

. . . .

The COURT: You did foreclose, did you, Mr. Wasgatt? A. I foreclosed.

Mr. KING: Did you send anyone to take possession of the property? A. I did.

Q. Who did you send? A. I sent Thomas.

Q. Did you go and examine the property before you bought the mortgage? A. I didn't examine it all over.

Q. Did you go there? A. I went there and looked at the place and bought with reference to the chances for business, and that fall I went home and learned that the property had been cared for by my brother.

Q. You say you went home. What do you refer to as your home? A. That was Beech Hill, where my parents lived at that time.

Q. Were you married at that time? A. No, sir.

Q. How long did you remain at Beech Hill, at your father's, at that time? A. I only remained there a short time, for I remember that I went into the woods to work that winter. After the mills hung up I went home.

THE COURT: What is this, the year 1851, that you acquired the mortgage? A. Yes, sir.

MR. KING: In the spring, after returning from the woods, did you go back home? A. Yes.

Q. Did you make any arrangement with your brother Thomas about the occupation of this property, and if so, what? A. We had a verbal agreement or understanding that he should eventually have one-half the property; and he always staid at home, he was really somewhat of an invalid, and staid at home, and the understanding was that he should occupy it and care for it; I was away both winters and summers.

Q. Where did you go after that, Mr. Wasgatt? A. Well, the

next summer, 1852, I worked in the mills again for the same party, and that fall I went to California.

Q. How long did you remain in California? A. I was there a trifle less than five years, but the five years had elapsed before I got home; about a month on the way.

. . . .

Q. I don't think it was quite clear what the arrangement was with your brother. Do you mean your brother was to have half of the property by paying you for it? A. He was to have half the property by repaying me for half the property; and sometime subsequently the arrangement was that he should have the whole of it by paying for the whole of it.

Q. When was that arrangement made, if you can tell? A. I can't tell when that arrangement was made; that was the understanding I know.

Q. As a matter of fact, had he practically paid you at his death?

A. He had, he had paid me and, well, in fact, before his death I offered to give him a deed, but he didn't care about taking a deed; that wasn't a great while before he died.

From other testimony in the case, it appeared that Thomas Wasgatt left the property in about 1867. Thereafter, however, at different periods, he placed some other tenant in possession.

The legal title appeared never to have been in Thomas Wasgatt. Thomas Wasgatt was thus in possession under Cornelius.

The plaintiffs claimed that Thomas Wasgatt made certain admissions operating as against the title, or claim of title, on the part of Cornelius Wasgatt. The testimony showing these admissions came from three witnesses, viz: Augustus C. Savage, Albert L. Brown and Mrs. Deborah Sumner, and their testimony as to the admissions of Thomas Wasgatt were admitted, subject to seasonable objection on the part of the defendant. Such admissions appeared in the testimony as follows:

Testimony of AUGUSTUS C. SAVAGE, called by the plaintiffs in rebuttal:

Q. Do you remember having a conversation with Thomas Wasgatt at one time, standing down there by this rock? A. I do.

Q. State when it was that you had this conversation? A. That was between the first and middle of June, 1855.

Q. Did the conversation have reference to the acre of land? A. It did.

Q. Now, I will ask what the conversation was? A. We spoke about the lot in a general way, and he and I went together and found the rock; I never had seen it before, and he said he never had seen the rock, but we spoke of it and walked along there, and trod down the underbrush, some alders; there had been an old fence there, some decayed pieces still remained, I remember.

Q. Was there any fence standing there at the time? A. No sir, not there.

THE COURT: What do you mean—along by the road? A. Along by the road.

MR. DEASY: Was there some remnants of an old fence there? A. There was.

Q. Where was this rock with reference to the remnants of the old fence? A. The old fence went directly over; there was other large rocks besides the marked one that had been rolled out in building the road; rolled out of the road.

Q. What else was said by him, anything said about a deed? A. Yes; he said there at that time that that rock corresponded with the record of a deed to Mr. Walsh that he had seen.

Q. What was the date of this again, the year? A. Well, it was in 1855.

Q. What time in the year? A. June.

Q. Were you quite familiar with Thomas Wasgatt? A. Yes, sir.

Q. Have you at other times and other places during Thomas Wasgatt's occupancy there, had conversations with him in relation to this lot, or spoken of it? A. Well, it has been spoken of in a general way between us, I couldn't fix the dates, as the Walsh lot, in locating different places.

TESTIMONY OF ALBERT L. BROWN.

Q. When was this? A. Well, I couldn't tell exactly, but it was shortly after I come out of the army.

Q. When did you come home from the war? A. In 1866.

Q. Where did you meet Thomas A. Wasgatt at this time, and have this conversation? A. I met him down by a big rock there, next to the road, right by the side of the road.

. . . .

Q. Was it near this rock that you were when you met Thomas A. Wasgatt soon after the war? A. Yes sir; Thomas Wasgatt sat down on this rock and I sat down on the side of the road, where we was when we was talking.

Q. Did your conversation have reference to the lot of land by that rock? A. Part of the conversation did, yes sir.

Q. State what the conversation was? A. Well, I asked him if he didn't think that he missed it in cultivating the back part, the other side of the lot, instead of that. I told him that it looked to me as if that was a great deal more fertile piece of land and easier cultivated in every way, and I thought it would pay him better to have the field there than it would where he did. Says he "I don't own this land nor never did;" says he "here is a piece of land laying here, between here and the beach and that line of stakes out there"—there was a line of stakes then sticking up that showed there had once been a fence, but the stakes, some of them leaning this way and some that way, and any way, but it seemed as though the bottoms of them come pretty near on a line, I should say, running from that rock over a distance, and he said that piece of land he didn't own nor never did.

Q. Did he say who did own it? A. Well, he told who owned it, but I couldn't swear to the name, as I am hard to remember names; but there is one thing I do remember that he said, that he was a shoemaker and after buying this piece of land he moved to Portland, and since he had been to Boston, or New York, he didn't know where.

Q. Did he show you the corner bound of this lot of the shoemaker, who moved to Portland or Boston? A. Only that rock.

Q. What did he show you about that rock? A. He told me that was the corner bound, and went round the rock and showed me a mark on the rock.

TESTIMONY OF MRS. DEBORAH SUMNER.

Q. Do you recall going down to Thomas Wasgatt's with Alvin Walsh and Mary Jane Chase? A. I do.

Q. What is your recollection of the time—the date? A. Well, I think it was 1867 or 1869, somewhere along there; I don't really fix the date.

. . . .

Q. Who did you see there? A. I saw Mr. Thomas Wasgatt.

Q. Did you hear a conversation between Thomas Wasgatt and Alvin Walsh with reference to the payment of taxes? A. I did.

Q. What was this conversation? State what the conversation was? A. Well, Mr. Walsh spoke about the place, paying the taxes, that he would see his father about paying the taxes, but they could have the place, the use of the place for the paying of the taxes.

Q. What did Mr. Wasgatt say? A. He said he would pay the taxes for the use of the place.

Q. What place did they refer to? A. The Walsh place.

Q. What place was that? A. It was a place enclosed after Thomas Wasgatt had enclosed it in the field.

The instrument under which the predecessors of the defendant down to 1881 claimed to be occupying, includes in express description, all of said lot 69, including the one acre in question.

The deed in 1881 from Cornelius Wasgatt to the defendant, Mr. Wheelwright, includes in its description, the twenty-five acres, taking in also the one acre in question.

All of these conveyances prior to that to Wheelwright, conveyed a perfect title to the whole of lot 69, except the acre demanded, and the deed to Wheelwright conveyed the whole of the tract therein described, except the acre demanded.

Upon the point relative to the occupation of a part of the Pung, or Wasgatt farm, (other than the one acre in question), under deeds describing the entire lot, and the occupation of a part of the twenty-five acre Wheelwright lot, (other than the one acre in question), under deed describing the entire lot, the court, subject to seasonable exception on the part of the defendant, instructed the jury as follows:

"Well, it is necessary, of course, for this defendant to show that

he or those under whom he claims, and most, of course, of this occupation was by persons under whom he claimed prior to the time of the deed to him in 1881, he must show that he or they occupied this particular lot, this acre. It would not be sufficient for Mr. Bartlett, James Bartlett, upon his part, or Cornelius Wasgatt upon his part,—and by him, I mean, of course, those occupying under him,—it would not be sufficient that they occupied all the rest of this lot 69 for twenty years, or for fifty years, or for every year from 1844 up to to-day; because they had a right to occupy that during these various periods of time. The parties who owned during that time were the owners of the lot 69, all except the acre, and their occupation, the occupation of Bartlett and of the Wasgatts and persons under the Wasgatts, and of Freeman and Curtis, and of Wheelwright, of the rest of the farm, would not give them title to the lot demanded in this suit. And you see very readily why. Because they owned that. It is unquestioned and it is admitted that these various deeds conveyed all of lot 69, except the acre; and there was no reason why that Bartlett in his day, and the Wasgatts in Cornelius Wasgatt's time, and the others since, should not occupy the rest of it; because they owned it, and they did occupy it, and it is not questioned in this case.

"But the occupation of the rest of the farm, of the rest of lot 69 in this case, because of the fact that the deed conveyed to them a good and perfect and indefeasible title to the rest of the lot, would not give this defendant or any of his predecessors in title, title to that acre. The occupation must be of that acre, because it is the acre alone that is demanded; it is the acre alone that we are considering. Although, of course, it was necessary in appreciating the case and understanding the history of it, and the connection of these various parties with it, that we should know who was living upon the farm during the time, and who was occupying the whole lot at different times, and how they occupied the rest of the time, connected with it and admissible so far as it throws any light upon the occupation of the acre. But the important thing is the occupation of the lot in dispute. Now I think I must have made that plain to you.

"Sometimes when a person has a conveyance of a lot of land or a tract of land which is put upon record, and he occupies only a part of the described premises, his occupation of a part will be presumed to be of the whole because of the fact that he has a deed of the whole which is upon record, and it shows the nature and extent and character, and especially the extent, of his occupation; but that is not true when the deed actually conveys, because the grantor had the right and power to convey, a portion of the premises described in the deed. In other words, Mrs. Pung in the first place, and Bartlett afterwards, and Wasgatt still later, actually owning all of 69, at any rate except the lot, the deeds covering the whole of 69, and occupation of a part of 69 under the deeds, would not give title, however long continued, to the lot demanded in this writ, because those various persons, grantees in the deed, had a right to occupy, and did occupy under their deed, and the presumption, of course, is that a person's occupation is in accordance with his right."

L. B. Deasy, for plaintiffs.

Counsel cited: 3 Wash. Real Prop. p. 18; *Baxter* v. *Bradbury*, 20 Maine, 260-264, 37 Am. Dec. 49; *Stephenson* v. *Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489-493; 1 Greenl. Ev. § 109; *Peaceable* v. *Watson*, 4 Taunt. 16; *Marcy* v. *Stone*, 8 Cush. 4, 54 Am. Dec. 736; *Currier* v. *Gale*, 14 Gray, 504, 77 Am. Dec. 343; *Noyes* v. *Dyer*, 25 Maine, 468; 3 Wash. Real Prop. *498; *Bailey* v. *Carlton*, 12 N. H. 9, 37 Am. Dec. 190; *Turner* v. *Stephenson*, (Mich.) 2 L. R. A. 277; *Trimble* v. *Smith*, 4 Bibb, Ky. 257; *Waggoner* v. *Hastings*, 5 Pa. St. 300; *Hole* v. *Rittenhouse*, 25 Pa. St. 491; *Beauplan*d v. *McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115; *Ament* v. *Wolf*, 33 Pa. St. 333; *Euing* v. *Alcorn*, 40 Pa. St. 492; *O'Hara* v. *Richardson*, 46 Pa. 385; *MacArthur* v. *Kitchen*, 77 Pa. St. 62; *Thompson* v. *Burhaus*, 61 N. Y. 52; *Tritt* v. *Roberts*, 64 Ga. 156; *Bowen* v. *Chase*, 98 U. S. 262; *Proprs. Kennebec Purchase* v. *Laboree*, 2 Maine, 275, 11 Am. Dec. 79; *Putnam Free School* v. *Fisher*, 34 Maine, 172; *Adams* v. *Clapp*, 87 Maine, 316.

H. E. Hamlin, for defendant.

Counsel cited: Page on Wills, pp. 352-356; *Chamber's Admr.* v. *Wright's Heirs*, 40 Mo. 482, 93 Am. Dec. 311; *Hathorn* v. *Eaton*,

70 Maine, 219; *Richards* v. *Pierce*, 44 Mich. 444; *Poole* v. *Fleeger*, 11 Pet. 185; *Abbott* v. *Pratt*, 16 Vt. 626; *Gilmer* v. *Poindexter*, 10 How. 257; *Fenn* v. *Holme*, 21 How. 481; *Singleton* v. *Touchard*, 1 Black, 342; *Johnson* v. *Christian*, 128 U. S. 374; *Redfield* v. *Parks*, 132 U. S. 239; *Haynes* v. *Boardman*, 119 Mass. 414, 20 Am. Rep. 331; *Alden* v. *Gilmore*, 13 Maine, 178; *Pejepscot Proprs.* v. *Nichols*, 8 Maine, 362, 23 Am. Dec. 521; *Papernick* v. *Bridgewater*, 5 El. & Bl. 166, 85 E. C. L. 166; *Poole* v. *Morris*, 29 Ga. 374, 74 Am. Dec. 68; *Tyler* v. *O. C. R. Co.* 157 Mass. 336; *Hill* v. *Roderick*, 4 W. & S. 221; *Com.* v. *Kreager*, 78 Pa. St. 477; *Gordon* v. *Ritenour*, 87 Mo. 54, 56 Am. Rep. 440; *Mooring* v. *McBride*, 62 Tex. 309; *Hanley* v. *Erskine*, 19 Ill. 265; *Campan* v. *Dubois*, 39 Mich. 274; *Douglas* v. *Irvine*, 126 Pa. St. 643; *Morton* v. *Massie*, 3 Mo. 482; *Little* v. *Megquier*, 2 Maine, 176; *Proprs. Ken. Purchase* v. *Laboree*, 2 Maine, 275, 11 Am. Dec. 79; *Putnam Free School* v. *Fisher*, 34 Maine, 172; *Gardner* v. *Gooch*, 48 Maine, 487; *Marshall* v. *Walker*, 93 Maine, 532; *Noyes* v. *Dyer*, 25 Maine, 468; *Brackett* v. *Persons Unknown*, 53 Maine, 228.

SITTING: EMERY, WHITEHOUSE, STROUT, FOGLER, PEABODY, JJ.

EMERY, J. This was a real action for the recovery of a small parcel of land of about an acre in extent. One Harriet Pung, the owner of an hundred acre lot, conveyed out of it this one acre to Edward Walsh by deed recorded in 1842. Later, in 1845, Harriet Pung conveyed the whole hundred acre lot to James Bartlett. This deed included the one acre previously conveyed to Walsh, and under this deed the defendant claimed the one acre which the plaintiffs, the heirs of Edward Walsh, demand in this action. The verdict was for the plaintiffs and the defendant brings the case to the law court on these exceptions to the ruling of the presiding justice.

I. The plaintiffs claim title as children and heirs of Edward Walsh deceased who was seized in his life time. One of the plaintiffs, an heir of Edward Walsh, testified that Edward Walsh left a will, but could not say whether it had ever been probated in this state. There was no other evidence as to the will and none at all as to its contents or terms.

The presiding justice ruled that the testimony as to the will did not bar or affect the right of the plaintiffs as heirs to maintain this action.

When it is reflected that there is no evidence whatever that the will, even if probated, in any way disposed of or referred to this demanded acre, it must be manifest that the evidence did not in the least tend to show want of title in the plaintiffs as heirs.

II. To defeat the plaintiff's seisin, the defendant undertook to establish by evidence an adverse possession of the demanded acre by himself and his predecessors in title for the requisite twenty years. To make out part of the twenty years he adduced the possession of one of his predecessors in title, Cornelius Wasgatt, from 1851 to 1867. Cornelius Wasgatt, after the conveyance to him of the hundred acre lot including the demanded one acre, put his brother, Thomas Wasgatt now deceased, in possession under a verbal contract to convey the whole lot to him when he should pay him the cost of the lot. Thomas did pay for the whole lot before his death but never took a deed from Cornelius. The only actual possession Cornelius ever had of any part of the hundred acre lot was this possession by his brother, and verbal vendee, Thomas. The latter occupied the whole lot generally as a farm, the one acre demanded, which was on the seashore, being included in the pasture which was surrounded by a fence on three sides and bounded by the sea on the fourth side. There was no other occupation of the demanded one acre than as a part of the pasture.

As tending to show that the occupation of this one acre was not adverse to the record owner Edward Walsh, under whom the plaintiffs claim, they offered in evidence the testimony of witnesses to the following effect, viz: 1—that at one time during his occupancy of the farm Thomas Wasgatt was standing by a large rock described in the deed to Edward Walsh as the corner bound of his acre lot, and said to the witness "that that rock [meaning the rock at the corner of the acre lot] corresponded with the record of a deed to Mr. Walsh that he had seen;" 2—that at another time during his occupancy he was sitting on this same rock talking with another witness sitting on

the road side,—that when told by the witness that this land by the rock seemed more fertile and was inquired of why he did not cultivate it, he said, "I don't own this piece, nor never did. There is a piece of land laying here between here and the beach and that line of stakes out there which I don't own." That he further said the lot pointed out belonged to a shoemaker, and that the rock was the corner bound of the lot; 3—that at another time during his occupancy he said to one of the sons of Edward Walsh who was there looking after his father's interests that he would pay the taxes on this lot for the use of it. To this testimony the defendant objected on the ground that the declarations of Thomas, the tenant, could not prejudice the rights or interests of his landlord Cornelius, especially as they were not brought to the notice of the record owner and hence did not influence his action. The testimony however was admitted.

The issue was the character of the occupation of this one acre lot during Thomas Wasgatt's occupancy of the whole hundred acre farm under his brother. Was that occupancy adverse to the record owner? The burden was upon the defendant, and, to sustain it, he had put in testimony as to Thomas Wasgatt's acts of occupancy. Had Thomas Wasgatt been produced as a witness by the defendant to prove occupancy, it can hardly be doubted that upon cross-examination Thomas could have been lawfully inquired of as to the extent and character of his occupancy. Had Cornelius Wasgatt been the defendant, and produced Thomas as a witness to prove a similar ground of defense, he must have subjected him to cross-examination upon the character of his occupancy.

It is to be noted that Thomas Wasgatt was deceased, that he was the person in actual occupation, and that he had a direct pecuniary interest in the land under his contract for purchase, and hence that all the declarations testified to were directly against his pecuniary interest. It is also to be noted that the first two declarations were made at the corner of the acre lot while viewing it, and the third declaration was made to the agent of the record owner who was there inquiring about the taxes.

The declarations were certainly of some probative force as to the character of the possession or occupation of the land, and we think that

under the above combination of circumstances they were admissible in evidence upon that question. Thomas Wasgatt, the declarant, was the person occupying. The acts of occupation were his. The declarations were made while he was in occupation and were concerning his occupation. They were made in the course of his business of occupation. Again, he was not the mere agent or tenant of Cornelius Wasgatt, under whom the defendant claims. He was occupying under a contract for purchase, which he fulfilled. He was occupying for himself. The occupation would inure to his own pecuniary benefit rather than to that of Cornelius. The declarations when made were more against his own pecuniary interest than against that of Cornelius.

In *Williams* v. *Ensign*, 4 Conn. 456, one Cotton had been in the personal occupation of the land for fifteen years, but was deceased at the time of the trial. Each party claimed that Cotton's occupation was under him or his predecessor in title. Cotton's declarations while in occupation of the land, that he held under the defendant's predecessor in title, were held to be admissible evidence. In *Marcy* v. *Stone*, 8 Cush. 4, 54 Am. Dec. 736, the defendant set up title by the adverse possession of Mrs. Healey, one of his predecessors in title. Mrs. Healey's son was shown to have been in actual occupation of the land and to have deceased. His declarations on the land that he was occupying it under Mrs. Healey, his mother, were held admissible. In *Currier* v. *Gale*, 14 Gray, 504, 77 Am. Dec. 343, the defendant set up title by the adverse possession of Jacob R. Currier (not the plaintiff) his predecessor in title. One Webster was shown by the defendant to have been in occupation of the premises for some fifteen years. Webster was deceased at the time of the trial and his declarations during his occupancy, that he occupied under Jacob R. Currier, were held admissible evidence. In all these cases was cited with approval the case, *Peaceable* v. *Watson*, 4 Taunt. 16, where it was held that the declarations of a deceased occupant of land stating under whom he occupied as tenant were admissible. It is true these cases cited are not precisely in point in all particulars, but they fully sustain the principle that the declarations of a deceased occupant of land made while occupying, in the course of his occupation,

as to the character of his occupation and against his own pecuniary interest, are admissible evidence. We think the principle includes this case.

An answer to the defendant's contention that the declarations of a tenant in occupation as to the character or purpose of his occupation should not be received in evidence against his lessor, is suggested by the case *Mee* v. *Litherland*, 4 Ad. & El. 784, (31 E. C. L. 179). In that case the defendant claimed a leasehold interest. The plaintiff claimed the leasehold interest had terminated by the attornment of the tenants, and to prove this produced an admission of the tenants to that effect. It was held that the admission of the tenants was evidence against the defendant since his title depended on theirs, and if their title failed his must also fail. In the case at bar the title of Cornelius Wasgatt, the defendant's predecessor in title, depended on the occupation by Thomas Wasgatt. If that occupation was not adverse to the claimant by record, Cornelius acquired no title by such occupation. Declarations by Thomas Wasgatt deceased, made while in occupation against his interest as to the character of his occupation, would seem to be evidence against all persons claiming title under that occupation even though such persons had no notice of such declaration.

III. The recorded deeds under which the defendant claimed title included not only the demanded acre, but also a much larger tract within which the acre was situated and included. That the defendant and his predecessors in title had occupied that part of this tract, outside of the demanded acre, in the manner and for the time necessary to acquire title thereto by adverse possession, was conceded. The defendant contended that such occupation of the rest of the tract was constructively extended over the demanded acre, by the familiar rule that adverse occupation of part of a tract of land under a recorded deed presumably extends over the whole tract described in the deed as conveyed. The presiding justice overruled this contention and in effect instructed the jury that there must have been some adverse occupation of some part of the demanded acre itself to bring it within the rule above stated. To this ruling the defendant excepted.

The principle of the rule invoked by the defendant is, that when an owner of a parcel of land sees, or could see, any part of it in the adverse occupation of another person, he should assume such occupation to be under some claim of right and if that occupation be under a recorded deed to the occupant, the owner is bound to take notice that the claim of right extends over the whole parcel and that the occupation of part will affect the whole. When, however, the owner finds that no part of his land is being adversely occupied, he has no occasion to assume or investigate anything. Recorded conveyances between other persons, even of his land if not followed by an actual adverse occupation of some part of his land, do not affect him. He is not required to take any notice of such conveyances. He is not required to take any notice from the occupation of adjoining lands that his land is claimed. His title to his own land is not affected by the most complete occupation of the adjoining lands. It is only when some part of his land is being adversely occupied that he is put upon inquiry or is affected with notice of recorded conveyances between other persons. Buswell on Adverse Possession, § 256; *Bailey* v. *Carleton*, 12 N. H. 9, 37 Am. Dec. 190; *Turner* v. *Stephenson*, 72 Mich. 409, 2 L. R. A. 277; *Rite* v. *Tubbs*, 23 Cal. 431; *Hole* v. *Rittenhouse*, 25 Pa. St. 491; *Adams* v. *Clapp*, 87 Maine, 316.

It must be conceded that the language of the opinion of this court in *Noyes* v. *Dyer*, 25 Maine, 468, cited by the defendant, does, apparently at least, sustain his contention. There is in the report of that case, however, a suggestion of other evidence in addition to the occupancy of the adjoining land. The presiding justice instructed the jury that the occupation of the adjoining land, "with the other evidence in the case, if believed by the jury constituted a disseisin of the demandant to the extent of the bounds of the lot described in the deed." In the opinion is stated some little evidence of occupation of the demanded parcel though it had not been improved or enclosed. The decision of the court was, that upon all the evidence the jury might find the demandant to have been disseised of the demanded parcel though it had not been enclosed or improved. In the case at bar the ruling complained of was based upon the hypothesis, of which

there was some evidence, that there was no adverse occupation of any part of the plaintiffs' land. So based, we think the ruling was correct, and so far as the dictum or opinion in *Noyes* v. *Dyer*, 25 Maine, 468, conflicts with that ruling we do not find it sustained either by reason or authority, and hence it must be considered as overruled. It cannot be that the owner of land, no part of which is occupied adversely to him, loses his title to it because one stranger has included it in his deed to another stranger. Whether the hypothesis was the fact was a question for the jury.

The defendant urges that the bill of exceptions in this case does show evidence of adverse occupation of the plaintiffs' acre, in that it was within the defendant's pasture undistinguishable from the rest of the pasture, the whole pasture being enclosed by a fence and the sea. The presiding justice, however, did not rule that there was no evidence of adverse occupation of the plaintiffs' acre. He simply ruled that, unless the jury found there was some actual adverse occupation of some part of the plaintiffs' acre, they could not extend over it the occupation by the defendant of other land within the same deed to which the plaintiff was a stranger. This ruling was correct. There was no request for a ruling upon the effect of the evidence stated.

Exceptions overruled.

WALTER H. COLEMAN *vs.* HARTLEY LORD, and others.

York. Opinion February 25, 1902.

Deed. Private Way. Plan. Survey. Practice. Verdict.

When lots of land have been granted, designated by numbers, according to a plan referred to, which has resulted from a survey actually made and marked upon the face of the earth, the lines and corners fixed by that survey determine the extent and bounds of the respective lots.

When the deed also gives the boundaries of the lots, and the bounds so given are precisely the same as those appearing upon the plan referred to, the same rule applies.

The court may properly instruct the jury to return a verdict for either party where it is apparent that a contrary verdict would not be allowed to stand on the evidence introduced.

Exceptions by plaintiff. Overruled.

Trespass for breaking and entering plaintiff's close situated in Kennebunkport and described as follows: "bounded southerly by Beach Avenue, so-called; westerly by lot number twenty-one on the plan of property of the Kennebunkport Sea Shore company; northerly by Fort Lane, so-called; and easterly by lot number eighteen on said plan."

The writ alleged that defendant broke down, damaged and spoiled one hundred and fifty feet of fence and trellis work of the plaintiff belonging to and inclosing said close.

The plea was the general issue, with a brief statement setting out in effect that defendants were officers and agents of the Kennebunkport Sea Shore company, grantor in the deed to the plaintiff of the premises described in the writ, which company previous to the date of said deed was the owner of a large tract of land of which plaintiff's close was a part; that said company had, in 1883, divided said tract into lots and private ways and made and recorded a plan thereof, which is the same plan referred to in plaintiff's writ; that said Fort Lane was one of said private ways and the premises described in the

writ were two of said lots; that at the date of said deed to plaintiff and said pretended trespass said company was, ever since has been, and now is the owner of several lots on Fort Lane and various other of said ways connecting therewith; that the fence referred to in plaintiff's writ at the time of the alleged trespass was within the limits of said Fort Lane; that the trellis referred to was a building, and the portion of the same which was removed was also within the limits of said Fort Lane; that whatever was done in the premises by said defendants was done by them as officers and agents of said company, and that plaintiff had no right, title or interest in and to said Fort Lane other than the right to pass over the same.

After the evidence was taken out, the presiding justice directed the jury to find a verdict for the defendant, which was done. To this order and ruling the plaintiff took exceptions.

The facts appear in the opinion.

G. F. and L. Haley; A. E. Haley, for plaintiff.

J. W. Symonds, D. W. Snow, C. S. Cook, C. L. Hutchinson; H. Fairfield and L. R. Moore, for defendants.

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

FOLGER, J. This is an action of trespass quare clausum and comes to this court upon exceptions to an order of the presiding justice directing the jury to return a verdict for the defendant, which was accordingly done.

The locus was conveyed to the plaintiff by the Kennebunkport Sea Shore company by deed dated June 6, 1888, and is described in the deed as, "a certain parcel of land situate in Kennebunk in said county of York, and being lots No. 19 and 20 upon a plan of lots dated September 13, 1883, and filed with York county deeds Sept. 17, 1883, Book of plans No. 3, page 4, bounded and described as follows, viz: Beginning at a stake on Beach Avenue on said plan at the southeasterly corner of lot No. 21; thence northerly by said lot one hundred feet to 'Fort Lane'; thence easterly by said Lane, two hundred feet to the northwesterly corner of lot No. 18; thence southerly by said lot No. 18 one hundred feet to the above named

Beach Avenue; and thence westerly by said avenue two hundred feet to the point begun at."

Fort Lane is a private way the fee of which, at the time of the conveyance to the plaintiff, was and now is in the plaintiff's grantor, the Kennebunkport Sea Shore company. The plaintiff's northerly line is, therefore, the southerly side of Fort Lane. *Southerland* v. *Jackson*, 30 Maine, 462, 50 Am. Dec. 633; *Same* v. *Same*, 32 Maine, 80; *Bangor House* v. *Brown*, 33 Maine, 309; *Palmer* v. *Dougherty*, 33 Maine, 502, 54 Am. Dec. 636.

In 1882, the Kennebunkport Sea Shore company being the owner of a large tract of land which included the plaintiff's premises and also what is now known as Fort Lane, caused the tract to be surveyed and subdivided into lots and parks and streets, and caused the plan referred to in the plaintiff's deed to be made in accordance with the survey and recorded.

In June, 1888, the company conveyed to the plaintiff the lots described in his deed. In the fall of the same year the plaintiff erected a cottage upon the premises, and in 1891 or 1892, he built along his Fort Lane line a fence and a building in part of lattice work all of which he claims are upon his own land. The defense contends that the fence so built was from six inches to a foot, varying at different points because of irregularities in the fence, over the plaintiff's line and within the limits of the lane, and that the lattice wall was from six to seven inches within the limits of the lane.

In May, 1895, Mr. Hartley Lord, representing the Kennebunkport Sea Shore company, of which he was one of a committee having the management of the company's land, and others acting under his directions, took down the fence and cut off the lattice wall to a line one inch within the limits of the lane and removed the materials to a vacant lot. The plaintiff brings this suit to recover damages for such acts. The question at issue here is where upon the face of the earth is the southerly line of Fort Lane.

Where lots have been granted, designated by number, according to a plan referred to, which has resulted from an actual survey, the lines and corners made and fixed by that survey are to be respected as determining the extent and bounds of the respective lots. *Pike* v.

Dyke, 2 Maine, 213, 11 Am. Dec. 62; *Stetson* v. *Adams*, 91 Maine, 178; *Bean* v. *Bachelder*, 78 Maine, 184.

In the case now before us the plaintiff's deed conveys to him lots numbered 19 and 20 upon a designated plan. It is true that the deed gives the boundaries of the lots, but the bounds so given are precisely those appearing on the plan.

Mr. E. C. Jordan, an experienced civil engineer, testifies that in 1882, he surveyed and laid out into lots the land of the Kennebunkport Sea Shore company, including the plaintiff's two lots; that he placed stakes at the corners of the lots; that the survey was not a compass survey, but a transit survey; that all physical monuments he took offsets to and supplemented them by drill holes for purposes of reproduction of any point in the absence of stakes; that he made the recorded plan from his actual survey; that in May, 1894, at the plaintiff's request he re-surveyed the plaintiff's lots and this re-survey corresponded with his original survey and plan, and that the plaintiff's fence was from six inches to a foot, varying by reason of irregularities in the line of the fence, within the limits of Fort Lane, and the side of the lattice work was at one corner six inches and at the other corner seven inches within the limits of the lane; that subsequently at the request of the Kennebunkport Sea Shore company, he re-surveyed the line of Fort Lane and obtained the same result.

The plaintiff, upon whom is the burden of proving the trespass complained of, testifies that when he purchased his lots there were standing certain stakes, which he seems to assume marked the corners of his lots; that in the fall of 1888, after he had built his cottage and cleared up his grounds he took steps to "perpetuate" as he calls it, his bounds, by removing the stakes and putting in their places stone monuments where it was possible so to do, and by placing an iron bolt in the ledge where a stone monument could not be set; and that the fence and the northerly side of his lattice were located on a line drawn between his monuments on Fort Lane and upon his own land. It will be observed that the only stake, or other visible monument, named in the plaintiff's deed is a stake on Beach Avenue on said plan at the southeasterly corner of lot No. 21.

When a plan of a tract of land is made with intent to represent

a survey, actually made and marked upon the face of the earth, if there be a variance between the survey and the plan, the plan is controlled by the survey. *Williams* v. *Spaulding*, 29 Maine, 112; *Ripley* v. *Berry*, 5 Maine, 24, 17 Am. Dec. 201.

In the case at bar no variance appears between the survey and the plan. The only testimony as to the actual original survey is that of the engineer by whom the survey and plan were made. He testifies that the plan was made by him in accordance with the survey; and that two subsequent re-surveys made by him show no error or variance. He established the southerly line of Fort Lane, and found that the plaintiff's fence and that part of his lattice were northerly of that line and therefore within the limits of the lane.

We think that the testimony upon which the plaintiff relies is too remote and uncertain to control the positive, uncontradicted testimony of the engineer, corroborated by his plan.

It is claimed by the plaintiff that a gate post which was removed by the defendants was attached to the end of a plank which extended about four feet under the surface upon the plaintiff's land, and that the defendants removed the entire plank including that portion which was within the plaintiff's limits, and that the defendants are to that extent guilty of trespass.

We do not think so. The defendants had the right to remove the obstructions, doing to the plaintiff's property no greater damage than was reasonably necessary. We do not think that the removal of the plank in its entirety, which after the removal of the post served no useful purpose, instead of cutting in two and thus destroying or diminishing its value, was in excess of their right. Besides, "de minimis non curat lex."

It is a well established rule of procedure in this state, that the court may properly instruct the jury to return a verdict for either party where it is apparent that a contrary verdict would not be allowed to stand on the evidence introduced. *Market and Fulton Natl. Bank* v. *Sargent*, 85 Maine, 349, 35 Am. St. Rep. 376; *Bennett* v. *Talbot*, 90 Maine, 229.

This case falls within the rule. If the case had been submitted to the jury and a verdict rendered for the plaintiff, it would have

been the duty of this court to set aside the verdict as against evidence.

Exceptions overruled.

FRANK E. MOORE *vs.* EDWARD STETSON, and others.

Penobscot. Opinion February 24, 1902.

Marine Railway. Licensor and Licensee. Servant. Appliances. Negligence. Assuming Risk.

In a case where the owners of a steamer, desiring to make repairs upon her, contracted with the owners of a marine railway to take the steamer out of the water upon the railway, for the purpose of repairs, and to return her to the water when the repairs were finished, and the owners of the steamer were to have the use and occupancy of the railway, while the repairs were being made, and were to employ their own men, and furnish their own materials in making the repairs, and were to pay a certain sum per day for the use of the railway, *held;* that the relation of the parties was not that of lessor and lessee, but rather that of licensor and licensee.

The licensors owed to the licensees and to the servants of the licensees engaged in the work of repairs, the duty of seeing to it that their railway and appliances, so far as they were used in the repair of the steamer, were in a reasonably safe condition; and that if the licensors failed to perform that duty, they are not relieved from liability to a servant of the licensees by the fact that the master of the steamer in charge of the repairs, knew the condition of the railway alleged to be unsafe and by which the servant was injured, and neglected to notify the servant thereof.

Held; that the evidence in this case fails to show negligence on the part of the defendant.

The stone, the insecure condition of which the plaintiff contends produced his injury, was placed and maintained upon the bed-piece of the railway for the purpose of ballast, and for no other purpose. The defendant had no reason to suppose it would be used for any other purpose. The evidence fails to disclose that the stone was not fitted or sufficiently secured for the purpose for which it was intended and used. Nor is there any testimony that prior to, or at the time when the steamer was taken from the water, the stone was not safely and securely placed and held in position. It is not contended that the defendants knew that the stone was liable to tip.

Held; also, that, from the position of the stone, its irregular shape and great size, it must have been apparent to the plaintiff that it was intended for ballast only, and was not intended to be used as a place for workmen to walk, stand or work in the performance of their labor, or for any purpose.

When a workman uses an appliance or instrumentality for a purpose for which it is not intended, the intended use being apparent and obvious, he does so at his own risk. In so using the stone for a purpose for which it was obviously not intended, the plaintiff, in this case, assumed the risk of danger, and cannot hold the defendants responsible for the consequences. The verdict for the plaintiff, therefore, cannot be sustained.

Motion and exceptions by defendants. Motion sustained. Exceptions overruled.

Case, for personal injuries.

The facts appear in the opinion.

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

Counsel contended, among other things, that the mere fact that the primary object of the presence upon the railway of the rock which caused the injury to plaintiff, was to sink the railway when shoved into the water, is not necessarily inconsistent with plaintiff's contention that he had a right to step upon the rock in the course of his duty. If, from its position, the attending circumstances, the custom at the railway, or necessity he was invited to step thereon, he would not necessarily be guilty of contributory negligence in so doing.

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

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

FOGLER, J. This is an action of case in which the plaintiff seeks to recover damages for personal injuries sustained by him through the alleged negligence of the defendants. The verdict was for the plaintiff, and the defendants bring the case here upon exceptions and also upon a motion for new trial. There is little controversy, if any, between the parties, as to the facts, which are substantially as follows:

The defendants were the owners of a marine railway situate in Brewer on the Penobscot river. In May, 1897, the owners of the steamer "Golden Rod," desiring to have that steamer repaired, cleaned and painted, entered into a contract, orally, through Capt.

Crosby, master of the steamer, with the defendants, by the terms of which the defendants were to take the steamer out of the water upon their railway and to return her to the water when the repairs were finished, for a certain sum. The owners of the steamer were to have the use and occupancy of the railway for the purpose of repairing their steamboat until the repairs and other necessary work were finished. The steamboat owners were to employ their own men and furnish their own materials. For the use of the railway while the repairs were being made the steamboat owners were to pay the defendants five dollars per day. Under this agreement the defendants took the steamer out of the water, and the steamboat owners entered into the occupancy, and had the use of the railway until the repairs were completed. The defendants neither exercised nor attempted to exercise any control or management of the railway while it was occupied by the steamer. The steamboat owners employed the men and furnished the materials for the repairs and other work upon the steamer. The plaintiff was mate of the steamer "Golden Rod" and was employed by the owners of the steamer in the work of repairs from the time the steamer was placed upon the railway until he met with the injury for which he claims damages.

In the construction of the railway two permanent stationary tracks extend from the shore into the river below high-water mark. Upon these tracks are two bed-pieces. These bed-pieces rest lengthwise on the tracks or rails so they will slide up and down, and are connected and held together by large cross-sills. Upon these bed-pieces and cross-sills, rests the cradle upon which the vessel lies when upon the railway. Upon the above named bed-pieces are large blocks of granite which are placed there as ballast, in order to hold the bed-pieces down upon the tracks or rails when they are slid into the water. One of these granite blocks, so placed, was irregular in shape, being two and five-tenths feet wide at one end and one and seven-tenths feet wide at the other end and one and one-half feet high, and rested on a bed-piece twelve inches wide. This stone was not, at the time the plaintiff was injured, securely and firmly fastened to the bed-piece upon which it rested, but had become so loosened that it canted or tipped when a man stepped or walked upon it.

On the day when the plaintiff met with the accident, he was employed in painting the steamer. A plank rested on the cross-pieces between the rock and the vessel which the plaintiff wished to use upon a staging which ran along the side of the steamer. He stepped upon this rock and stood facing the vessel. The plank was six inches, or thereabouts, lower than the rock upon which he stood. As the plaintiff stooped downward and forward to pick up the plank, the rock, as he testifies, slid forward and caught his leg between the rock and the plank, and the bone of his leg was thereby broken and he brings this action against the defendant to recover damages for that injury.

It is not claimed that the defendants or their agents knew that the stone had become loosened, while Capt. Crosby, master of the steamer and agent of her owners, testifies that he knew that the stone "teetered" and that he gave no notice of the fact to either the plaintiff or the defendants.

The defendants' exceptions, after stating the case, are as follows:

"The defendants requested the court to instruct the jury as follows:

"1. If Capt. Crosby knew the stone teetered (and he testifies that he did) and by reason thereof the place was rendered dangerous to work in, because the stone was loose, and Capt. Crosby did not notify the plaintiff of the fact, and ordered or allowed the plaintiff to work in such place of danger under such circumstances, without notifying the plaintiff of the danger, the negligence of Capt. Crosby in not notifying the plaintiff of the danger and in ordering or allowing the plaintiff to work in the place known to Capt. Crosby to be dangerous, without notifying the plaintiff of the danger, would constitute negligence on the part of the steamboat company. Therefore, these defendants cannot be held liable in this action, because the negligence of the steamboat company was intervening negligence of a third person who can be held liable to the plaintiff in an action therefor.

"2. If the jury find that the defendants were negligent, and if Capt. Crosby knew the stone teetered (and he testifies that he did) and there being no proof that the defendants, or their agents or servants, knew the stone teetered, and because the stone was inse-

curely fastened, the place was thus rendered dangerous to work in, and Capt. Crosby did not notify either the plaintiff or the defendants, or their agents or servants, of the fact that the stone was loose, and Capt. Crosby either ordered or allowed the plaintiff to work in the place, under the circumstances, the steamboat company, which Capt. Crosby represented, would be liable to the plaintiff for knowingly allowing the plaintiff to thus work in a place of danger without notifying him of the danger; and the negligence of the steamboat company being subsequent to any negligence on the part of the defendants, and because Capt. Crosby had knowledge of the negligence of the defendants (if they were negligent) and due care on the part of Capt. Crosby toward plaintiff, and the performance of duty which was upon Capt. Crosby, to notify the plaintiff of the danger, would have prevented the injury, these defendants cannot be held liable to plaintiff in this action.

"3. The defendants were under no duty to have the stone so securely fastened that it would be safe to walk upon.

"4. By the agreement between Capt. Crosby and these defendants the relation of lessor and lessee was established, and the owners of the 'Golden Rod' were occupying the railway as tenants: hence these defendants cannot be held liable in this action.

"5. The rock or stone was used for the purpose of sinking the ways. It served its purpose and the accident did not occur because the rock was so placed upon the way that it failed to sink it. The rock was entirely visible to the eye of the plaintiff, and the purpose which it served and the position it occupied was self-evident. It was apparent that it was intended to sink the ways and was not intended to be walked upon. The plaintiff, if he undertook to use the rock for a purpose other than for the one for which it was designed, was guilty of negligence unless he first ascertained whether it was so securely placed that he could safely step upon it, because a glance at the rock would have informed him that it was irregular in shape and that it might teeter or cant if he undertook to step or walk upon it.

"Which said instructions the court, in order to make progress with the case, declined to give except so far as given in the charge, to

which refusal, said defendants except and pray that their exceptions may be allowed."

We do not think that, by the terms of the contract, the relation of landlord and tenant was created between the defendants and the steamboat owners. The testimony fails to show that the defendants granted to the steamboat owners any interest in or any right to control their railway plant. On the contrary, Capt. Crosby who made the arrangement, testifies: "I had no charge of the railway, of course. I didn't consider myself the owner of Mr. Stetson's property; only the boat." Again: "They were to haul the boat out of the water, and I was to do my own repairs."

If a tenancy was created, it could only be a tenancy at will, and could only be terminated by mutual consent or by thirty days' notice in writing given by either party to the other. This could not have been contemplated by the parties. The privilege granted to the steamboat owners to make repairs while the boat lay upon the ways was a license only. The owners of the boat were licensees and not tenants.

A license is an authority to do a particular act, or a series of acts, upon another's land without possessing an estate therein. *Pitman* v. *Poor*, 38 Maine, 237, and cases there cited; *Cook* v. *Stearns*, 11 Mass. 533. A somewhat analogous case is that of *Inhabitants of Rockport* v. *Rockport Granite Company*, 177 Mass. 246, in which it is held that a "motion man" quarrying paving blocks on the land of another under an agreement to pay the land owner two dollars for each thousand blocks quarried, is a licensee. The court says: "He is not a tenant. He has no right of possession in the land worked by him, but merely the privilege of quarrying rock on it and working up the rock into marketable shape. The payments made by him to the quarry owner are by way of stumpage and not a payment by way of rent."

In the case at bar the payment of five dollars per day was not a payment of rent, but a payment for the privilege of the steamboat remaining on the railway during the period required for repairs.

We are of the opinion that the refusal of the presiding justice to instruct the jury that the relation of landlord and tenant was estab-

lished and that the owners of the "Golden Rod" were occupying the railway as tenants, was correct and that the defendants' exceptions in that respect should be overruled.

The exceptions to the refusal of the presiding justice to give the first and second requested instructions, involving as they do the duties and obligations of licensees to the employees of the latter, may be discussed and considered together.

As before stated, the relation of the defendants and the owners of the steamboat was that of licensor and licensee. The latter were not mere, or bare, licensees, but were licensees by the express invitation or permission of the defendants. In case of a mere passive license it is generally held that the licensee takes upon himself all risks as to the condition of the premises; although the licensor is liable for his own active negligence.

But in case of express license, or even implied license, the authorities hold that the licensors assume an obligation to see to it that the premises are in a reasonably safe condition. The liability of the licensor in such case is clearly stated in *Bennett* v. *Louisville and Nashville R. R. Co.*, 103 U. S. 577:—

"The owner or occupant of land, who, by invitation express or implied, induces or leads another to come upon his premises for any lawful purpose, is liable in damages to such persons,— they using due care,— for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public or to those who were likely to act upon such invitation."

In *Carleton* v. *Franconia Iron & Steel Co.*, 99 Mass. 216, the law is thus stated: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."

To the same effect is *Penn. R. R. Co.* v. *Atha*, 22 Fed. Rep. 920,

in which the court say, citing *Nickerson* v. *Tirrell*, 127 Mass. 236: "The owner or occupier of a dock is undoubtedly liable for damages to a person who makes use of it by his invitation, express or implied, for an injury caused by any defect or unsafe condition of the dock which he negligently causes or permits to exist, provided, of course, the person himself exercises due care. He is not an insurer of the safety of his dock, but he is required to use reasonable care to keep it in such a state as to be safe for the use of vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such care — if there is a defect which is known to him, or which, by the use of ordinary prudence and diligence, should be known to him — he is guilty of negligence, and liable to the person who, using due care, is injured thereby."

Numerous authorities might be cited to the same effect.

The rule above laid down applies not only to real estate, but also to machinery and appliances used by the licensee by the invitation, expressed or implied, of the licensor. *Johnson* v. *Spear*, 76 Mich. 139, 15 Am. St. Rep. 298.

Applying the law thus laid down the defendants, licensors, owed to the steamboat owners, licensees, the duty of seeing to it that their railway and appliances, so far as they were used in the repair of the steamboat were in a reasonably safe condition.

The duty which the licensor thus owes to the licensee, he also owes to the servants of the licensee.

In the case of *Johnson* v. *Spear*, supra, the plaintiff, an employee of a contractor for hoisting coal, was injured by the breaking of a defective chain, a part of the hoisting apparatus. It was held that he could recover damages of the owner of the dock and hoisting gear for the injuries so sustained. The court say, citing authorities, p. 144: "It is analogous to that class of cases where the owner of real property is held liable to any one who, expressly or impliedly invited upon his premises, is injured by a concealed defect therein." It is further stated by the court: "If injuries result from negligence of the defendant, [the property owner] while work is being done upon his premises, and through his fault in not keeping them in a safe and suitable condition, he is liable to any servants of the con-

tractor for injuries resulting to them from defects therein; not because there is any contract obligation between the parties, but arising out of his obligations or duty to provide safe appliances for the servants of the contractors to use, and to keep his premises upon which such servants are at work in a reasonably safe condition, whether the contract provides for it or not." See *Coughtry* v. *Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387.

Nor do we think that the failure of Capt. Crosby to notify the plaintiff that the stone was liable to tip, which fact he testifies was known to him, absolves the defendants from liability for their own negligence, if they were negligent.

The plaintiff was employed upon the defendants' premises by their implied invitation and possession and they owed to him certain duties. Capt. Crosby was not their agent in any respect, and his negligent acts could not relieve them from their performance of their duties or from their liability for their non-performance.

The defendants' exceptions to the refusal of the presiding justice to give the first and second requested instructions must be overruled.

As to the other exceptions, it appears by the charge that the presiding justice fully and correctly instructed the jury as to the legal duty and liability of the defendants, and left it to the jury to decide the case upon all the testimony and all the circumstances. We cannot hold that this was error. Those exceptions are therefore overruled.

On motion: Upon their motion for new trial the defendants contend, first that the evidence fails to prove negligence on their part; and, secondly, the plaintiff's injury was, even by his own testimony, the result of his own negligence.

We are of opinion that the motion should be sustained upon both the points thus raised.

First: It was the duty of the defendants to provide workmen employed upon their railway with reasonably safe appliances and instrumentalities for the labor and service to be performed by them. They were liable only for such defects or dangerous conditions as were known to them or of which they ought to have known by the exercise of reasonable diligence. The stone, the insecure condition

of which the plaintiff contends produced his injury, was placed and maintained upon the bed-piece of the railway, for the purpose of ballast and for no other purpose. The defendants had no reason to suppose it would be used for any other purpose.

The evidence fails to disclose that the stone was not fitted, or sufficiently secured for the purpose for which it was intended and used. Nor is there any testimony that prior to or at the time, when the "Golden Rod" was taken from the water, the stone was not safely and securely placed and held in position. It is not contended by the plaintiff that the defendants at or before the time when the plaintiff was injured, had any knowledge that the stone was liable to tip. Before the steamer was taken from the water the defendants' foreman, who had held that position for several years, and another witness, made an examination of the railway and its appurtenances and found, as they testify, that everything was apparently in a suitable condition. We are of opinion that the testimony fails to show negligence on the part of the defendants.

Second: From the position of the stone, its irregular shape and its great size, it must have been apparent to the plaintiff that it was intended for ballast only, and was not intended to be used as a place for workmen to walk, stand or work in the performance of their labor, or for any purpose. It is a familiar rule of law that when a workman uses an appliance or instrumentality for a purpose for which it was not intended, the intended use being apparent and obvious, he does so at his own risk, and if by so doing he meets with an injury, the employer is not liable therefor. *Demers* v. *Deering*, 93 Maine, 272; *Felch* v. *Allen*, 98 Mass. 572.

Assuming that the plaintiff met with his injury, in the manner and under the circumstances to which he testifies, he went upon the rock in question; and, standing on its edge which projected several inches over the bed-piece upon which the stone was placed, leaned forward and downward for the purpose of picking up a plank which lay six inches below the bottom of the stone. While he was in this position the stone canted or tipped, causing a fracture of the plaintiff's leg.

In so using the stone for a purpose it was obviously not intended, he assumed the risk of danger and must suffer for his own fault or folly.

Exceptions overruled. Motion sustained.
New trial granted.

LOTTIE I. DAY, Admrx. *vs.* BOSTON & MAINE RAILROAD.

York. Opinion February 26, 1902.

Railroad. Negligence. Death. Evidence. Burden of Proof.

1. In an action for negligently causing the death of a person, the plaintiff has the burden of proving affirmatively due care on the part of the deceased.
2. That the witnesses who could have testified to facts showing such due care are all deceased, does not change the rule that absence of evidence of due care on the part of the deceased will defeat the action.
3. A traveler upon a highway, as he approaches a railroad crossing, should use adequate means to ascertain whether a train be approaching the crossing from either direction. He should listen for the sound of trains on either hand, and look both ways along the track to see if trains be approaching. The greater the difficulties in the way of hearing or seeing approaching trains, the greater should be the effort of the traveler.
4. That the train was approaching the crossing at a much greater rate of speed than allowed by law in that locality, does not lessen the duty of the traveler to use due care upon his own part to avoid collision.
5. Where the evidence only shows that a traveler, with a team upon a highway, approaching a railroad crossing stopped momentarily a few rods from the crossing and then immediately drove upon the crossing, and there is no evidence that he at that, or any other time, listened or looked either way for approaching trains, there is not sufficient evidence of due care upon the part of the deceased.
6. Evidence that such a traveler driving toward a railroad crossing, when near the crossing, was seen looking directly before him at the crossing, and was not looking in either direction along the railroad track, is not sufficient evidence of due care on his part to ascertain the approach of trains.

7. Evidence that a hand-car passed over the crossing, when the highway traveler with a team was some five hundred feet therefrom driving along parallel with the railroad, and that the men on the hand-car saw the traveler on the highway, does not amount to evidence that the traveler noticed the hand-car. Quantitative probability as to a past event does not amount to evidence of such event.

8. Whatever the probabilities in this case, there is no evidence that the deceased traveler, as he approached the railroad crossing, observed due care to ascertain whether a train was approaching and no evidence that any act of the railroad company or any of its servants induced him to forego such care. So far as appears, the case is the too common one where the traveler either forgot to look and listen, or being aware of the approaching train, recklessly undertook to cross before it.

Motion by defendant. New trial granted.

Case for causing the death of Edwin Day upon a grade crossing of the street with the defendants' railroad in North Berwick. The plaintiff had a verdict of $4000.

The facts are fully stated in the opinion.

E. P. Spinney, for plaintiff.

The train ran at an enormous rate of speed, so that it attracted especial attention of all observers that day. Said train was run towards and over Junkin's crossing that day at the rate of sixty miles per hour. Junkin's crossing being near the compact part of the town of North Berwick and without gates or flagman or automatic signals, the defendant therefore ran its train in violation of the public laws of Maine. Chap. 51, § 75, as amended by chap. 377 of statute of 1885.

That was negligence on the part of defendant, per se. *State* v. *B. & M. R. R.*, 80 Maine, 431 and 432, and cases; *Hooper* v. *B. & M. R. R.*, 81 Maine, 265, and cases.

Though at common law it is not negligence per se to run a train at a rapid rate over a crossing, yet the speed at which a train is run over a crossing may be so great as to be negligence under the circumstances as a matter of fact, and this is a question for the jury on the facts of each case. The speed of a train at a crossing should not be so great as to render unavailing the warnings of its whistle or bell, and this caution is especially applicable when their sound is obstructed by wind, and other noises, and when intervening objects

prevent those who are approaching the railroad from seeing a coming train. 1st Am. & Eng. Ency. of Law, Vol. 4, pp. 932 and 933; *Salter* v. *Utica R. R.* 88 N. Y. 42; *Wild* v. *Hud. Riv. R. R.* 29 N. Y. 315; 14 Am. & Eng. R. R. Cases, 670; Pierce on Railroads, 355; *Warner* v. *N. Y. C. R. R.* 44 N. Y. 465.

Junkin's crossing is in the village of North Berwick and near the compact part of the town, and crossing the Boston & Maine Railroad, Eastern division, at grade at an angle of forty degrees and thirty minutes. At this crossing, at the time of the accident, there were no gates, or flagman, or automatic signals. If defendant run trains faster than six miles per hour, this was in violation of R. S., c. 51, § 75, as amended by c. 377 of the statute of 1885. This was negligence per se. *Hooper* v. *B. & M. R. R.* 81 Maine, 266; *Webb* v. *P. & K. Railroad*, 57 Maine, 134; *Whitney* v. *M. C. R. R. Co.*, 69 Maine, 210; *Plummer* v. *East. R. R. Co.*, 73 Maine, 593; *State* v. *B. & M. R. R.* 80 Maine, 431, and cases; *Norton* v. *E. R. R. Co.*, 113 Mass. 366; *Prescott* v. *Same*, 113 Mass. 370; *Pollock* v. *Same*, 124 Mass. 158; *Eaton* v. *Fitchburg R. R. Co.*, 129 Mass. 364.

No bell or whistle was sounded on that engine as required by law prior to said trains crossing Junkin's crossing.

In not sounding bell and whistle the defendant violated c. 51, § 33, of R. S., and was therefore guilty of negligence per se.

Webb v. *P. R. R. R. Co.*, 57 Maine, 134; *Whitney* v. *M. C. R. R. Co.*, 69 Maine, 210; *Plummer* v. *E. R. R. Co.*, 73 Maine, 593; *Com.* v. *B. & W. R. R. Co.*, 101 Mass. 202; *Sonier* v. *B. & A. R. R. Co.*, 141 Mass. 10; *Renvick* v. *N. Y. C. R. R. Co.*, 36 N. Y., 132; *Smedis* v. *B. & R. B. R. R. Co.*, 88 N. Y. 13; *Y. & C. U. R. R. Co.* v. *Loomis*, 13 Ill. 548; 21 Am. & Eng. Ry. Rep. 532; *Ernst* v. *Hud. R. R. R. Co.*, 32 Barb. 159; *State* v. *B. & M. R. R. Co.*, 80 Maine, 431, and cases; *Hooper* v. *B. & M. R. R.* 81 Maine, 265.

While it is a general rule that a person about to enter upon a railroad crossing must look and listen for approaching trains, yet the rule is not invariable, and will not be applied when the circumstances were such as to afford the plaintiff a reasonable excuse for not looking, and it may often be a question for the jury to determine whether the conduct of the plaintiff is in fact negligent. Buswell on Personal

Injuries, pp. 245, 246; *Piper* v. *Chi. Mil. & St. P. R. R.* 77 Wis. 247; *Breekenfelder* v. *L. S. & M. S. R. R.* 44 N. W. Rep. 957; *Bare* v. *Penn. R. R.* 135 Penn. 95; *State* v. *Union R. R.* 70 Md. 69; *Kane* v. *N. Y. N. H. & H. R. R.* 9 N. Y. Sup. N. E. Rep. 879.

In the case of *Duame* v. *Chi. & N. W. R. R.* where the facts were similar to those stated above, except that it was a train instead of a hand-car, the court said, "That when a train had passed a crossing while the injured person was within a few rods of it and driving at a trot, and had passed on out of sight so as to induce the belief that it was to continue on its course in same direction, and there was no reason to suppose that it would immediately return, the general rule of contributory negligence in a person attempting to cross was held not applicable." *Duame* v. *C. & N. W. R. R.* 92 Iowa, 227; Buswell on Personal Injuries, p. 247.

When there is evidence of negligence upon the part of the defendant, the law will not presume in the absence of proof, that the negligence of deceased contributed to his death. *Lehigh V. R. R.* v. *Hall*, 61 Penn. St. 361.

The traveler has a right to assume and rely upon the discharge of duty on the part of the corporation and its servants. *Ernst* v. *H. R. R. R.* 35 N. Y. 25; *Shear. & Red.* on Negligence, p. 31.

The fact that a hand-car went by on the single track and that the customary warnings on the engine were not given, were equivalent to Mr. Day to an invitation to cross and an assurance of safety. *Smith* v. *M. C. R. R.* 87 Maine, 339, and cases supra.

Whether a person injured at a railroad crossing was or not, at the time of the collision, in the exercise of due care, is a question of fact for the jury to determine from the evidence under proper instruction. Whether or not the railroad company is guilty of negligence in not employing a flagman at a certain crossing is a question of fact. *Webb* v. *P. & K. R. R.* 57 Maine, 117, and cases.

Geo. C. Yeaton, for defendant.

If it be admitted (which it is not) that this crossing is "near the compact part of the town," manifestly the rate of speed of the train could have had little significance when and where, as here, neither

the time of day, condition of weather and atmosphere, or physical surroundings could oppose any obstruction to a very full and liberal opportunity for good "eyes and ears" to have rendered their normal service, and seasonably have informed the traveler along the highway of an approaching train.

For no omission of duty on the part of defendant can cancel his obligation to perform his own. To this conclusion authorities all concur. Even in those jurisdictions—of which this is not one—where it is held that violation of a police ordinance, or statute, is per se negligence, it is also almost invariably held that when contributory negligence is also proved, or, here, when plaintiff fails to prove its absence, the violation of the ordinance or statute is not the proximate cause.

See *Horn* v. *Rio Grande & Western Ry. Co.*, 19 Am. & Eng. R. R. cases, annotated (new series).

The same follows relating to the giving of required statutory signals of approaching trains, or their omission, although defendant here strenuously contends that the giving of these signals was completely proved. Five witnesses—two of whom were women living near, and both wholly disconnected, in all ways, from defendant's service, and thus entirely relieved from the standing smirch of such relation, and somewhat unwilling witnesses also—testify that they did hear the crossing-signal whistle sounded. That some other people did not hear it has little probative force under any circumstances, still less under these.

It has been well settled for a long time, not only in this jurisdiction, but in widely separated jurisdictions, indeed, almost universally, in every court entitled to respect,—State, Federal, Canadian, English, Continental, others,—that he who approaches a grade crossing over the tracks of a steam railroad with which he is familiar (as deceased must have been, a stablekeeper living within one-half mile, cutting and hauling hay across it) is bound to heed the fact of the ever-present peril which confronts him whenever he attempts to cross. His duties are plain, explicit, and never to be omitted with impunity. Whatever the railroad corporation may do, or neglect to do, his duty is constant and abiding.

Furthermore, if, as here, examination, comparison, and analysis of all the evidence renders it, if not morally certain, at least extremely probable that deceased did see the approaching train and miscalculated the chance of safety in the attempt to pass over ahead of it, neither he nor his representative can hold defendant responsible for the calamitous consequences of his hazardous speculation. It is fallacious to argue, and untenable alike in logic and in law, that such a sufferer, deceived by his own estimate of chances, may recover. No modern court of repute has ever held that a man might, at his option, face such visible danger and be excused because he erroneously estimated its proximity or degree. *Merrigan* v. *B. & A. R. R.* 154 Mass. 189, 191; *Mott* v. *Detroit G. H. & M. Ry. Co.* (Mich. May 9, 1899), 15 Am. & Eng. R. R. Cases, 113; *Chic. &c. R. R. Co.* v. *Houston*, 95 U. S. 697, 702; *No. Pac. R. R. Co.* v. *Freeman*, 174 U. S. 379, 384.

See also *Central Ga. R. R. Co.* v. *Forshee*, 27 So. Rep. 1006; *Hopkins* v. *So. Ry. Co.*, 110 Ga. 85; *Baltimore & Ohio S. W. Ry. Co.* v. *Keck*, 57 N. E. Rep. 112; *Chicago & E. I. R. Co.* v. *McElhaney*, 87 Ill. App. 420; *Chicago & A. R. R. Co.* v. *Williams*, 87 Ill. App. 511; *Peturin* v. *St. Louis, I. M. & S. Ry. Co.*, 156 Mo. 552; *Houston & T. C. R. Co.* v. *Knipstein*, 55 S. W. Rep. 754; *Getman* v. *D. L. & W. R. Co.*, 162 N. Y. 21: *Henarie* v. *N. Y. Central & H. R. R. Co.*, 60 N. Y. S. 752; and a long array of authorities cited in a note to Elliott on Railroads, § 1168.

No legal doubt can exist that the burden of proof to establish the exercise of due care on the part of deceased is upon plaintiff, and that if the evidence is equally consistent with the exercise of it or the want of it, she cannot prevail. *Murphy* v. *Deane*, 101 Mass. 455; *Dowd* v. *Chicopee*, Id. 93; *Dyer* v. *Fitchburg R. R.* 170 Mass. 148; *Walsh* v. *Boston & Maine R. R.* 171 Mass. 52. And while it is true this need not be shown affirmatively, but may be inferred from circumstances, yet if "there is only a partial disclosure of the facts, and no evidence is offered showing the conduct of the party injured, in regard to matters specially requiring care on his part, the data for such an inference is not sufficient; it can only be warranted when circumstances are shown which will fairly indicate care, or exclude

the idea of negligence on his part." *Mayo* v. *Boston & Maine R. R.* 104 Mass. 137; *Crafts* v. *Boston*, 109 Mass. 519; *Hinckley* v. *Cape Cod R. R. Co.*, 120 Mass. 257-262; *Gerety* v. *R. R.*, 80 Pa. St. 274-277. Nor can this ever be left to conjecture (*Barton* v. *Kirk*, 157 Mass. 303), which is not allowed to supply the place of proof. *Moore* v. *Boston & Albany R. R. Co.*, 159 Mass. 399. And this is as well settled in Maine as elsewhere. *Lesan* v. *Maine Central R. R.* 77 Maine, 85; *Merrill* v. *No. Yarmouth*, 78 Maine, 200; *Allen* v. *Maine Central R. R. Co.*, *supra*; *McLane* v. *Perkins*, 92 Maine, 39.

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

EMERY, J. The evidence for the plaintiff shows the following: The plaintiff's intestate, Edwin Day, in the forenoon of a summer day was driving alone in a hay rack drawn by one horse along a village street toward a grade crossing of the street with the railroad tracks of the defendant company in North Berwick. He was standing up next the front rail of the hay rack as he was thus driving. When first seen by any of the witnesses, he was driving along Portland street nearly parallel with the railroad tracks. He then turned from Portland street into Wells street which led more directly to the crossing, and over it at an angle of 43½ degrees with the track. The distance from the turn into Wells street to the crossing was 471 feet. He was "jogging along," as the plaintiff's witness described it, at a rate of about five miles an hour. He stopped momentarily some twenty feet from the crossing and then drove immediately upon the crossing, where he was struck and killed by a train of the defendant company, which had come along the track from the direction thus partially behind him. He was about thirty-five years of age, in the full possession of all the usual faculties, and was familiar with the crossing and the surroundings.

There is no evidence that in approaching the railroad crossing, Mr. Day took any precautions whatever to ascertain whether a train was also then approaching the crossing from either direction. True,

he stopped momentarily some twenty feet from the crossing, but it does not appear that he looked, or listened, or took any other measures to ascertain what might be approaching on the railroad tracks. There is no evidence for what purpose he stopped there. He may have stopped to look at something else than railroad or trains, or his horse may have stopped of its own volition without any act or will of Day's. We can only conjecture. There is no evidence. Nor can we assume, in the absence of evidence, that he did then look and listen for trains. On the contrary, it would seem that he could not have looked and listened at that point for trains without seeing or hearing this train, which, according to the plaintiff's own theory of its speed, was then less than 300 feet away. It is also true that a witness testified that as he was going from the crossing on Wells street he met Day at a point three or four rods from the crossing, and that Day then appeared to be looking "straight ahead toward the crossing, and not off to the right," (which would be toward the railroad). This does not tend to show requisite care and precaution on the part of Day. There was then, at that distance, no occasion for him to look at the crossing itself. Nothing then on, or passing, the crossing could endanger him at that distance. Looking straight ahead at the crossing would give him no information as to what might be on the tracks at a distance from the crossing and approaching it. Looking at or toward a railroad crossing is clearly not enough precaution for any traveler who proposes to pass over. He should look both ways along the tracks, to see what is approaching the crossing as well as what is on it.

It is the firmly settled law of this state that in approaching a railroad crossing at grade the traveler upon the highway, to be in the exercise of ordinary prudence, must bear in mind that trains are liable to be approaching the crossing at that same time, and at any moment, from either direction;—that the train cannot turn aside for him, and cannot be easily stopped to avoid him. He must, therefore, to comply with his duty to exercise ordinary care, be on the alert to ascertain by the use of his senses of sight and hearing, and by any other appropriate means, the approach of trains, and to seasonably avoid collision with them. He can usually avoid collision readily, easily

and promptly, if he be properly careful and alert while approaching the crossing. In view of the obvious peril at grade crossings and of the obvious inability of the train to turn out or stop instantly, it has further been repeatedly held that care commensurate with the peril requires the traveler upon the highway to look and listen for trains at the very time he is approaching the crossing, and that an omission to take this ordinary precaution is, if unexplained, contributory negligence per se, as matter of law, and will bar an action for the collision even though the railroad company was negligent in the premises. He must bear in mind, what is of common knowledge, that railroad trains move much faster than the ordinary pace of a horse drawing a vehicle along the highway and hence must not rest content with an observation made at considerable distance from the crossing, especially if there be objects or circumstances to obstruct his vision or hearing at the more remote point. He must be mindful, must observe, look and listen, as he approaches close to the place of peril, the crossing. *Chase* v. *M. C. R. R. Co.*, 78 Maine, 346; *Allen* v. *M. C. R. R. Co.*, 82 Maine, 111; *Smith* v. *M. C. R. R. Co.*, 87 Maine, 339; *Romeo* v. *Boston & Maine R. R.* 87 Maine, 540; *Giberson* v. *B. & A. R. R. Co.*, 89 Maine, 337.

It is further the settled law of this state that it is incumbent upon a plaintiff suing to recover damages alleged to have resulted from the negligence of another party, to affirmatively prove his own freedom from contributory negligence in the premises. There is no presumption that a plaintiff in such case was thus free from contributory negligence, though sometimes the circumstances may of themselves show that he was, as in the case of a passenger injured by the negligence of a railroad company, while sitting in his seat doing nothing. In the absence of affirmative evidence tending to show that the plaintiff, himself being an actor, exercised on his part the care and effort incumbent on him to avoid the injury he cannot maintain his suit. That the only witness who could testify to facts showing such care is dead, and the plaintiff is thus left without the evidence, does not enable the plaintiff to recover without the evidence. In support of the foregoing proposition it is only necessary to cite the late case of *McLane*

v. *Perkins*, 92 Maine, 39, 43 L. R. A. 487; where the proposition is fully reviewed and affirmed.

In this case the plaintiff contends that the evidence shows circumstances and conditions which made it difficult for Mr. Day to see or hear the approaching train, or to obtain any other information of its nearness to the crossing. If such was the case, it was the duty of Mr. Day to make all the more effort to ascertain the truth; — but the case is barren of evidence that he made any effort whatever, great or small. The difficulty of seeing and hearing the train is therefore immaterial, since it is not claimed that it was impossible with any effort to know of the train's approach. It is the absence of evidence of any, even the smallest, effort on the part of Day, not his inability to see or hear with reasonable effort, which convicts him of contributory negligence.

The foregoing statement of the law and the evidence would seem to require a judgment for the defendant, notwithstanding the verdict of the jury in favor of the plaintiff. A verdict of a jury on matters of fact, and within even their exclusive province, cannot be the basis of a judgment where there is no evidence to support it, or when they have made inferences contrary to all reason and logic. In this case Mr. Day, as he approached the crossing, had a plain duty long and clearly defined by law, failing to perform which, he or his representative could not sustain an action. There is no evidence that he did that duty or any part of it, and such a fact must be established by evidence and not assumed.

But the plaintiff contends in this case that some of the defendant company's servants so conducted during Mr. Day's approach to the crossing, as to assure him that no train was approaching so near as to endanger him in attempting the crossing when he did. This assurance was given, the plaintiff says, by some of the section men propelling a hand-car along the track over the crossing toward the direction from which the train was coming. The argument is that Mr. Day, seeing this hand-car and knowing that it must go nearly 1000 feet to reach a switch or side track where it could let a train by, was thereby assured that no train from that direction would reach the crossing until that 1000 feet had been first covered by the

hand-car and then by the train, which would have allowed him ample time for crossing safely; and that a jury might reasonably find that it was not negligence in Mr. Day to rely on that assurance and cease his own personal outlook for the approach of such a train at such a time as would endanger him. *Hooper* v. *B. & M. R. R.* 81 Maine, 260, and *York* v. *M. C. R. R. Co.*, 84 Maine, 117, 18 L. R. A. 60, are cited.

It appears in evidence that the defendant company's section men did propel a hand-car along the track over the crossing in the direction named, but this was while Mr. Day was on Portland street some fifty feet from the turn into Wells street and while he was traveling parallel with the railroad and not toward it. The distance from the crossing on Wells street to its junction with Portland street was 471 feet. The section men, or some of them, as they passed the crossing noticed Mr. Day and his team at the locality named, on Portland street near Wells street.

Unfortunately for this contention there is no evidence that Mr. Day noticed this hand-car although it was within the range of his vision. There are no circumstances tending to show that he noticed it, or if he did notice it, that it in the least influenced his after conduct. He was on Portland street at the time, traveling parallel with the railroad, and, if he faced as he was driving, was not facing the car or the track. His momentary stop some twenty feet from the crossing does not tend to show that he noticed the car. That stop was some minute or two after the car had passed and after the section men on the car saw him.

Of course, it is possible that he noticed the hand-car. Indeed, it may be quantitatively probable that he did. Quantitative probability, however, is only the greater chance. It is not proof, nor even probative evidence, of the proposition to be proved. That in one throw of dice there is a quantitative probability, or greater chance, that a lesss number of spots than sixes will fall uppermost is no evidence, whatever, that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would out weigh all the probability otherwise.

Granting, therefore, the chances to be more numerous that the plaintiff's intestate did notice the hand-car than that he did not, we still have only the doctrine of chances. We are still without evidence tending to actual proof. However confidently one in his own affairs may base his judgment on mere probability as to a past event; when he assumes the burden of establishing such event as a proposition of fact, as a basis for a judgment of a court, he must adduce evidence other than a majority of chances.

The situation was very different from that in either of the cases cited. In each of those cases the traveler was directly at the crossing at the time of the event on the crossing. In the one case the gates were up when the traveler reached the gated crossing and remained up. In the other case the traveler was at the crossing, halted and waiting, as the train passed directly before his face. In this case at bar the event occurred when the traveler was 500 feet distant from the crossing, traveling parallel with the railroad, and nothing appears in evidence or the situation that would force the event upon his attention as in the other cases.

For lack of evidence, even from circumstances, that Mr. Day in fact noticed the hand-car as it passed along the track and was influenced by it to cease further outlook, that episode does not suffice to show that Mr. Day took the requisite precautions, or was excused from taking them by any assurance of safety from the company's conduct. The whole evidence does not show, either that he took the precaution, or that he in fact relied upon assurances of safety.

The plaintiff calls attention to evidence that this crossing was in a compact part of the town where the speed of trains was limited by law to six miles an hour when passing the crossing, and that this train passed the crossing at a much greater rate of speed. She contends that Mr. Day could properly assume, and act upon the assumption, that the train was not moving more than the lawful rate of six miles an hour, and therefore if he could have safely crossed the track in front of a train moving only at that rate, she has shown that he was free from contributory negligence in crossing the track when he did. Unfortunately for this contention, also, there is no evidence that Mr. Day consciously saw or heard the train at all, or reasoned about

its speed as compared with his own. So far as the evidence shows he went upon the crossing entirely unmindful of what was approaching. Had he noticed the train it was his duty to note its actual rate of speed and take no chances of collision with it.

The plaintiff further calls attention to evidence that no bell was rung, no whistle was blown, and no other signal of approach was given by the train. She contends that the absence of all signals of approach was an assurance of safety. As to this contention, it has been repeatedly held that the traveler upon the highway must not depend solely upon any signal from the railroad company's servants, but must in the absence of such signals still be on his guard and endeavor to ascertain the actual fact whether or not a train be approaching. See cases cited above.

So far as now appears, the case is the too common one where the traveler upon the highway either took no adequate care to ascertain whether a train was approaching, or else, being aware of the approaching train, recklessly undertook to cross before it.

We find in the law and the evidence no foundation for this verdict and it must be set aside.

Motion sustained. Verdict set aside.

PETER A. FITZGERALD

vs.

THE INTERNATIONAL PAPER COMPANY.

Franklin. Opinion February 28, 1902.

Assumpsit. Services. Legal Day's Work. Extra Hours. R. S., c. 82, § 43.

1. Under R. S., c. 82, § 43, declaring ten hours of actual labor to be "a legal day's work unless the contract stipulates for a longer time," the stipulation need not be expressed, nor made before the work is begun. It is enough if it appears, from the circumstances and the conduct of the parties, that they understood that more than ten hours of labor was to be performed each day for the agreed wages per day.
2. Where a laborer hires to work as one of the crew of a pulp mill which to his knowledge is run through to the twenty-four hours, with one day-crew and one night-crew, alternating each week, and he works in such crew more than ten hours each day, and receives weekly his per diem pay as agreed without claiming more, it can be reasonably inferred that he agreed to work more than ten hours a day, and he cannot afterward recover pay for the extra hours.

On report. Judgment for defendant.

Assumpsit on the following account annexed:—

"International Paper Company,

To Peter A. Fitzgerald, Dr.

1900.

March 29,	To 375 hours' labor in pulp mill at Jay	
to	Bridge, equal 37½ days of 10 hours	
Dec. 24.	each at $1.50-1.00 per day,	$56.25."

The writ also contained an omnibus count accompanied by a specification that plaintiff would offer the same evidence in support thereof as would be offered in support of the account annexed, averring that they were for the same cause of action.

The facts appear in the opinion.

B. E. Pratt, for plaintiff.

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

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

FOGLER, J. Revised Statutes, ch. 82, § 43, is as follows:

"Sec. 43. In all contracts for labor, ten hours of actual labor are a legal day's work, unless the contract stipulates for a longer time; but this rule does not apply to monthly labor or to agricultural employments."

The plaintiff, who was employed by the defendant company as a laborer in its pulp mill from March 29, 1900, to December 24, 1900, brings this action to recover payment for labor alleged to have been performed by him over hours, or in excess of ten hours per day each and every day during the entire period in which he was so employed.

The agreed wages to be paid to the plaintiff was one dollar and fifty cents per day. There was no stipulation in words at the time of the hiring as to the number of hours which should constitute a day's work. The mill was run constantly during each twenty-four hours, there being a day-crew and a night-crew of men. The day-crew came on at seven o'clock in the morning and quit work at six o'clock in the afternoon, having an hour off for dinner. The night-crew commenced at six o'clock in the evening and left at seven o'clock in the morning having an hour off for lunch. The men alternated each week in their work, those who worked in the day-time one week working in the night-time the succeeding week and vice versa. The plaintiff worked in this manner during the term of his employment. He testified that he knew when he begun work that there were two crews, one working by day and the other by night. The plaintiff, as did the other workmen, received his pay weekly at the rate of one dollar and fifty cents for each day in which he had been employed during the week. At no time of payment did he complain or object that he had not received the correct amount due him. He made no claim for payment for labor performed in over hours until after his employment had terminated.

As before stated, there was no stipulation in words between the parties as to the number of hours which should constitute a day's

labor. But, as stated in *Gallagher* v. *Hathaway Manuf. Corp.*, 172 Mass. 230, an agreement is express none the less that it is expressed by conduct and not by words.

The case comes here on report. The court is to determine the fact as well as the law. We are satisfied that the contract between the parties, so far as it relates to the hours of labor, is evidenced by the conduct of the plaintiff. He knew that the mill ran constantly, day and night, and that the hands employed were required to work more than ten hours of each twenty-four hours. With such knowledge he accepted the employment. He seems to have worked over ten hours per day as a matter of course, as incident to his employment and without the special request of the company or its agents; he made no objection or complaint on account of his being required to work beyond ten hours; he received his weekly per diem pay without protest or complaint; he, at no time during his employment demanded or claimed extra pay for the past, nor gave notice that he should claim it in the future. The conclusion is almost irresistible that his understanding of the contract of employment was that his wages agreed upon should be in full for all services performed by him each day, though the day's work should exceed ten hours, and we accordingly hold that the action is not maintainable.

The conclusion is not in conflict with the decision in *Bachelder* v. *Bickford*, 62 Maine, 526, cited by plaintiff's counsel. There the plaintiff was employed to labor in a grist mill. At times it was necessary to run the mill all night. It was customary when a man wrought all night for him to lay off the next day, the night work counting for a day's work. The plaintiff, during the time of his employment, worked at his employer's request thirty-two nights, but in no instance laid off the next day but worked all day.

The court held that the plaintiff was entitled to recover for his all night labor, each night counting as a day.

Judgment for defendant.

EDMUND THOMAS, EXR. *vs.* MARY E. THOMAS.

Knox. Opinion February 28, 1902.

Writ. Service. Non-Resident. R. S., c. 81, §§ 17, 21.

1. When the defendant is a non-resident, and only commorant in some town in this state and is so described in the writ, a return by the officer that he "attached a chip as the property of the defendant, and summoned the said defendant by leaving at her last and usual place of abode a summons for her appearance at court," does not show sufficient legal service.

Exceptions by plaintiff. Overruled.

The presiding justice ordered the action to be dismissed for want of sufficient service of the writ upon the defendant.

D. N. Mortland, for plaintiff.

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

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

FOGLER, J. This is an action of trover which comes to this court upon exceptions by the plaintiff to the order of the presiding justice, on motion of the defendant, dismissing the action for want of sufficient service. The writ is dated August 21, 1901, and commanded the officer "to attach the goods and estate of Mary E. Thomas of Philadelphia in the state of Pennsylvania, and now commorant in South Thomaston in the county of Knox, to the value of five hundred dollars, and summon the said defendant (if she may be found in your precinct) to appear before our justices of our Supreme Judicial Court to be holden in Rockland within and for the county of Knox on the third Tuesday of September, A. D. 1901, to answer unto Edmund W. Thomas, Executor." The return of the officer, deputy sheriff of Knox county, states that, "On August twenty-third, A. D. 1901, by virtue of this writ I attached a chip, the property of the within named defendant, and on the twenty-third day of August,

A. D. 1901, I summoned the said defendant by leaving at her last and usual place of abode a summons for her appearance at court."

On the first day of the return term, the defendant appeared specially for the purpose of objecting to the service of the writ, but for no other purpose, and filed a motion in writing to dismiss the action for insufficiency of service. After a hearing thereon by the presiding justice, said motion was sustained and said action ordered dismissed, from which ruling and order the plaintiff excepts.

By the exceptions and the motion, which is made a part of the exceptions, it appears that the defendant was a permanent resident of Philadelphia, and at the date of said writ, and at the time of service thereof, she was commorant together with her daughter and son-in-law in the town of South Thomaston. The question is whether the service as stated by the officer in his return is sufficient to bring the defendant within the jurisdiction of this court.

By the common law personal service was required in all actions purely in personam. In this state, and, it is presumed, in all the other states of the Union, provision is made by statute for substituted or constructive service upon parties resident in the state. Such substituted service is a departure from the common law and the authority for it must be strictly followed. *Settlemier* v. *Sullivan*, 97 U. S. 444; *Galpin* v. *Page*, 18 Wall. 320.

Our statute, R. S., c. 81, § 17, provides how writs may be served on residents and declares that, "a separate summons, in form by law prescribed, shall be delivered to the defendant or left at his dwelling-house or place of last and usual abode." Section 21 of the same chapter, providing for the service of writs on non-residents, contains no provision for substituted or constructive service.

The obvious construction of these sections is that constructive service can only be made upon parties defendant resident within the limits of the state and, therefore, within the jurisdiction of the court.

At the date of the service of the writ the defendant's permanent residence was in Pennsylvania, but she was then commorant in this state. Can she be regarded as a resident of the state so that substituted service could be made as provided by statute?

The learned counsel for the plaintiff contends that, as commorancy is "a residence temporary, or for a short time," a person commorant in a place is one having a residence for the time being in such place, and, if he resides at a given place, whether for a long or short period of time, he is a resident. We cannot sustain this contention. We think the word "resident" in the statute means one having a permanent residence in the state as distinguished from one who is merely temporarily within the limits of the state.

In *Pullen* v. *Monk*, 82 Maine, 412, the court, in discussing the meaning of the word "commorant" contained in another statute, uses the following language: "It cannot be doubted that a man may be a resident in one place and commorant in another at the same time. The distinction is between a permanent and a temporary home. A commorancy may be all the residence a man has, but usually not. In Webster's dictionary commorancy is defined as meaning, in American law, 'residence temporarily or for a short time.' The term from its derivation from the latin implies something less than a regular residence, such as a staying, a sojourning, and more literally a tarrying. It was to express these minor degrees of residence that the word got in vogue in our jurisprudence, though not often used."

And in *Gilman* v. *Inman*, 85 Maine, 105, the court, speaking of the same word, says: "The etymological signification implies an abiding or tarrying for some appreciable though temporary duration less than a permanent residence."

In *Ames* v. *Winsor*, 19 Pick. 247, the defendant was described in the writ as of Duxbury, but as commorant in Boston. The service was by leaving a summons at his last and usual place of abode in Boston. Under a statute providing for substituted service identical with that of this state, the court held the service insufficient and stayed all further proceedings in the case. It is there said, "The law proceeds on the supposition, that, at a man's dwelling-house, or last *and* usual place of abode, (for both must concur) there will be some person enjoying his confidence, careful of his interests and charged with his concerns, who will give him actual notice," a reasoning adopted and declared in *Sanborn* v. *Stickney*, 69 Maine, 343.

It is true, as pointed out by the plaintiff's counsel, that in *Ames* v. *Winsor*, the place of permanent residency and the place of commorancy were both in the same commonwealth. We perceive no difference in principle between such a case, and a case where a defendant is commorant in a state other than that of his permanent residence.

The precise question here at issue was decided in *White* v. *Primm*, 36 Ill. 416. There the defendant was a resident of Illinois. At the date of the officer's return, he was stopping for two or three weeks at a private boarding-house in St. Louis. It was held that service by leaving a copy at that boarding-house was insufficient, although the officer's return stated that he had served the precept "by leaving a copy at the usual place of abode of the defendant." In the opinion it is said, "But we are not prepared to recognize a doctrine so perilous to private rights as it would be to admit that the hotel or boarding-house, where a stranger is sojourning for a few days, is to be considered his 'usual place of abode' within the meaning of the statute."

See also *Blythe* v. *Hinckley*, 84 Fed. Rep. 228; *Grant* v. *Dalliber*, 11 Conn. 234.

The counsel for the plaintiff further contends that, as the officer's return states that he left a summons at the defendant's place of last and usual abode, that statement must be regarded as conclusive of the fact. That contention might have force if the defendant had a place of last and usual abode within the officer's precinct.

But the case shows that the defendant had no such place of abode within the state, and this court could not obtain jurisdiction of the case by a constructive service. The construction to be given to the return most favorable to the plaintiff is that the summons was left at a place which the officer supposed or believed to be the place of the defendant's last and usual abode. We do not think that the officer's return can be held to rebut the truth, and establish as a fact that which did not exist. Nor do we think that there are admissions in the defendant's motion or exceptions which tend to give the court jurisdiction.

Exceptions overruled.

HATTIE EVELETH *vs.* CHARLES H. SAWYER.

Piscataquis. Opinion March 1, 1902.

Pleading. Parties. Contracts.

Where the law implies a promise, the consideration for which moves from several persons jointly, the promise so implied will be joint as to the promisees.

The same contract cannot be so framed as to give the promisees the right to sue upon it both jointly and separately. They must be entitled under it either jointly only, or separately only, and must sue accordingly. It cannot be treated as joint or several at the option of the promisees, but must be understood to be as to them joint, when the interest is joint, and several, when the interest is several.

The law will not imply a contract which the parties themselves cannot make.

On report. Plaintiff nonsuit.

Assumpsit on account annexed for rent.

W. H. Powell and C. W. Hayes, for plaintiff.

H. Hudson, for defendant.

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

POWERS, J. Prior to Nov. 7th, 1899, the defendant occupied the Eveleth House in Greenville as the tenant at will of John H. Eveleth, who died on that date. The title to the premises descended, one-third to the plaintiff, and two-thirds to Rebecca W. Crafts, as tenants in common. The defendant continued to occupy the premises in the same manner after as before the death of Mr. Eveleth, and the plaintiff brings this action for the use and occupation of her share of the property from Nov. 7, 1899, to August 7, 1900.

This action can only be maintained by proof of a promise, express or implied. *Goddard* v. *Hall,* 55 Maine, 579. The evidence introduced by the plaintiff fails to satisfy us that there was an express

promise. It simply goes to the extent that the defendant at one time, when asked by plaintiff's agent what he thought would be a fair rental for the premises, said about $400. It appeared that the defendant repeatedly refused to pay any rent to the plaintiff; that he had paid the rent in advance up to January 1, 1901, to Mr. Eveleth before his decease; and that, while acknowledging the title of the plaintiff and her co-tenant, he denied that he was under any further liability until after that date to pay rent to anyone.

We think further, that not only has the plaintiff failed to show an express promise, but that if any promise is implied under the circumstances it must be considered joint as to the promisees. The consideration for the defendant's promise moved not from the plaintiff alone, but from the plaintiff and her co-tenant, Mrs. Crafts. Where the consideration moves from several persons jointly, such persons, as having the joint legal interest in the contract, should be joined as plaintiffs in suing for a breach of it. Dicey on Parties, 106. *Chanter* v. *Leese,* 5 M. & W. 698. And it is a general principle that where part owners sue ex contractu all the persons who are part owners must join. *White* v. *Curtis,* 35 Maine, 534.

This result is not in conflict with *Nott* v. *Owen,* 86 Maine, 98, 41 Am. St. Rep. 525, cited by the plaintiff. In that case the plaintiff owned one-fourth of the store, and there were separate express contracts between the different owners and the tenant. The plaintiff terminated the tenancy as to his one-fourth, and brought suit for rent thereafter accruing, the express contracts with the other owners remaining in full force. It is evident that, under those circumstances, the only contract that could be implied with the plaintiff was separate, and the action was properly brought in his name alone.

In *Kimball* v. *Sumner,* 62 Maine, 305, the action was neither joint nor several, and for that reason was decided not to be maintainable. The court says that if the remedy pursued should be joint, "We think such a rule is founded upon principle and good sense, and may be fairly deducible from the authorities although the cases do not agree." The suggestion there made that, when the contract is made by implication of law, it is reasonable to allow the heirs to elect whether it shall be considered joint or several, is open to several

objections. It allows one of the parties to a contract, not express but implied by law from the circumstances, to determine one of the important terms of the contract without the other party having any such voice in its interpretation. It affords no rule of guidance when the heirs disagree. It is directly opposed to the rule that one and the same contract cannot be so framed, as to give the promisees the right to sue upon it both jointly and separately. They must be entitled under it either jointly only, or separately only, and must sue accordingly, which is but another way of saying that a joint and several covenant must be understood to be joint when the interest is joint, and several when the interest is several, and cannot be treated as joint or several at the option of the covenantees. Dicey on Parties, 111-114. If the parties themselves cannot frame such a contract the law will not imply one. Moreover, it is more consistent with justice to imply a joint contract, as the law does not permit a man to be harrassed with a multitude of suits when the whole matter can be better settled in one.

It is unnecessary to now consider the other objections raised by the defendant, as for want of necessary parties plaintiff the entry must be,

Plaintiff nonsuit.

IRENE A. WADE, and another, *vs.* JOHN S. FOSS.

Androscoggin. Opinion March 3, 1902.

Bills & Notes. Stamps. War Rev. Law, 1898, §§ 13, 14.

The statute of the United States requires a stamp upon promissory notes, and provides that, unless stamped, they shall not be admissible in evidence in any court.

Held; that this provision applies only to courts of the United States, and has no application to state courts.

Rules of evidence in the latter courts are governed by the laws of the state, and not subject to control by Congress. An unstamped note cannot, for that cause, be excluded as evidence on a trial in a court of this state.

See *Wade* v. *Curtis*, post.

Exceptions by plaintiffs. Sustained.

Action on a promissory note, not having an internal revenue stamp.

Tascus Atwood, for plaintiff.

D. J. McGillicuddy and *F. A. Morey*, for defendant.

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

STROUT, J. Assumpsit upon a promissory note bearing date June 17, 1899. Its admissibility was objected to because it was not stamped, as required by c. 448 of the statutes of the United States of 1898. The objection was sustained and the note excluded. To this ruling the plaintiff excepted. The act required notes of hand to be stamped, and by § 13, it was provided that if any person issued any instrument without stamp which the act required to be stamped, "with intent to evade the provisions of this act," he was guilty of a misdemeanor, for which a penalty was prescribed, "and such instrument . . . not being stamped according to law shall be deemed invalid and of no effect." It will be noticed that the invalidity results only where the "intention to evade" exists, and

does not extend to cases where the omission to stamp arose from accident or mistake. It is provided, however, in the same section, that subsequently, by paying a penalty of ten dollars the instrument may be stamped, even if the stamp was omitted with intent to evade, and if there was no such intent, then without paying the penalty, in which case the instrument became "as valid, to all intents and purposes, as if stamped when made or issued." Taking the whole section together, the phrase "such instrument" is confined to that issued "with intent to evade." Even these are not made absolutely void, but voidable. *Wingert* v. *Zeigler*, 91 Md. 318, 80 Am. St. Rep. 453. In *Green* v. *Holway*, 101 Mass. 243, 3 Am. Rep. 339, a case under the statute of 1866, which contained substantially the same language, this construction was adopted. Under the act of March 3, 1865, which contained similar language, this court held that to declare the instrument void, there must be an intent to evade the law, and that such intent must be affirmatively shown. *Dudley* v. *Wells*, 55 Maine, 145. It is not shown in this case.

Section 14 of the act of 1898 provides that no unstamped paper, which the law requires to be stamped "shall be recorded or admitted or used as evidence in any court" until properly stamped. Although this language is broad, and might include all courts, yet when it is considered that the powers of the United States are given and limited by the constitution, and that all powers not granted by it to the general government, nor by it withheld from the states, reside in the states, and that each within its sphere, is supreme, it follows logically that in the administration of justice in a state, in its own courts and and under its laws, not in conflict with the legitimate authority of the general government, the rules of evidence in such courts are derived from and subject to the law of the state, and not within the authority or control of Congress. *Walker* v. *Sauvinet*, 92 U. S. 92; *Presser* v. *Illinois*, 116 U. S. 269.

It cannot be conceded that Congress had authority to exclude as evidence in a State court that which by the laws of the state was admissible. Under our law the note was admissible, whether stamped or not. The maker might be liable to the penalty provided in the act of 1898, if he intended to evade the statute, but the contract, as

evidenced by the note, was a valid contract in this state, and provable as such.

It cannot be presumed that Congress intended to infringe upon the right of the state in its courts. It must have intended the provision excluding unstamped contracts from admission as evidence to apply only to the courts of the United States, over which it had undoubted jurisdiction. It has been so held in many states. *Carpenter* v. *Snelling*, 97 Mass. 452; *Green* v. *Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Moore* v. *Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *People* v. *Gates*, 43 N. Y. 44; *Clemens* v. *Conrad*, 19 Mich. 170; *Craig* v. *Dimock*, 47 Ill. 308, 95 Am. Dec. 489; *Wingert* v. *Zeigler*, 91 Md. 318, 80 Am. St. Rep. 453; *Sammons* v. *Holloway*, 21 Mich. 162, 4 Am. Rep. 465; *Insurance Co.* v. *Estes*, 106 Tenn. 472, 82 Am. St. Rep. 892; *Bumpass* v. *Taggart*, 26 Ark. 398, 7 Am. Rep. 623; *Davis* v. *Richardson*, 45 Miss. 499, 7 Am. Rep. 732; *Griffin* v. *Ranney*, 35 Conn. 239; *Wallace* v. *Cravens*, 34 Ind. 534; *Small* v. *Slocumb*, 112 Ga. 279, 81 Am. St. Rep. 50; *Cassidy* v. *St. Germain* 22 R. I. 53, 46 Atl. Rep. 35; *Knox* v. *Rossi*, 48 L. R. A. 305. See also License Tax cases, 5 Wal. 462.

An opposite doctrine is held in *Chartiers & Robinson Turnpike Co.* v. *McNamara*, 72 Penn. St. 278, 13 Am. Rep. 673; *Plessinger* v. *Dupuy*, 25 Ind. 419—overruled by *Wallace* v. *Cravens*, supra; *Edeck* v. *Ranuer*, 2 Johns. 423.

In *Leavitt* v. *Leavitt*, 4 Maine, 16, it was held that an unstamped instrument, which the law of the United States required to be stamped, was inadmissible in evidence, but this case has been practically overruled in this state by *Dudley* v. *Wells* and *Sawyer* v. *Parker*, supra. The overwhelming weight of authority and the more satisfactory reasoning is in accord with the construction we adopt.

In *Clemens* v. *Conrad*, supra, it is said by Chief Justice Cooley,—"Of the authority in Congress to impose stamp duties, and to compel their payment by such penalties as the wisdom of that body may devise, we make not the least question." "To make an instrument inadmissible in evidence because not sufficiently stamped is, however, quite a different thing from imposing penalties for a breach of the revenue laws. The latter punishes the guilty party or compels him

to perform his duty to the government; the former imposes what may be sometimes equivalent to a forfeiture of rights upon a party, guilty or innocent, who chances to be so circumstanced that he cannot make a showing of his rights in court without the production of the unstamped instrument." "A rule of evidence laid down in general terms is to be understood as applicable to those courts only for which the legislature prescribing it has general power to make rules, and not to other courts not expressly named over which it has no such general power, and with whose proceedings it could interfere, if at all, only in exceptional cases."

An analogous rule of construction is applied to the first ten amendments to the constitution of the United States. In them occur such general expressions as "the right of the people to keep and bear arms," — "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches" etc.,—"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury",— and the right of trial by jury in civil causes. Although broad and general in language, they are held by the supreme court of the United States to have reference only to powers exercised by the Federal government, and not to those exercised by the state. *Eilenbecker* v. *District Court of Plymouth County*, Iowa, 134 U. S. 31; *Twitchell* v. *Commonwealth*, 7 Wal. 321; *Spies* v. *Illinois*, 123 U. S. 131.

It results that the note should have been admitted in evidence.

Exceptions sustained.

KENNEBEC WATER DISTRICT, In Equity,

vs.

CITY OF WATERVILLE, and others.

Kennebec. Opinion March 3, 1902.

Municipal & Const. Law. Water Company. Eminent Domain. Jury Trial. Stat. 1883, c. 175, § 4; Spec. Laws, 1881, c. 141; 1887, c. 59; 1889, c. 339; 1891, c. 14 & 33; 1893, c. 352; 1899, c. 200. 14th Amend. U. S. Const. Art. XXII, Amend. Maine Const.

1. The special act c. 200 of the Special Laws of 1899, incorporating the territory and people constituting the city of Waterville and the contiguous Fairfield village corporation into a body politic and corporate for the purpose of supplying the inhabitants of such territory and the said municipalities and the towns of Benton and Winslow with pure water for domestic and municipal purposes, is within the legislative power, and is not forbidden by the constitution. The act having been approved according to its terms by majority votes of the city of Waterville and the Fairfield corporation at legal meetings, the said territory and people have become a body politic and corporate under the name of the Kennebec Water District as provided in the act, and as such possess all the powers conferred by the act.
2. The Kennebec Water District has by said act the power to acquire by purchase or by exercise of the power of eminent domain the entire plant, property, and franchise, etc., of the Maine Water Company within the district and the towns of Benton and Winslow by proceeding as set forth in the act. The purpose for which this exercise of the power of eminent domain is conferred upon the Kennebec Water District is a public purpose, and the legislature is the sole judge whether the public exigency requires such condemnation.
3. The trustees of the Kennebec Water District having failed to agree with the Maine Water Company upon the terms of purchase, the former is entitled as provided in the act to have three appraisers, appointed by the court sitting in equity, to appraise and fix the amount of the compensation to be paid by it to the Maine Water Company for its property so condemned.
4. The Maine Water Company is not entitled by the constitution to a jury trial upon the question of the amount of such compensation, and the provision in the act for determining that amount by three appraisers appointed by the court instead of by a jury is within the legislative power.

5. The fact that by the act all other persons and corporations (other than the Maine Water Company) whose property is taken under the act can have damages or compensation assessed by a jury, does not bring the act in conflict with the XIV amendment of the U. S. constitution as denying the Maine Water Company the equal protection of the laws. The right of that company to just compensation is fully recognized. No greater right is conferred upon others. The only difference is in procedure.

6. The fact that the Maine Water Company has issued its bonds and mortgaged its property to secure them, and has also assumed fixed permanent obligations to Waterville and other municipalities to supply them with water, do not exempt its property and franchise from the power of eminent domain. These are mere incidents, to be considered in the appraisal.

7. The fact that the debt of the city of Waterville already exceeds the five per cent debt limit permitted to cities and towns by the constitution, does not prevent the operation of the act under which the Kennebec Water District is to proceed. Nothing lawfully done or authorized by the act can increase the municipal indebtedness of the city of Waterville.

On report. Bill sustained. Decree for plaintiff.

Bill in equity brought by the Kennebec Water Distrtct, a corporation, to procure, by virtue of the provisions of its charter, judicial appraisal and condemnation of the entire plant, property and franchises, rights and privileges of the Maine Water Company, a corporation, in Waterville, Fairfield, Benton and Winslow.

The case fully appears in the opinion.

O. D. Baker, H. D. Eaton, G. K. Boutelle, for plaintiff.

D. P. Foster for city of Waterville; *G. G. Weeks* for Fairfield Village Corporation; *C. F. Libby* for Portland Trust Company; *J. W. Symonds, D. W. Snow, C. S. Cook and C. L. Hutchinson; H. M. Heath & C. L. Andrews; W. T. Haines,* for Waterville Water Company, Maine Water Company, Portland Trust Co. and Maine Trust and Banking Company, defendants.

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

FOGLER, J. This is a bill in equity brought by the Kennebec Water District, a corporation, to procure, by virtue of the provisions of its charter, judicial appraisal and condemnation of the entire plant, property and franchises, rights and privileges of the Maine Water Company, a corporation. The case comes to this court, first, upon excep-

tions to a pro forma overruling by the justice below of the joint and several demurrer to the bill by the respondents; and, secondly, upon bill, answers and proof, upon the stipulation of the parties that if the exceptions are overruled, the court is to render such judgment and make such orders upon the bill, answers, admissions and so much of the proof as is pertinent and legally admissible, as the rights of the parties require.

The Kennebec Water District was incorporated by and under the provisions of chapter 200 of the Private Laws of 1899.

The first section of that act is as follows:

"The territory and people constituting the city of Waterville, and the Fairfield Village Corporation, shall constitute a body politic and corporate under the name of the Kennebec Water District, for the purpose of supplying the inhabitants of said district and the towns of Benton and Winslow and all said municipalities with pure water for domestic ard municipal purposes."

Section two of the Act is as follows:

"Said district is hereby authorized, for the purposes aforesaid, to take and hold sufficient water of the Kennebec River, the Messalonskee stream, or its tributary lakes, or the Sebasticook River or its tributary lakes, and may take and hold by purchase or otherwise any land or real estate necessary for erecting dams, power, reservoirs or for preserving purity of the water and water shed, and for laying and maintaining aqueducts for conducting, discharging, distributing and disposing of water."

By said act the district is authorized to lay and maintain through the streets and municipalities named in the act, all such pipes, aqueducts and fixtures as may be necessary for the objects for which it was incorporated; and the affairs of the water district shall be managed by a board of trustees composed of five members to be selected as provided in the act.

Section six and seven of said act are as follows:

"Section 6. Said water district is hereby authorized and empowered to acquire by purchase or by exercise of the right of eminent domain, which right is hereby expressly delegated to said district for said purpose, the entire plant, property and franchises,

rights and privileges now held by the Maine Water Company within said district and said towns of Benton and Winslow, including all lands, waters, water rights, dams, reservoirs, pipes, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying water in said district and towns and any other real estate in said district."

"Section 7. In case said trustees fail to agree with said Maine Water Company upon the terms of purchase of the above mentioned property on or before April fifteenth, eighteen hundred and ninety-nine, said water district through its trustees is hereby authorized to procure judicial appraisal and condemnation of said property by bill in equity filed in the supreme judicial court for the county of Kennebec for that purpose on or before May one, eighteen hundred and ninety-nine, and jurisdiction is hereby given to said court over the entire matter, including application of the purchase money, discharge of incumbrances and transfer of the property. For the purpose of fixing the valuation thereof it shall appoint three appraisers, one of whom shall be learned in the law and another skilled in hydraulic engineering, none of whom shall be residents of the counties of Kennebec or Somerset, and on payment or tender by said district of the amount fixed, and the performance of all other terms and conditions imposed by the court, said entire plant, property, franchises, rights and privileges shall become vested in said water district, and be free from all liens, mortgages and incumbrances theretofore created by the Waterville Water Company or the Maine Water Company. Said appraisers shall, upon hearing, fix the valuation of said plant, property and franchises at what they are fairly and equitably worth, so that said Maine Water Company shall receive just compensation for all the same. In their report said appraisers shall state the date as of which the valuation aforesaid was fixed, from which date interest on said award shall run, and all net rents and profits accruing thereafter shall belong to the water district. The court may confirm such report, or reject it, or recommit the same, or submit the subject matter thereof to a new board of appraisers."

The act further provides that all valid contracts existing between the Waterville Water Company, (of which the Maine Water Company

is the successor) or the Maine Water Company, and any persons or corporations, for supplying water within said district and the towns of Benton and Winslow, shall be assumed and carried out by said Kennebec Water District; that if any surplus of earnings shall remain at the end of each year, after payment of current expenses and interest, and after providing for a sinking fund for the final extinguishment of the funded debt of the corporation, shall be divided between the municipalities comprising the district in the same proportions as each contributed to the gross earnings of the district's water system; and that the act of incorporation shall take effect whenever approved by majority votes of the city of Waterville and of the Fairfield Village Corporation at legal meetings called under the provisions of the charters of said places.

It appears by records, made a part of the case, that the before-mentioned act incorporating the Kennebec Water District, was approved by the City of Waterville by a majority vote on the first day of April, 1899, and by the Fairfield Village Corporation, by a majority vote on the third day of the same month; that the trustees provided by the act of incorporation were duly selected and that such trustees duly organized as a board on the 13th day of April, 1899.

It is admitted "that the persons claiming to be trustees did fail to agree with the Maine Water Company on terms of purchase before the fifteenth day of April, 1899, although they made effort so to agree."

It is admitted by the plaintiff, "that the value of the property proposed to be taken by this process exceeds $100,000, and that the valuation and indebtedness of April 1, 1899, shall be taken as correct for all times involved in this proceeding."

The "Fifth," "Sixth," and "Seventh" paragraphs of the answer of the city of Waterville are as follows:

"Fifth:—That on the first day of April, A. D. 1899, the total valuation of taxable estates in the city of Waterville was $4,902,767, and the municipal indebtedness of said city of Waterville, apart from funds received in trust by said city, and from loans for the purpose of renewing existing loans, or for war, and from temporary loans to

be paid out of money raised by taxation during the year in which they were made, was $230,000."

"Sixth:—That it is illegal that the city of Waterville become a part of, or a member of said Kennebec Water District, as it thereby assumes the debts and liabilities of said Kennebec Water District, and the assumption of said debts and liabilities would be contrary to the provisions of Amendment One of the Constitution of the State of Maine."

"Seventh:—That the Act to incorporate the Kennebec Water District is unconstitutional and illegal, it being 'ultra vires' for the Legislature to impose debt or liability upon the city of Waterville contrary to Amendment One of the Constitution of the State of Maine."

The answer of the Fairfield Village Corporation alleges that on the first day of April, 1899, its assessed valuation of property within its limits was $766,005, and that on the same date its total indebtedness was $3233.80.

The Sixth paragraph of the joint and several answer of the Waterville Water Company, the Maine Water Company, the Portland Trust Company and the Maine Trust and Banking Company is as follows:—

"Sixth:—Still further answering, the said Waterville Water Company, and the said Maine Water Company, and the said Portland Trust Company, and the said Maine Trust and Banking Company, defendants, expressly deny the existence of any legal authority in the Kennebec Water District to acquire, either by purchase or by the exercise of eminent domain, the whole or any part of the plant, property, franchises, rights or privileges of the said Maine Water Company, and aver that even if the act of the Legislature in said fifteenth paragraph of the bill mentioned, contemplates any such purchase or exercise of eminent domain (which this defendant denies) such provision of said act, incorporating the Kennebec Water District, are in plain violation of the constitution of the State of Maine and are void."

The Waterville Water Company is a corporation organized under the provisions of chapter 141, Private and Special Laws of 1881, as

amended by chapter 59, Private and Special Laws of 1887, and chapter 14, Private and Special Laws of 1891, for the purpose of conveying to the towns of Waterville, Fairfield and Winslow a supply of pure water for domestic, manufactory and municipal purposes.

During the year 1887, and 1888, said company constructed a system of water works and began the business of supplying water to said towns and their inhabitants. By its mortgage deed of trust dated October 17, 1887, said company conveyed to the Portland Trust Company, as trustees for its bond-holders and all other interested parties, its entire plant, property, franchises, rights, privileges and immunities to secure its bonds to the amount of $200,000. which bonds were issued and are all now outstanding.

The Maine Water Company is a corporation organized under the provisions of chapter 339, Private and Special Laws of 1889, as amended by chapter 33, Private and Special Laws of 1891, and chapter 352, Private and Special Laws of 1893, for the purpose of erecting, operating, buying, leasing and selling the water works named in the act. The act authorized the Maine Water Company to purchase and hold the property, capital stock, rights, privileges, immunities and franchises of several water companies therein named, including the Waterville Water Company. By the same act the water companies therein named, including the Waterville Water Company, were authorized to make the contracts, sales and transfers authorized by the act.

On the third day of July, 1891, the Waterville Water Company, by virtue of the authority granted by the act incorporating the Maine Water Company, sold and conveyed to the Maine Water Company all its property, capital stock, rights, privileges and immunities and franchises, except its franchise to be a corporation, and the Maine Water Company immediately entered into possession and still continues in possession thereof, and then and thereby said Maine Water Company, by the provisions of its charter, became subject to all the duties, restrictions and liabilities to which the Waterville Water Company was subject by reason of charter, contract, or general or special law of this state or otherwise.

July 22, 1891, the Maine Water Company executed a mortgage

to the Maine Trust and Banking Company as trustee for bondholders, and all other interested parties of its entire property acquired from the Waterville Company, with all additions thereto, together with several other similar properties, located in various places in Maine and New Brunswick, to secure first consolidated mortgage bonds of said Maine Water Company to the amount of $2,000,000, of which bonds $582,000 are outstanding; and, of the remainder of such bonds, there are retained by said trustee $500,000 for future purchases of water plants by said Maine Water Company, and $918,000 for refunding of first mortgages on various water plants covered by said mortgage.

December 31, 1897, said Maine Water Company executed to said Maine Trust and Banking Company a second mortgage of the same property to secure $200,000 of second mortgage bonds of the Maine Water Company of which $89,000, are now outstanding.

It is objected, by counsel for the complainant, that neither the demurrer nor parts of the defendants' answers are sufficiently definite in their terms to cover the points of defense raised thereunder. The case is important, and we do not deem it advisable to decide it upon mere questions of pleading. We shall therefore consider and determine the cause upon its legal and constitutional merits.

To provisions of the legislative enactment creating the Kennebec Water District, and to the maintenance of this bill thereunder, various constitutional objections are raised by the defense.

I. It is contended, by the defense, in behalf of the Maine Water Company, that the provision in the charter of the Kennebec Water District authorizing the latter to acquire, by the exercise of the power of eminent domain, the entire plant, property and franchises, rights and privileges held by the former company is unauthorized, and in violation of the constitution of the state.

Whether the public exigency requires the taking of private property for public uses is a legislative question, the determination of which by the legislature is final and conclusive. *Spring* v. *Russell*, 7 Maine, 273; *Allen* v. *Jay*, 60 Maine, 124, 11 Am. Rep. 185; *Concord R. R. Co.* v. *Greeley*, 17 N. H. 47. Whether the use for

which such taking is authorized is a public use is a judicial question for the determination of the court. *Allen* v. *Jay,* supra; *Talbot* v. *Hudson,* 16 Gray, 417; *Concord Railroad* v. *Greeley,* supra; *Olmstead* v. *Proprietors of Aqueduct,* 47 N. J. L. 311. The supply of water to the people of a municipality or territory is everywhere recognized as a public use.

It is to be observed that neither the charter of the Waterville Water Company, nor that of the Maine Water Company, confers exclusive franchises or rights upon their respective corporations; so that the legislature in granting the charter of the Kennebec Water District was, in that respect, under no restriction or embarrassment.

The power of eminent domain is not created by constitution or statute. It is an inherent attribute of sovereignty; it existed in the sovereign long before the adoption of any constitution. The article in our bill of rights, Art. 1, § 21, declaring that, "Private property shall not be taken for public uses without just compensation; nor unless public exigencies require it," does not confer the power, but by implication recognizes it as existing in the state.

The sovereign power of the state, by which is meant the people of the state in their sovereign capacity, acting through their representatives, the legislature, possesses and has the right to exercise the great power of eminent domain over all the private property and property rights within the limits of the state of whatever nature, corporeal or incorporeal, and by whomsoever owned, whether by individuals or corporations. The property of a corporation is not exempt from the exercise of this power, even though it may have been granted exclusive franchises and privileges. A legislature in granting a charter, cannot, even by express terms, however strong may be the language used, preclude another legislature, or even itself, from exercising the sovereign power of eminent domain over the charter thus granted and the property and rights acquired thereunder. The legislature cannot barter away the sovereign power of the state. All grants by the state, whether of property or rights or franchises, are subject to this power.

Though the granting by the legislature of a charter to a corporation and its acceptance by the corporation may be regarded as a con-

tract, the subsequent taking of the franchise and property of the corporation for public uses is not an impairment of the obligation of the contract. The provisions for just compensation for the franchise, as well as for the property and other rights, so taken, is a recognition of the contract.

The principles here laid down are sustained by the text writers and by the decisions of the courts in cases where the questions involved have been adjudged by the courts.

Judge Cooley, (Const. Lim. 5th Ed., 341) says: "It must be conceded under the authorities, that the state may grant exclusive franchises . . . . but the grant of an exclusive privilege will not prevent the legislature from exercising the power of eminent domain in respect thereto. Franchises, like every other thing of value and in the nature of property within the state are subject to this power; and any of their incidents may be taken away or themselves altogether annihilated by means of its exercise. . . . . Appropriating the franchise in such a case no more violates the obligations of a contract than does the appropriation of land which the state has granted under an express or implied agreement for quiet enjoyment by the grantee, but which nevertheless may be taken when the public need requires."

Mills on Eminent Domain says, § 41: "While the legislature may not repeal or materially modify the charter of a corporation, unless the power is reserved, the property of the corporation is subject to condemnation for public uses. The taking of the property of a corporation is not an alteration, modification or repeal of its charter. It is the enforced purchase of its property."

Again, § 42: "Franchises are held in subordination to the exercise of eminent domain and must yield to its proper exercise. The investiture of the franchise is not absolute. . . . . There is no distinction between corporeal and incorporeal property, and a franchise is as subject to the power of eminent domain as any other property."

To the same effect is Lewis on Eminent Domain, § 135, where it is said, "The property in connection with which the franchise is made available, and the franchise itself, are, of course, subject to the power of eminent domain like all other property."

In *State* v. *Noyes*, 47 Maine, 189, this court has recognized, at least by implication, the principles above laid down. The court say, p. 208: "But if the legislature in granting the charter to the former corporation, restrained itself from conferring a similar privilege upon another corporation of the same kind within a specified distance, the restriction would be binding, and could not be revoked, excepting under the high prerogative of sovereignty, and by making just compensation."

The Supreme Court of the United States in *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685, hold that a water supply system belonging to a corporation may be acquired by the public in the exercise of the power of eminent domain, on payment of just compensation. The court say, p. 689: "All private property is held subject to the demands of a public use. The constitutional guarantee of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation."

As further authorities on this question, we cite: *West River Bridge Co.* v. *Dix*, 6 Howard, 507; *Boston & Lowell R. R.* v. *Salem & Lowell R. R. Co.*, 2 Gray, 1; *Enfield Toll Bridge Co.* v. *Hartford & New Haven R. R. Co.*, 17 Conn. 454, 466, 44 Am. Dec. 556; *White River Turnpike Co.* v. *Vermont Central R. Co.*, 21 Vt. 590; *Brainard* v. *Missisquoi R. R. Co.*, 48 Vt. 107; *In re City of Brooklyn*, 143 N. Y. 596; *Backus* v. *Lebanon*, 11 N. H. 19, 49 Am. Dec. 139.

It is urged, by the defense, that while one corporation chartered by the state is exercising its franchise and using its powers and property to perform its duties under its charter, another corporation cannot receive legislative authority to take the property and franchise of the

original company and employ them in the same business to do the same service.

There are authorities which support this proposition of the defense, but we think they are not in accord with the authorities above cited. As stated by Chancellor Walworth in *Beekman* v. *Saratoga & Schenectady R. R. Co.*, 3 Paige Chan. 45, 22 Am. Dec. 679, referring to the power of the state over all the property within its limits, "The eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity, and they have the right to re-assume the possession of the property in the manner directed by the constitution and laws of the state whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest or expediency of the state is concerned."

The particular property needed for public use may be pointed out by the legislature, and the courts cannot review its determination in this respect. Mills on Eminent Domain, Par. 11; *In re Union Ferry Co.*, 98 N. Y. 139.

In the case at bar the legislature, for reasons sufficient to itself, has determined that the supply of water to the people and territory and municipalities named in the charter of the Kennebec Water District can be furnished by that corporation, a corporation whose purposes are purely public, more in the interests of public welfare, than can be done by the Maine Water Company, a private corporation with public duties, but operated for private gain. We do not feel authorized to inquire into or review this determination of the legislature.

Again, it is beyond question that the property and plant of a water company, owned and operated by a private corporation, and engaged, by virtue of its charter, in furnishing water to the people of a municipality, may be condemned and taken for public use by such municipality, just compensation being given, to which power to so condemn, and take has been granted by the legislature. *In re City of Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685.

The Kennebec Water District is a quasi municipal corporation.

By the first section of its charter it is created not only a body corporate, but also a body politic. Its purposes are purely public. It is invested with the power and charged with the duty of furnishing the territory and the people within its limits a supply of water. Its purposes and its duties in this respect, are as extensive as could be conferred by the legislature upon a municipality. It is an agency, so far as supplying water is concerned, in municipal government. We are of opinion that the Kennebec Water District has, under the grants contained in its charter the right to take the water system of the Maine Water Company, as would a municipality under a like grant.

II. It is contended, in behalf of the Maine Water Company, that the act of the legislature in incorporating the Kennebec Water District is unconstitutional and void, inasmuch as it does not provide for a trial by jury in determining a just compensation for its property to be taken under the provisions of the act.

Section 21, Article I of the Constitution of this state provides that, "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." By this clause of the constitution no condition is placed upon the sovereign power of the state in the taking of private property for public uses under its inherent power of eminent domain, except that of giving just compensation for private property so taken. No tribunal or method is provided for determining what shall be a "just compensation." In the absence of any constitutional limitation to the contrary, the legislature may prescribe the terms, conditions and methods by which the compensation to be paid on a taking of private property for public use should be ascertained. The proceedings are in the nature of an inquisition on the part of the state, and are necessarily under its control. The state must provide for an assessment of damages by an impartial tribunal, and it may be a jury, or commission, or appraisers, or court without a jury. Mills on Eminent Domain, §§ 84-85. As stated in Lewis on Eminent Domain, § 313, "The legislature may provide such mode as it sees fit for ascertaining the compensation, provided that the tribunal is an impartial one and that the parties have an opportunity to be heard." The law as above

stated is fully supported by an array of authorities cited by the learned authors above named, and may be regarded as elementary.

The defense in the case at bar insists that § 20, Art. I of the Constitution of this state which provides that, "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury except in cases where it has heretofore been otherwise practiced," imposes an additional limitation upon the exercise of the power of eminent domain to the effect that the citizen whose property is taken by virtue of that power, has the right to have his just compensation determined in a trial by jury. The question involved is whether the section last above quoted applies in cases of private property taken for public uses.

This precise question has never been decided by this court, nor, so far as we are aware, has it ever been directly in issue in any proceedings before the court. In a few instances the opinions of the court have adverted to the question, but in neither of those cases has there been a decision, or any necessity for a decision upon the question, and the views of the learned justices who drew the opinions do not conform with each other, but are in conflict.

The case of *Day* v. *Stetson*, 8 Maine, 365, was an action on the case by the proprietors of an ancient ferry against the defendant who had erected and maintained a ferry at the same place by virtue of a charter granted by act of legislature. The act of incorporation authorized the corporators to erect piers, wharves, etc., as the Court of Sessions should adjudge convenient, making such compensation to the owner of the land or privileges so occupied and improved as the Court of Sessions might assess. In the opinion of the court by Mr. Justice WESTON, referring to such provision for compensation, it is said, "If this provision does not secure to such owner his constitutional right of a trial by jury, the statute would afford no protection against a suit at law brought by him for the recovery of damages. And if the plaintiffs as owners of the land and privilege so taken and occupied by the defendant, had brought their action for damages, we do not decide that it might not have been maintained." This does not appear to be even a dictum upon the question here involved, but

rather a reservation of expressing an opinion until a case should properly be presented.

In *Conant's Appeal*, 83 Maine, 42, the question before the court was the construction to be given to a statute enacted by the legislature. Mr. Justice EMERY in delivering the opinion says, "The Bill of Rights declares that in all cases concerning property, the parties shall have a right to a trial by jury, except in cases where it had theretofore been otherwise practiced. This right should be recognized in all such controversies between the citizen and the government. The spirit of legislation upon the subject has always been in harmony with the principle and, whatever the words of omission in the statute, we should be slow to infer any intention to violate the principle."

In *Cushman* v. *Smith*, 34 Maine, 247, it is stated in the opinion by SHEPLEY, C. J., "This provision of the constitution was evidently not intended to prevent the exercise of legislative power to prescribe the course of proceedings to be pursued to take private property and appropriate it to public use. Nor to prevent its exercise to determine the manner in which the value of such property should be ascertained and payment made or tendered. The legislative power is left entirely free from embarassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made therefor."

In *Riche* v. *Bar Harbor Water Company*, 75 Maine, 91, it is stated in an opinion by APPLETON, C. J., "The mode and manner by which the individual, whose property is taken for public use, shall obtain compensation, is to be determined by the legislature. It cannot be determined in any other way."

In neither of these cases was the question here under discussion involved or decided.

In view of the absence of any adjudication upon the subject by this court, and in view of the conflicting dicta by the learned justices in the three cases last cited, the question whether the citizen whose property is taken for public use has the constitutional right to have

his compensation determined by a trial by jury, must be regarded as an open question in this jurisdiction.

The constitutional clause here involved is: "In all civil suits and in all controversies concerning property the parties shall have a right to trial by jury."

The trial by jury guaranteed by the constitution is a trial by a common law jury, impannelled and sitting in a court of competent jurisdiction, presided over by a judge of the court.

It is a significant fact, worthy of consideration in this connection, that in Massachusetts the right of a citizen whose land was taken for highway purposes, to have the damages assessed by a common law jury was not granted under the constitution of that state until 1873, Public Acts 1873, chapter 261; nor was such right granted in this state until 1883; Public Laws 1883, chapter 175, § 4. Prior to these respective enactments damages in such cases were assessed by a committee appointed by the court or by a sheriff's jury, so-called, a jury selected and summoned by the sheriff and presided over by him, or by some other person possessing no judicial functions. The validity or constitutionality of such proceedings do not seem to have been ever questioned in either state.

A proceeding for assessing the amount of just compensation for private property taken for public uses is not "a civil suit." It is a special proceeding, provided and authorized by the sovereign power by whose authority the property is taken, to determine a specific fact. The proceedings are in the nature of an inquisition on the part of the state. *Garrison* v. *City of New York*, 21 Wall. 204; Mills on Eminent Domain, § 84.

It has sometimes been called a proceeding in rem. *St. Paul, Minneapolis & Manitoba Railway Co.* v. *City of Minneapolis*, 35 Minn. 141, 59 Am. Rep. 313; *Cupp* v. *Com. of Seneca County*, 19 Ohio St. 173.

The court of Massachusetts in *Henderson* v. *Adams*, 5 Cush. 610, decided that a complaint for flowing lands was not a demand which could be the subject of an action at law or a suit in equity, but was a particular statute mode of redress which must be pursued. "Suits" and "actions" are practically synonymous. "An action" is defined

by Lord Coke to be "a lawful demand of a man's right." In this state it has been held that, under a provision of the statute declaring that actions pending at the time of the passage or report of an act, are not affected thereby, that a petition pending before the county commissioners for a location of a highway was not an "action." *Webster* v. *County Coms.* 63 Maine, 27; and in *Belfast* v. *Fogler*, 71 Maine, 403, a proceeding in insolvency was not an action.

We are of the opinion that the defendant here, the Maine Water Company, is not entitled by the phrase, "in all civil suits" to have its compensation determined by a trial by jury.

Does the additional language of the same constitutional clause, "and in all controversies concerning property," give it that right?

The sovereign power of the state has the inherent power to take private property for public uses when the public exigencies require it. The only express constitutional condition upon the exercise of such power is that of giving just compensation. It has never been contended that in the matter of the taking of private property by the sovereign for public use, the citizen whose property it is proposed shall be taken, although it is a proceeding concerning property, has the right of a trial by jury upon the question of such taking. In that respect the will of the sovereign power is supreme, notwithstanding the constitutional right to a trial by jury, "in all controversies concerning property." In all cases in which private property is proposed to be taken for public uses, the sovereign power is bound to secure to the citizen whose property it is proposed to so take, just compensation, either by general legislative enactments, or by clear provision of the enabling act. There can be no controversy in this respect between the sovereign and the citizen.

In those states in which the constitution provides no tribunal or method for assessing compensation, the authorities almost uniformly hold that a trial by jury is not a matter of constitutional right.

In New York where the constitution requires compensation for private property taken for public uses, it was held in *Livingston* v. *Mayor of New York*, 8 Wend. 85, 22 Am. Dec. 622, that the trial by jury secured by the constitution applies only to cases of trial of issues of fact in civil and criminal proceedings in courts of justice

and has no relation to assessment of damages of the owners of property taken for streets or other public use, and that the mode of ascertaining such damages belongs to the legislature. The same doctrine is held in Minnesota under like constitutional provisions, in *Ames* v. *Lake Superior & Mississippi R. R. Co.*, 21 Minn. 241, in which the court say, (p. 293): "Proceedings under the right of eminent domain, to ascertain the compensation to be paid in taking private property for public use, have never been considered as actions of law within the meaning of constitutional provisions preserving the right of trial by jury; and except when such proceedings are expressly mentioned in state constitutions, the decisions are uniform that they do not come within the constitution."

The same is held in *Penn. R. R. Co.* v. *Lutheran Congregation*, 53 Pa. St. 445; *Long Island Water Supply Co.* v. *City of Brooklyn*, 166 U. S. 695; *Garrison* v. *City of New York*, 21 Wall. 204; *Scudder* v. *Trenton & Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *In re Lower Chatham*, 35 N. J. L. 497.

III. The third section of the act incorporating the Kennebec Water District provides, that if any person sustaining damages and said corporation shall not mutually agree upon the sum to be paid therefor, such person may cause his damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are or may be prescribed in case of damages by the laying out of highways. This gives to the owner of property taken the ultimate right upon appeal to have his damages assessed by a jury. Section five of the same act provides that if the trustees of the Water District fail to agree with the Maine Water Company, the damages shall be assessed by appraisers to be appointed by the court upon a bill in equity to be instituted by the Water District.

It is claimed by the defense that the different tribunals thus provided for the assessment of damages is a violation of the Fourteenth Amendment of the Federal Constitution which provides that no state "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In the case at bar the act of incor-

poration does not deny to any person, or to the Maine Water Company, the equal protection of the laws. It provides to each person who sustains damages and to the Maine Water Company just compensation. There is no discrimination or inequality in that respect. No different rule is prescribed for the estimation of just compensation in case of individuals, and in case of the Maine Water Company. The act provides for a competent and impartial tribunal in each case with the right of the property owner to appear and be heard. We think that this is all that is required by the terms of the amendment to the Federal Constitution above referred to. The only difference as to the award of compensation is one of procedure. As has already been shown the legislature has entire discretion to designate any impartial tribunal to assess compensation, whether jury, commissioners or appraisers. We perceive no reason for precluding the legislature from prescribing in the same act for the assessment of compensation by different tribunals for different classes of property taken, nor are we aware of any decision of any court holding that the legislature is so precluded. Ordinarily the compensation for tangible property taken may properly be determined by a jury; but when, as in the case at bar, the property and franchises of a large corporation are taken for public uses, and the value, not only of tangible property, but of the franchise, rights, privileges and contracts are factors in determining the amount of compensation to be paid, the legislature may well determine that commissioners or appraisers, the members of which have peculiar skill and experience in such matters, can, better than a jury, do exact justice to the corporation whose property has been condemned and taken.

We are of the opinion that the act here in question by prescribing a different tribunal for fixing the amount of just compensation to the Maine Water Company than that prescribed for fixing the compensation to other parties is not "without due process of law," and does not deny to any person or to the Maine Water Company, "the equal protection of the laws," and is not repugnant to the Fourteenth Amendment of the Federal Constitution.

IV. It is urged, as another ground of defense, that the charter of

the Kennebec Water District is unconstitutional and void for the reason that it impairs the obligations of contracts. The argument is that the Waterville Water Company has made valid and now existing contracts for supplying water to the city of Waterville and other municipalities; that the act of 1899, if carried out, necessarily destroys the ability of the Waterville Water Company or the Maine Water Company, its successor, to keep its contracts, either with Waterville or the other towns.

We cannot sustain this ground of defense. This precise question was directly in issue and was decided adversely to the contention of the defense in *Long Island Water Supply Co.* v. *City of Brooklyn*, supra, where it is held, p. 690, referring to the argument, as made here by the defense, "the vice of the argument is two-fold. First, it ignores the fact that the contract is a mere incident to the tangible property; that it is the latter, which, being fitted for public uses is condemned. And while the company, by being deprived of its tangible property is unable to perform its part of the contract, and therefore can make no demand upon the town for performance of its part, it still is true that the contract is not the thing which is sought to be condemned, and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property. Second, a contract is property and, like any other property, may be taken under condemnation proceedings for public use." And it is further stated, p. 691: "The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses." See also *West River Bridge*, supra, p. 532; Cooley's Const. Lim. 5th Ed., p. 346, et. seq.

Could the contention of the defense on this point be sustained, then the existence of the contract would withdraw the property, during the life of the contract, from the scope of the power of eminent domain.

V. The city of Waterville, a defendant in this case, contends that the provisions of the act creating the Kennebec Water District, if carried out, will increase the indebtedness of that city beyond its con-

stitutional debt limit and is, therefore, in contravention to Amendment I, Art. XXII of the Constitution of Maine, which reads as follows:

"No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed five per centum of the last regular valuation of said city or town."

It appears from the report that the valuation of the city of Waterville, April 1, 1899, was $4,902,767, and that its net indebtedness on that day was $230,000.

It is admitted by the plaintiff corporation that the valuation and indebtedness of the city on April 1, 1899, should be taken as correct for all times involved in this proceeding; and that the value of the property proposed to be taken by this process exceeds $100,000.

Applying well known rules of constitutional construction to the language of Amendment I, above quoted, it is obvious that it applies only to cities and towns. The language of the amendment is clear, plain and unambiguous. It can apply to cities and towns only, and not to any other form of municipal or quasi municipal bodies.

The question is, therefore, whether a debt or liability created and incurred by the Water District will be a debt or liability of the city of Waterville.

The Kennebec Water District is a quasi municipal corporation. It is declared to be such by § 10 of its enabling act. The powers, the rights and the property of the new corporation rest exclusively in it, and in no degree in the city of Waterville.

That the legislature has authority to create the Water District as a quasi municipal corporation cannot be successfully questioned. In *People* v. *Salomon*, 51 Ill. 37, in which was involved the authority of the legislature of Illinois to create the South Park Commissioners, the court, sustaining the authority of the legislature, declares, "There is no prohibition which we have been able to discover, and we have been pointed to none, against the creation by the legislature, of every conceivable description of corporate authority, and when created to endow them with all the faculties and attributes of other pre-existing corporate authorities. Thus, for example, there is nothing in the constitution of this state to prevent the legislature

from placing the police department of Chicago, or its fire department, or its water works, under the control of an authority which may be constituted for such purpose by a vote of the people, and endow it with the power to assess and collect taxes for their support, and confide to it their control and government."

In the case at bar, the power to take private property for public use is granted to the Water District and not to the City of Waterville; compensation for the property so taken is to be paid by the Water District; the title to the property which may be acquired by voluntary or enforced purchase is to vest in the District; to provide funds for the payment of property purchased or taken the district is authorized to issue bonds which, by the express terms of its charter, shall be legal obligations of the Water District.

The charter of the Water District confers no authority on the part of that corporation to create or incur indebtedness against the city, nor does it provide that the city shall be liable for any debts or liabilities incurred by the Water District.

In *Wilson* v. *Board of Trustees*, 133 Ill. 443, a case parallel in principle to that here at bar, it is held that the constitutional limitation upon the extent of corporate indebtedness applies to each municipal corporation singly, and where one such corporation may partially embrace the same territory as others, it may contract corporate indebtedness without regard to the indebtedness of any other corporate body embraced wholly or in part in its territory.

The same doctrine is held in the late case of *Tuttle* v. *Polk*, 92 Iowa, 433. The court says: "It [the constitution] recognizes the county and other political and municipal corporations as being distinct entities. Although none can incur an indebtedness in excess of five per centum of the value of the taxable property within its limits, yet the same territory, and, therefore, the same property, may be included within the limits of different corporations, as those of a county, city or town, and be subject to taxation for the debt of each."

As bearing upon the point here involved, we cite further, *C. B. & Q. R. R. Co.* v. *County of Otoe*, 16 Wall. 667; *Pattison* v. *Supervisors of Yuba Co.* 13 Cal., 175; *Hallenback* v. *Hahn*, 2 Neb. 377; *Owners of Lands* v. *The People*, 113 Ill. 296.

We hold that the indebtedness of the city of Waterville can, in no event, be increased by the provisions of the charter of the plaintiff corporation, and that the objections of the defense in this respect cannot be sustained.

VI. The reasoning and the authorities cited above on the question of debt limitation, apply with equal or greater force, adversely to the objection of the defense that the provisions of the plaintiff's charter authorize double taxation. The charter nowhere authorizes the Water District to assess or collect a tax upon the people or property included within its limits. As has already been shown, the city of Waterville is not liable for any indebtedness or liabilities of the District, and cannot therefore assess a tax on account thereof.

Exception to the overruling of the demurrer overruled. Bill sustained with costs. Case remanded to the court below for further proceedings in accordance with this opinion.

STATE OF MAINE *vs.* JOSEPH E. N. BOHEMIER.

Androscoggin. Opinion March 5, 1902.

Corporations. Const. Law. Police Power. Physicians and Surgeons. Criminal Practice. U. S. Const. Art. 1, § X, Par. 1. R. S., c. 46, § 23. Stat. 1895, c. 170. Spec. Laws, 1868, c. 597.

1. The act of 1895, c. 170, entitled "An act to regulate the practice of medicine and surgery" is within the legislative power.
2. There is nothing in the charter of the Maine Eclectic Medical society, c. 597 of the special laws of 1868, which exempts its members or licensees from the operation of the act of 1895, c. 170.
3. Said charter does not contain any express limitation of the power of the legislature reserved in R. S., c. 46, § 23; hence the legislature has full power to amend, alter or repeal said charter at any time.
4. That the act of 1895, c. 170, in terms exempts from its operation "a physician or surgeon who is called from another state to treat a particular case, and who does not otherwise practice in this state" does not bring the act in conflict with the XIVth amendment to the United States constitution. No arbitrary or unjust discrimination appears to be made by that provision.
5. *Semble*, that the law court will not consider a case of felony on report, but only after plea of guilty or verdict of guilty.

On report. Judgment for the state.

Indictment for practicing medicine and surgery without registration.

The case is stated in the opinion.

W. B. Skelton, county attorney, for State.

H. L. Whitcomb, for respondent.

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

EMERY, J. The defendant, a resident of this state, was indicted for practicing medicine and surgery for hire within this state without being registered by the State Board of Registration of Medicine and Surgery as required by c. 170 of the Public Laws of 1895, entitled

"An act to regulate the practice of medicine and surgery." He formally admits of record that he did so practice without being thus registered. He also concedes, or at least does not question, the constitutional power of the legislature, in the exercise of the police power, to regulate the practice of medicine and surgery within this state, and even to the extent of requiring all persons thereafter proposing to practice medicine or surgery for hire to be registered and licensed as provided in this statute. *Dent* v. *West Virginia*, 129 U. S. 114; *State* v. *Curran*, 87 N. W. R. 561, (Wis.)

The defendant claims, however, that this particular statute is inoperative against him personally for two reasons.

I. Before the passage of the statute in question he had obtained from the Maine Eclectic Medical Society, a corporation chartered by the State, by c. 597 of the special laws of 1868, a license to practice medicine and surgery for hire within this State. His argument is, that by incorporating the Maine Eclectic Medical Society with "such powers and privileges as pertain to other like corporations" the State contracted with the society and its regular licensees to permit them to practice medicine and surgery in this State without being subject to any additional rules or limitations not imposed by the society itself; and that the act of 1895, c. 170, impairs the obligation of this contract.

We cannot find in the special act of 1868, c. 567, incorporating the Eclectic Society, any words importing a contract with the society or its members that any of its members or licensees shall be exempt from such rules and limitations or conditions, as the legislature might from time to time find necessary to impose upon the practitioners of medicine and surgery, for the better protection of the health of the people. We find no such words in any charter of any medical society. We find in none of them any stipulation of any kind that its members may for all time practice medicine and surgery unrestrained by the police power of the legislature.

But, if there were any such stipulation or contract expressed or implied in the charter, it was revocable at the pleasure of the legislature. The statute R. S., c. 46, § 23, first enacted in 1831, and

declaring that "acts of incorporation may be amended, altered or repealed by the legislature as if express stipulation were made in them, unless they contain an express limitation," was in existence when the Maine Eclectic Medical Society was incorporated in 1868, and that act of incorporation contains no express limitation. The legislature, therefore, reserved full power to revoke any privilege therein granted. Hence, if the act of 1895, c. 170, did rescind any agreements made in the act of incorporation of the society, it does not impair the obligation of any contract. *Tomlinson* v. *Jessup*, 15 Wall. 454; *State* v. *Maine Central R. R. Co.*, 66 Maine, 488.

II. In § 10, of the act of 1895, c. 170, it is provided that the act shall not apply "to a physician or surgeon who is called from another state to treat a particular case and who does not otherwise practice in this state." The defendant contends that this is a discrimination against residents of this state in favor of those of other states which is forbidden by the XIVth amendment to the constitution of the United States, and which therefore destroys the whole act. In support of this contention he cites *State* v. *Montgomery*, 94 Maine, 192, 80 Am. St. Rep. 386, and several other similar cases. All the cases cited, however, arose out of alleged discriminations in matters of business, trade or manufactures and outside of the police power of a state. They were also cases in which the state had attempted to put special business burdens on citizens of other states which it did not impose on its own citizens.

The XIVth amendment does prohibit arbitrary discrimination between persons, or fixed classes of persons, such as that based on color, or race, or nationality, or state citizenship. It does not prohibit reasonable discrimination based on the requirements of the public health or morals. In this legislation (Act of 1895) there is no attempt at oppression of any fixed class of people, nor at denying equal rights to any fixed class. It is purely police legislation, designed solely for the promotion of the health of all the people within the state of whatever color, race, or citizenship. To effectuate this purpose, it requires all persons practicing or proposing to practice "medicine or surgery within this state for gain or hire" (i. e. as

a business) to furnish the statutory evidence of their qualifications." All persons within this class, whether white or black, citizens or aliens, have the same rights and duties without any discrimination between them. The defendant admits he is within this class and he does not show any discrimination against him in favor of any other person in the same class.

The statute, however, still in the interest of the health of the people, allows a physician or surgeon to be called from another state to treat a particular case without first applying for registration and certificate under the statute, provided he does not otherwise practice in this state. Here is another and distinct category from that above named. The defendant is not within this class because he is otherwise practicing in this state. The distinction made by the legislation between the two classes is certainly not arbitrary. It is one clearly required by circumstances and by the purpose of the act, viz: the health of the people. It does not break against the XIVth amendment nor against any other constitutional provision to which our attention has been called. *Dent* v. *West Virginia*, 129 U. S. 114; *State* v. *Curran*, 87 N. W. Rep. 561, (Wis.)

III. The offense with which the defendant is charged being a misdemeanor only, we have taken cognizance of the case on report. Were the offense a felony, we might not feel authorized to do so until there had been a plea of guilty or a verdict of guilty. According to the terms of the report the entry should be,

Judgment for the state.
The respondent to be sentenced.

JOHN P. RACKLIFF *vs.* ARTHUR I. RACKLIFF.

Franklin. Opinion March 7, 1902.

Water. Diversion. Deed.

In an action for the diversion of water from plaintiff's mill, situated upon Muddy Brook stream, below the mills and dams of defendant, it appeared that in 1860, S. B. Philbrick became the owner of a tannery and a lot of land of about two acres on the east side of the brook. His deed was bounded by the easterly side of the stream, which excluded all common law rights in the stream as riparian proprietor. This deed granted to him "the right to draw water from the upper dam (at outlet of pond) when there is more than three and one-half feet of water in the flume, for the use of all tanning purposes."

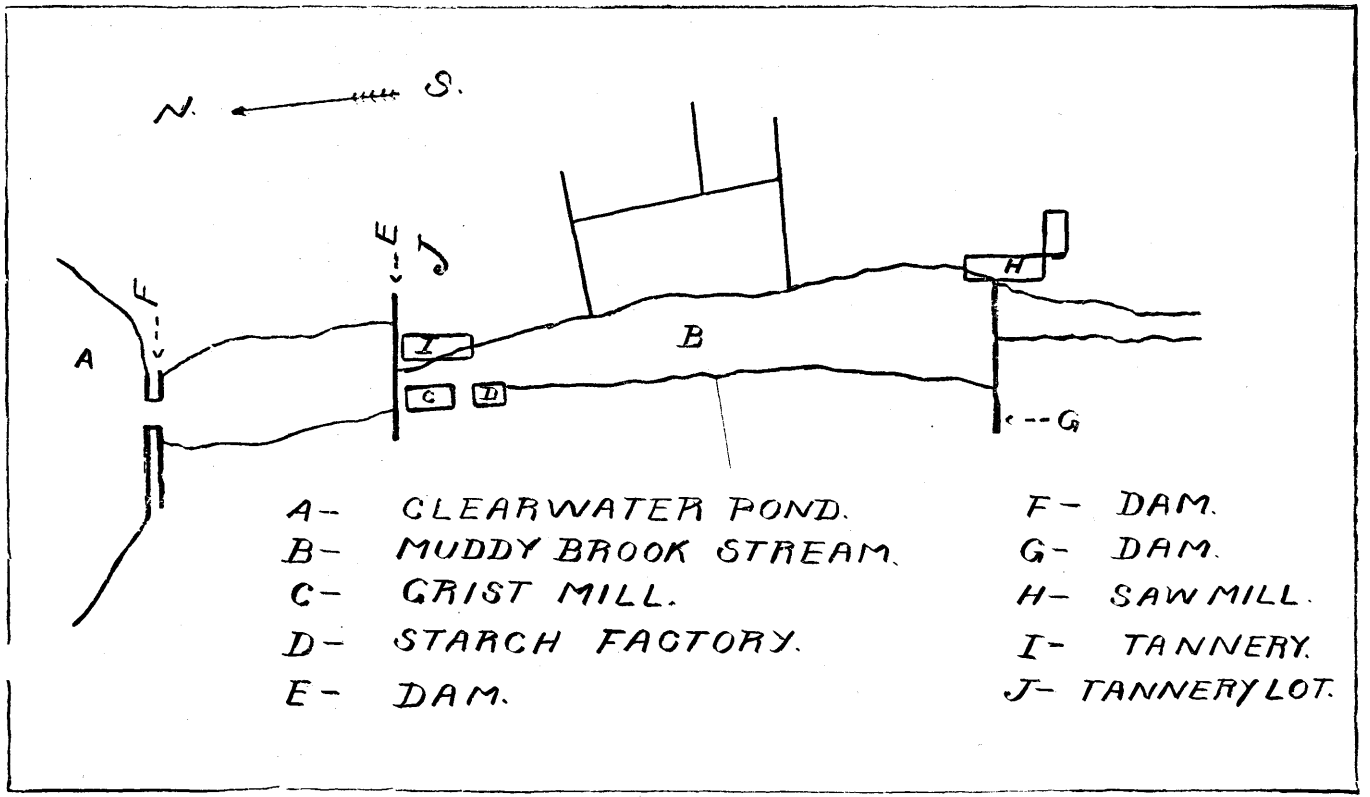
Held; that this grant is limited to a particular use—that of tanning purposes, and is not a measure of power.

1868, Hinkley, who then owned all the water rights at the outlet of the pond, and on the stream, together with the land on both sides, except the tannery lot, conveyed to Waugh the premises now owned by the plaintiff, which included the lower dam and saw-mill and mill pond to the same. This dam was nearly five hundred feet below the dam next above it. In that deed was granted "the right and privilege to draw and use water from Clearwater pond sufficient to carry one wheel in said saw-mill for the purpose of manufacturing timber," etc., "meaning one of the wheels now in the said mill or any other wheel venting or requiring no more water to carry it. Said water to be taken through the dam, flumes and pond of the other mills on the stream above the saw-mill."

On December 1, 1900, defendant was the owner of the tannery lot, the dam at the outlet of the pond, and all the land on both sides of the stream from the pond to plaintiff's land, with the mills thereon, and all water rights thereto appertaining, except the right which plaintiff had as derived under the Waugh deed. He erected upon the tannery lot a saw-mill, and used water to propel it.

Held; that the union of absolute title to the tannery lot, with all the other land on both sides of the stream above plaintiff's land, extinguished the easement in the tannery lot. Thenceforward the defendant, as riparian proprietor, had the right to the reasonable use of all the water of the stream, subject only to the right plaintiff derived under the Waugh deed.

The plaintiff did not claim that he has been deprived of the water granted under that deed, and therefore has suffered no damage.



A- CLEARWATER POND.
B- MUDDY BROOK STREAM.
C- GRIST MILL.
D- STARCH FACTORY.
E- DAM.
F- DAM.
G- DAM.
H- SAW MILL.
I- TANNERY.
J- TANNERY LOT.

On report. Judgment for defendant.

Action on the case for diversion of water.

The facts appear in the opinion.

Frank W. Butler, for plaintiff.

J. C. Holman and *H. Hudson*, for defendants.

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

STROUT, J. Muddy Brook stream is the outlet of Clearwater Pond in Industry. Prior to 1860 there was, and still is, a dam at the outlet of the pond, which controls the supply of water for the mills on Muddy Brook stream. About 450 feet below this dam there was, and now is, a dam across the stream. At that dam, on the west side of the stream, there was then a grist-mill and starch factory, and later a shovel-handle mill on the site of the starch factory. Opposite, on the east side of the stream, there was a tannery. Nearly five hundred feet below these mills there was, and still is, another dam and a saw-mill. Prior to that time Newman T. Allen and Benjamin Allen owned all the dam, and all the water rights and privileges at the outlet of the pond, and all the land on both sides of the stream used as mill privileges or mill yards, from the outlet of the pond to and including the plaintiff's premises.

October 22, 1860, S. B. Philbrick became the owner of the tannery and tannery lot of about two acres, on the east side of Muddy Brook, by conveyance from the Allen heirs. The deed bounded the lot by "the easterly side of the stream," thus excluding all common law rights in the stream as riparian proprietors, leaving the whole water power of the stream in the grantor. But the deed granted to Philbrick "the right to draw water from the upper dam (at outlet of pond) when there is more than three and a half feet of water in the flume, for the use of all tanning purposes," with a limitation as to user when the water in the flume was below three and one-half feet. The grantee in this deed was required to keep in repair one-eighth of the upper dam (at the pond) and that part of the grist-mill dam east of the wasteway, a clear indication that the parties

contemplated a much larger use of the water power by the grantor than by the grantee.

May 18, 1868, Amos S. Hinkley, who then owned all the water rights at the outlet of the pond, and on the stream, together with the land on both sides, except the tannery lot, conveyed to Oliver and Bryce H. Waugh a parcel of land, which included the lower dam and saw-mill and the mill pond to the same. This dam was nearly five hundred feet below the dam of the grist-mill and shovel-handle factory. The northerly line of this lot was about 250 feet south of and below the grist-mill dam. The plaintiff owns the land and privileges conveyed to the Waughs by Hinkley. The deed granted to Waugh "the right and privilege to draw and use water from Clearwater pond sufficient to carry one wheel in said saw-mill for the purpose of manufacturing timber, boards, shingles, clapboards, laths and pickets, meaning one of the wheels now in the said saw-mill or any other wheel venting or requiring no more water to carry it. Said water to be taken thróugh the dam, flumes and pond of the other mills on the stream above the saw-mill." But he was forbidden to draw water below the depth of four feet above the bottom of the flume, or to draw or use any in the night time.

On November 1, 1900, the defendant had become the owner of the tannery lot, the dam at the outlet of the pond, and all the land on both sides of the stream from the pond to the plaintiff's land, with the mills thereon, and all water rights appertaining thereto, except the right which plaintiff held as derived under the Waugh deed. At the same time the plaintiff owned the land on both sides of the stream south of and below defendant's land, with the right to water as granted in the Waugh deed.

In place of the tannery which formerly stood on the tannery lot, but which had ceased to exist, defendant has a saw-mill which he has operated by water from the pond and his dam next below.

Plaintiff claims that defendant has "diverted, withdrawn and turned aside large quantities of water from his mill and prevented the same from flowing down said stream as it ought to have done," to his detriment. The gravamen of his claim is, that the deed to Philbrick of the tannery lot granted the use of water for tanning

purposes only, and that when the tannery ceased to exist, and the defendant erected a saw-mill in its place, his use of water for that saw-mill was unauthorized.

To arrive at a true construction of the grant of water right in the Philbrick deed, which was "the right to draw water . . . . . for the use of all tanning purposes," it is necessary to view it from the standpoint of the parties at the time. The land conveyed was carefully bounded by the east side of the stream, thus excluding all common law rights to the water as riparian proprietors. The only right to water which Philbrick acquired, was the specific grant above quoted. At that time the grantor had a grist-mill and starch factory on the west side of the stream opposite the tannery lot. While he had no objection to the operation of the tannery, he might well object to a competing mill on that lot, which would quite likely depreciate the value of his mills and lessen their profits. The tannery was then in existence, and of course in the minds of the parties. The grant was "for the use of all tanning purposes," not of sufficient water for such purposes, but limited to that purpose. The language is clear and the intention unmistakeable. It was not used as a measure of power, but a limitation upon its use. *Deshon* v. *Porter*, 38 Maine, 289, is a case very closely analogous. In *Covel* v. *Hart*, 56 Maine, 518, the grant was of "a right to draw water from the saw-mill flume sufficient to carry on the business of tanning in said yard," and it was held to be a measure of power, and not a limitation to a particular use, and "restricted substantially to the amount of water which was sufficient to carry on the business of tanning in the yard, as it was carried on at the time of the date of the deed." But in arriving at that conclusion the court laid stress upon various terms in the deed, indicative of intention, which are not found here. Besides, the language in that case was water "sufficient to carry on" a tanning business, which might be regarded as a measure of power, while the term here is water "for the use of all tanning purposes," which affords a strong indication that the parties had in view the tannery then existing, and not any prospective substituted use. The many cases cited from this and other jurisdictions all turn upon the language of the grant, as water "sufficient for one fulling wheel,"

"sufficient to carry a turning lathe," "water sufficient to drive the factory and machinery attached," "sufficient to carry a water wheel," etc., all evidently and plainly indicating a measure of power rather than designation of use.

In this case we can have no doubt that the grant was limited to tanning purposes, to that "use" only, having special reference to the tannery then existing, and cannot be regarded as a measure of power.

But this construction is not decisive of the rights of the parties to this suit. The grant to Philbrick was of an easement in the land and water rights of the grantor. The latter retained to himself the right to use all the water from his two dams and flowing in the stream, except that specifically granted. The subsequent grant to Waugh of a specific quantity of water, conferred upon him no right as to the prior grant to Philbrick. Waugh could not complain of the use or non use of its easement by the tannery lot.

On November 1, 1900, the defendant was the owner in fee of the dominant and servient estates. He then owned the dams at the pond and at his mills and all the water rights at the pond and on the stream, and the land on both sides of the stream, subject only to the right granted by the Waugh deed, then held by the plaintiff. Such union of title in the defendant extinguished the easement before that attached to the tannery lot. Jones on Easements, § 835; *Warren* v. *Blake*, 54 Maine, 276, 89 Am. Dec. 748; *Dority* v. *Dunning*, 78 Maine, 381. Thenceforward the defendant possessed all the common law rights of a riparian proprietor in the water from the pond to plaintiff's land, subject only to his right to draw water as granted by the Waugh deed. Plaintiff owned the land conveyed by the Waugh deed, through which Muddy Brook stream run. Whatever common law rights he had as such riparian owner, if not eliminated by acceptance of the easement granted in the Waugh deed, are unaffected by the use of the tannery lot for a saw-mill. Neither, as holding the secondary easement, can he object to the extinguishment of the first.

As riparian proprietor on both sides of the stream from the pond to plaintiff's land, the defendant is unaffected by the limitation in the grant of the tannery lot, and has the full right of reasonable use of

the water from the pond, modified only by the plaintiff's right to draw water for one wheel from the pond through defendant's flumes, according to the grant in the Waugh deed. If the defendant's substituted use of water for a saw-mill on the tannery lot does not injuriously affect the easement of plaintiff, he cannot complain. So long as defendant runs through his flume sufficient water to run plaintiff's wheel, he receives all that was granted in the Waugh deed. If this was not done, plaintiff had the right to have the gates at defendant's mill or at the pond opened sufficiently to accomplish it. If, in addition, plaintiff had any right of water as riparian proprietor where his land borders on the stream, such right was subject to a reasonable use of the water by the defendant higher up on the stream. Both parties undoubtedly expected defendant to use water for his mills, and he could not be required to shut them down to retain water as a reservoir for plaintiff, but might make such use of the water as did not unreasonably interfere with plaintiff's rights. The plaintiff was not charged with the maintenance of either of the dams owned by defendant, or any part of them. That burden lies upon defendant solely. He, of course, has no right to make such excessive or wasteful use of the water as unreasonably to injure plaintiff's mill.

Applying these principles, the plaintiff does not complain of wasteful use of water by defendant, except as he says, water run over his dam on one day. But on that day defendant's mill had run but a few minutes. The excess of water, if any, resulted from leaky dams — nor does it appear that defendant unreasonably held back the water. The evidence fails to show that plaintiff was deprived of water sufficient for his one wheel by any unreasonable or improper act of the defendant. The plaintiff says that he commenced sawing about the last of March. "Had water enough except the day when I hoisted the gate;" "think I have hoisted three times;" "some of the time he (defendant) accommodated me to run it through the Johnson, (one of defendant's) mills;" "there has been enough water this spring, plenty of it, more than I wanted." The diversion complained of is from November 1, 1900, to March 30, 1901, and yet during this

time plaintiff says he has had water enough. He apparently has no right to complain.

If, notwithstanding the defendant has operated a saw-mill on the tannery lot, by water from the pond, the plaintiff has been supplied with all the water to which he was entitled under the grant in the Waugh deed, and no unreasonable use has been made by defendant, he is not injured by the substituted use. Until he suffers damage therefrom he cannot maintain any action for such use. No evidence of damage to plaintiff is introduced. On the contrary, plaintiff says he has had water enough, even more than he wanted, during the period complained of. He does not claim that the excess has done him harm, except that he fears he may need the water at some future time, an apprehension that may never ripen into a fact. It is immaterial to the plaintiff whether defendant used all his water power on the west side of the stream or partly on the east side.

Judgment for defendant.

EUGENE JACQUES *vs.* JOHN P. PARKS, and another.

Aroostook. Opinion March 8, 1902.

Arrest. Tax Warrant. Jurisdiction. Officer. Damages. R. S., c. 6, §§ 182, 184; Stat. 1893, c. 155.

1. An officer is protected in the service of process, if it issues from competent authority and is legal upon its face. Warrants issued by inferior magistrates must show upon their face legal authority for their issue.
2. A tax warrant is illegal which contains no statement that the town had fixed a time for payment, nor directed the officer, before arrest, to deliver to plaintiff or leave at his last and usual place of abode, a summons from the collector issuing it "stating the amount of tax due, and that it must be paid within ten days from the time of leaving such summons," as required by statute.
3. *Held;* in this case, that the warrant failed to show authority in the collector to issue it, and was upon its face invalid and void. It afforded no protection to the officer.

4. The plaintiff was assessed a tax in Caribou in 1897. Not being paid, King, collector of taxes and one of defendants, issued a warrant of distress against him, directed to the sheriff or his deputies. Parks, the other defendant, a deputy sheriff, received the warrant and arrested and committed plaintiff to jail, where he remained thirteen days, when he was released upon payment of a sum more than double the amount of the tax. The statute authorized the issuance of a warrant to distrain the person or property of the delinquent "after the expiration of the time fixed for payment by vote of the town." The town had not by vote fixed any time for payment of taxes that year. This was a condition precedent to the right to issue a warrant. King, therefore, had no authority to issue it.

5. The arrest of plaintiff was made under the direction of an illegal warrant issued by King, and the actual arrest was made by Parks upon that illegal warrant. Both are therefore liable for the illegal arrest and imprisonment.

In assessing damages by the law court as stipulated by the parties, it is considered by the court, that the plaintiff was detained thirteen days, and obliged to pay twenty-three dollars and thirty-five cents in excess of the tax to obtain his release, and was exposed to harsh treatment after his arrest, by being compelled to ride, on a cold afternoon in December, in wet clothing, without outside wraps, a distance of several miles. In view of all the circumstances, the damages were assessed at one hundred dollars.

On report. Judgment for the plaintiff.

Action of personal trespass and false imprisonment brought by Eugene Jacques of Van Buren, against John P. Parks of Cyr Plantation and Carl C. King of Caribou.

The case is stated in the opinion.

A. W. and J. B. Madigan; P. C. Keegan, for plaintiff.

I. G. Hersey and B. L. Fletcher, for defendants.

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

STROUT, J. King, one of defendants, was collector of taxes of Caribou for the year 1897. In the tax lists committed to him was an assessment against the plaintiff for seventeen dollars and ninety-six cents. The tax being unpaid, King as collector, on the twenty-fourth day of October, 1898, issued his warrant to the sheriff of Aroostook or his deputies, purporting to be under and by virtue of c. 155 of the Laws of 1893, amendatory of c. 6, § 182 of R. S. That statute authorized the collector to issue a warrant "to distrain the person or

property of any person delinquent in paying his taxes after the expiration of the time fixed for payment by vote of the town." The vote of the town fixing time for payment is made a condition precedent to the authority of the collector to issue his warrant of distress. It is admitted that the town of Caribou did not by vote prescribe any time for payment of taxes for that year. King, therefore, had no authority to issue the warrant. *Snow* v. *Weeks*, 77 Maine, 429.

The warrant was placed in the hands of Parks, a deputy sheriff and the other defendant in this suit, who arrested the plaintiff, and committed him to jail, where he remained thirteen days, when he was discharged on payment of the tax and costs, amounting to forty-one dollars and eleven cents.

An officer is protected in the regular service of process, if it issues from competent authority and is legal upon its face. Warrants issued by inferior magistrates must show upon their face legal authority for their issue. It cannot be presumed. *Gurney* v. *Tufts*, 37 Maine, 130, 58 Am. Dec. 777; *Brown* v. *Mosher*, 83 Maine, 111, 23 Am. St. Rep. 761. This warrant contained no statement that a vote of the town had fixed a time for payment of taxes, nor did it direct the officer, before arrest, to deliver to the plaintiff, or leave at his last and usual place of abode, a summons from the collector issuing it, "stating the amount of tax due, and that it must be paid within ten days from the time of leaving such summons," as required by R. S., c. 6, § 184. This section applies to warrants issued under § 182.

The warrant failed to show authority in the collector to issue it, and omitted a direction to leave the summons required by law, which should have been, but was not, issued by the collector; and it was upon its face invalid and void. It therefore afforded no protection to the officer. *Snow* v. *Weeks*, 77 Maine, 429; *B. & M. R. R.* v. *Small*, 85 Maine, 462, 35 Am. St. Rep. 379.

The arrest of plaintiff having been made under the direction of an illegal warrant issued by King, and the actual arrest having been made by Parks, both of them are liable for the illegal arrest and imprisonment.

By the report this court is authorized to assess the damages.

The plaintiff was detained thirteen days, and obliged to pay twenty-three dollars and thirty-five cents in addition to the tax to obtain his release, and was exposed to harsh treatment after his arrest, by being compelled to ride, on a cold afternoon in December, in wet clothing without sufficient outside wraps, a distance of several miles. In view of all the circumstances, we assess the damages at one hundred dollars.

Judgment for plaintiff for one hundred dollars.

CHARLES J. McLEOD, and another, *vs.* CALVIN J. JOHNSON.

Penobscot. Opinion March 10, 1902.

Evidence. Replevin. Fraud. Warranty. Estoppel. Res Gestae. Pleading.

Words spoken or acts done when the act litigated is being executed are not always res gestae.

In a replevin suit it appeared:—

That on October 10, 1899, plaintiffs and defendant agreed in writing that defendant should cut, haul and drive certain logs; should the logs cut, upon a re-scale for sale, overrun the stumpage sale, defendant was to be paid for such overrun, and all the horses and camping outfit used in the operation, except what should be hired, were to become the property of plaintiffs until the contract should be fulfilled and settlement made. December 9, 1899, the defendant by a bill of sale, with covenants of warranty and ownership, conveyed to the plaintiffs the property replevied, being the horses, etc., above mentioned. Defendant could neither read nor write and signed both instruments by mark.

Plaintiffs claimed title under these two instruments.

The defense was the general issue, non cepit; and by brief statement, property in the defendant and not in the plaintiff; that the bill of sale was obtained of the defendant through fraudulent representation; that the plaintiffs fraudulently, with intent to obtain the defendant's signature to the contract, failed to read or make known to him the provision that the horses and outfit were to become plaintiffs; and, lastly, that both the agreement and the bill of sale were not genuine.

Neither the amount of logs cut by the defendant, his compensation therefor, nor the fact that a balance was due the plaintiffs on the logging operation, was in dispute.

There was a special finding by the jury that the bill of sale was executed by the defendant with full knowledge of its contents.

One of the plaintiffs upon cross-examination was asked the following question: "Didn't you state to Mr. Johnson (the defendant) in Mr. Marsh's office in Old Town, at the time this contract was executed, that if he could bury up any of those logs or put them under the ice and not let the scaler turn in a true account of them, that he could make something out of it?"

Held; that the language supposed by the question does not tend to prove fraud in the inception of the contract, since it does not appear by the exceptions that the supposed words, if spoken, were intended to induce or did induce the defendant to sign the contract; they cannot therefore be regarded as part of the res gestae.

The defendant offered to show by his own testimony the conversation between the parties to the contract, at the time and place of its execution, concerning the provision therein relating to the extra compensation for the overrun of the sale scale.

Held; that the testimony was properly excluded. There is no ambiguity in the clause above referred to. If the conversation offered took place before the contract was signed, it was inadmissible as the contract was afterward reduced to writing; if it took place after the signing, it was clearly inadmissible.

Held; that evidence tending to show the property in some of the horses to be at the date of the writ in persons not parties to this suit was only admissible as bearing upon the defendant's conduct, for since the jury found the bill of sale was executed and delivered by defendant with full knowledge, he is estopped as against the plaintiffs from setting up title at the date of the writ in third parties, not deriving title from the plaintiffs.

Held; also, that, where the only question raised by the plea is that of title, defendant cannot show himself not in possession of the chattels in controversy at the date of the writ, for the purpose of defeating the action.

Exceptions by defendant. Overruled.

Replevin for several horses.

Besides the general issue of non cepit and the four special grounds of defense mentioned in the opinion, each of which was separately stated and numbered, the first item in the brief statement was as follows: — "First: That at the time when said goods and chattels were replevied by the plaintiffs, the property of the same was not in the

plaintiffs or either of them ; nor was the property of any part thereof in the plaintiffs or either of them."

It appeared by the exceptions that the testimony of Charles J. McLeod, one of the plaintiffs, tended to show that the defendant, at the time of the execution of said contract, agreed to give a bill of sale of the horses at a later time ; and that it was plaintiffs' contention at the trial, that in pursuance of such agreement the bill of sale was given, and that defendant operated under the contract.

The facts appear in the opinion.

P. H. Gillin and T. B. Towle, for plaintiffs.

The case shows that testimony was offered that the defendant was to give a bill of sale of the horses owned by him at a later date.

The ruling that the defendant was estopped from showing title in third parties not deriving title from the plaintiffs, for the purpose of defeating the action, was correct for two reasons.

First. Because defendant alleges in his brief statement the title to all the horses to be in himself, and does not anywhere allege, nor was plaintiff apprised that it was claimed that the title to any of the horses replevied was in persons not parties to the suit.

It is well settled that non cepit admits the property in the plaintiffs, and the defendant under that plea is not at liberty to dispute it, and he thereby throws upon the plaintiffs the burden of proving only that he wrongfully took, or wrongfully detained the goods at the place alleged. *Sawyer* v. *Huff,* 25 Maine, 464 ; *Bettinson* v. *Lowery,* 86 Maine, 218. But, on the other hand, if defendant avows the taking and justifies it on the ground that the goods belonged not to plaintiffs but to defendant, and so demands a return, the question then becomes as to the property and right of possession of the plaintiffs ; and this must be shown only as against the defendant. *Lewis* v. *Smart,* 67 Maine, 206.

The defendant having set out that he was the owner of the property, could not under his pleadings introduce evidence tending to show title to some of the horses in third parties.

Second. Defendant is estopped by the covenants in the bill of sale, which the jury found he had executed and delivered with full knowl-

edge of its contents, and wherein he avouched himself to be the true and lawful owner. *Hammond* v. *Woodman*, 41 Maine, 177, 66 Am. Dec. 219; *Temple* v. *Partridge*, 42 Maine, 56; *O. Sheldon Co.* v. *Cooke*, 177 Mass. 441; *Dewey* v. *Field*, 4 Met. 381, 38 Am. Dec. 376; *Mitchell* v. *Ingram*, 38 Alabama, 395; *Bursley* v. *Hamilton*, 15 Pick. 40, 25 Am. Dec. 433; *Dezell* v. *Odell*, 3 Hill, N. Y. 215, 38 Am. Dec. 628; Greenleaf on Evidence, 15th Ed. Vol. I, § 22 and § 23; Am. & Eng. Enc. of Law, Vol. 3, page 828; *Longfellow* v. *Longfellow*, 61 Maine, 590; Parsons on Contracts, 8th Ed. Vol. II, *788.

Evidence of the declarations and conversations at the time of the execution of the contract were properly excluded as being immaterial, irrelevant and not germane to the issue; because it appears admittedly that neither the amount of logs cut by the defendant, his compensation therefor, nor the fact that a balance was due plaintiffs from defendant on the logging operation, was in dispute at the trial.

Again, the evidence offered which was excluded, has no tendency to prove fraud on the part of anybody.

If there was any fraud, the doctrine of pari delicto applies and the defendant was as much a party to it as the plaintiffs. He cannot, therefore, now assert his fraud and claim as a right any advantage resulting from it. *Taylor* v. *Weld*, 5 Mass. 108; *Ayers* v. *Hewett*, 19 Maine, 281; *Nichols* v. *Patten*, 18 Maine, 231, 36 Am. Dec. 713; Parsons on Contracts, Vol. II, 8th Ed. *782, *783.

Hugo Clark and H. L. Fairbanks, for defendant.

The first item in the brief statement is a pure negative plea which puts the burden of proof on plaintiff, and is sustained as a perfect defense by any proof which shows the property not in plaintiff. Its truth is therefore established by showing title in a third party. *Johnson* v. *Neale*, 6 Allen, 227, 228; *Dillingham* v. *Smith*, 30 Maine, 370, 382.

The defendant was entitled to put in as many defenses as he elected and had all the rights incident to each.

The fact that some one plea put in might carry an implied admission, if interposed alone and another put the plaintiff to his proof of the same point, must result to the advantage of the defendant, not

plaintiff; so far as the proof required is concerned. R. S., c. 82, § 22; *Nye* v. *Spencer*, 41 Maine, 272; *Moore* v. *Knowles*, 65 Maine, 493.

The bill of sale, if given at all, was a further assurance of the contract and a part of the same transaction, as shown by plaintiff's own testimony. Any fraud or illegality of consideration in the contract, then, extended to the bill of sale. *Prentiss* v. *Russ*, 16 Maine, 30, 32, 33 Am. Dec. 631. Hence the special finding was immaterial.

The clause in the contract providing for extra compensation for the over-run of sale scale, in view of the loss of logs incident to driving, and in the light of the decisions in *Cushman* v. *Holyoke*, 34 Maine, 289, and *Putnam* v. *White*, 76 Maine, 551, foreshadows an illegal design against the land owner to purloin logs, to such an extent as to call for explanation as to its presence in the contract. For, unless the object of this clause can be shown by parol testimony, it will be only in cases of such illegalities as the parties are weak enough to expose in their writings that the court can prevent a party from obtaining the fruits of an unlawful bargain. The parties were in pari delicto, and it is well settled in this state that in such cases the law will afford no relief. *Concord* v. *Delaney*, 58 Maine, 309; *Ellsworth* v. *Mitchell*, 31 Maine, 247, 249; *Russell* v. *DeGrand*, 15 Mass. 35, 37.

The ground is not that defendant has superior claims or is entitled to peculiar favor, but that plaintiff's are not entitled to enforce at law an unlawful contract. *Wheeler* v. *Russell*, 17 Mass. 257, 279; Parsons on Contracts, 8th Ed. Vol. II, (bottom page) 869; *Morris* v. *Telegraph Co.*, 94 Maine, 423.

The excluded declaration was admissible for four reasons: (1) because parol testimony is admissible in a case where fraud is charged and plead in defense; (2) to impeach the plaintiff; (3) as part of the res gestae; (4) because it was proper cross-examination of the plaintiff, since he went into the conversation and by evidence outside the contract showed the oral agreement to give a bill of sale later. *Williams* v. *Gilman*, 71 Maine, 21; *Oakland Ice Co.* v. *Maxcy*, 74 Maine, 294, 301; Wharton on Evidence, 2d Ed. Vol. I, page 476.

Fraud is distinctly plead and charged in defense, therefore the con-

versation of the parties at the time and place of the execution of the contract are admissible; not to vary or modify the contract, but to show that it had no legal existence.

Fraud being alleged, a wide range is given to establish it. "Human affairs consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each dates its birth to some preceding circumstances and in its turn becomes the prolific parent of others . . . . ." 1 Greenleaf on Evidence, 15th Ed. § 108; 1st Ed. Am. & Eng. Enc. of Law, Vol. 4, page 863; *Am. Fur Co.* v. *U. S.* 2 Peters, 358; *State* v. *Soper*, 16 Maine, 293, 33 Am. Dec. 665; *Stewart* v. *Hanson*, 35 Maine, 506, 507; *State* v. *Walker*, 77 Maine, 488, 490; *State* v. *Maddox*, 92 Maine, 348; 1st Ed. Am. & Eng. Enc. of Law, Vol. 21, pages 99, 100; ib. Vol. 4, page 865; *Deer Isle* v. *Winterport*, 87 Maine, 37, 44; Wharton on Evidence, 2nd Ed., Vol. I, page 35, note 1; Jones on Evidence, Vol. 2, § 440; *Holley* v. *Young*, 66 Maine, 520, 523.

A replevin writ does not authorize a search. The property must be taken from the defendant. *Ramsdell* v. *Buswell*, 54 Maine, 546.

Both the defense that the property was not in possession of the defendant at the date of the writ, and the alleged defense of the illegality of subject matter of the contract,— the claimed design to purloin the logs, sought to be shown,— can be taken advantage of under the general issue without being specially plead. *Springfield Bank* v. *Merrick*, 14 Mass. 321, 322; *Wheeler* v. *Russell*, 17 Mass. 257.

Such a defense "is one outside the real merits of the case, and although an issue might possibly be made on it, yet . . . . it need not necessarily be pleaded. But if it comes to the knowledge of the court in any proper manner it will refuse longer to entertain the proceedings." It is like collusion in an action of divorce or champerty in the assignment to plaintiff of the claim in suit. 1st Ed. Am. & Eng. Enc. of Law, Vol. 3, page 87, note 1, and cases there cited.

There was no inconsistency in the defenses. And, besides, there were horses enough so that a return of some might have been ordered

under each defense. Cobby on Replevin, § 565. *Gaynor* v. *Blewitt*, 69 Wis. 582, 34 N. W. Rep. 725.

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

FOGLER, J. This is an action of replevin. The verdict was for the plaintiff and the defendant excepts to the rulings of the presiding justice in four instances.

The following facts appear by the exceptions: October 10, 1899, by an agreement in writing by and between the plaintiff and the defendant, the defendant agreed to cut, haul and drive into the main Penobscot river, certain spruce, pine and cedar logs to the amount of one million feet or more, at the agreed price of six dollars and fifty cents per thousand feet for spruce and pine, and seven dollars and fifty cents per thousand feet for cedar. It was also stipulated in the agreement that should the logs cut under the agreement, upon a re-scale for sale, over-run the stumpage scale, the defendant should be paid for such over-run seven dollars and fifty cents per thousand feet for spruce and pine, and eight dollars and fifty cents per thousand feet for cedar. By the contract the defendant agreed that all the horses and camping outfit used in carrying on the operations, except what should be hired, should become the property of the plaintiffs until the contract should be fulfilled and settlement made.

December 9, 1899, the defendant by a bill of sale by him signed, conveyed to the plaintiffs the property replevied in this suit, consisting of ten horses "with harnesses, sleds and hitch and rigging, all the camp outfit now at Elm Stream."

The defendant pleaded the general issue, non cepit, and by brief statement that the property of the goods and chattels replevied was, at the time they were replevied, in the defendant, and not in the plaintiff; that the bill of sale above mentioned was obtained of the defendant by fraud through a certain false and fraudulent representation made by the plaintiff, McLeod, to the defendant; that the provision in the contract that his horses and outfit should become the property of the plaintiff was not read or made known to him at the

time he signed the contract, and that the plaintiff fraudulently, with the intent to obtain the defendant's signature to the contract, failed and omitted to make such provision known to him, by reason whereof the said provision is not genuine, but null and void; and, lastly that both the agreement and the bill of sale are not genuine.

The exceptions state that the defendant could neither read nor write and he signed both instruments by mark.

Neither the amount of logs cut by the defendant, his compensation therefor, nor the fact that a balance was due the plaintiff from the defendant on the logging operations was in dispute at the trial. There was a special finding by the jury that the bill of sale was executed by the defendant with full knowledge of its contents.

We will now proceed to examine the exceptions seriatim.

1. The plaintiff, McLeod, upon cross-examination, was asked by the defendant's counsel the following question, "Didn't you state to Mr. Johnson (the defendant) in Mr. Marsh's office in Oldtown at the time this contract was executed, that if he could bury up any of those logs or put them under the ice and not let the scaler turn in a true account of them, that he could make something out of it?" The presiding justice excluded the question, to which ruling the defendant excepts. We think the ruling was correct. The contract between the parties was in writing signed by them. Its terms are clear and unambiguous. In the absence of fraud both parties are bound by the writing. The duties and rights of the defendant are fully expressed in the contract. No words spoken by the plaintiff could affect his duties or his rights. The language supposed by the question does not tend to prove fraud in the inception of the contract. It does not appear by the exceptions that the supposed words, if spoken, were intended to induce or did induce the defendant to sign the contract. If spoken it was a mere suggestion upon which the defendant might, or might not act, as he saw fit. It is contended by the learned counsel for the defendant, that as the supposed words were spoken at the time the contract was executed, they are a part of the res gestae and therefore admissible. Words spoken or acts done when the act litigated is being executed are not always res gestae.

In *Carter* v. *Buchanan*, 3 Ga. 513, the res gestae is defined to

mean the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character.

Mr. Wharton says, "The res gestae may, therefore, be defined as those circumstances which are the undesigned incidents of a particular litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are a part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors." 1 Wharton on Evidence, § 259.

In the light of the foregoing definition, the words supposed by the question to have been spoken by the plaintiff cannot be regarded as pars rei gestae.

II. The defendant offered to show by his own testimony the conversation between the parties to the contract, at the time and place of its execution, concerning the provisions therein relating to extra compensation to the defendant for any amount that the sale scale of the logs should over-run the stumpage scale. The defendant's counsel contended that the testimony was admissible as a part of the res gestae. The presiding justice ruled that the testimony was inadmissible and excluded it, to which ruling the defendant excepts.

The testimony was properly excluded for the reasons given with reference to the first exceptions. There is no ambiguity in the clause above referred to. If the conversation offered in testimony took place before the contract was signed, it was inadmissible as the contract was afterwards reduced to writing; if it took place after the signing it was clearly inadmissible.

III. Evidence was introduced by the defendant tending to show the property in some of the horses described in the bill of sale, to be at the date of the writ in persons not parties to this suit.

Counsel for defendant contended that under the first count in the brief statement property of some of the chattels in controversy could be shown in persons not party to the suit, for the purpose of defeating recovery thereof by the plaintiff.

The presiding justice ruled that such evidence was only admissible as bearing upon the defendant's conduct, and, that if the jury should find that the bill of sale was executed and delivered by the defendant with full knowledge of its contents, he would be estopped in this suit from setting up title in third parties at the date of the writ not deriving title from the plaintiffs.

To this ruling exceptions were taken by the defendant and allowed.

The defendant by his pleas alleges that, at the time when the chattels were replevied, they were the property of the defendant and not the property of the plaintiff. The burden was upon the plaintiffs to prove property in themselves.

To prove their title the plaintiffs introduce a bill of sale with a covenant of warranty of title from the defendant to themselves, and in which the defendant avouches himself to be the true and lawful owner of the chattels.

The jury found specially that the bill of sale was executed by the defendant with full knowledge of its contents.

The defendant is estopped as against the plaintiffs by his bill of sale and covenants therein contained from setting up title in the property or any part of it in a third party, unless the title of the third party be derived from the plaintiffs. 1 Greenl. on Ev. § 24; *Hammond* v. *Woodman*, 41 Maine, 177, 66 Am. Dec. 219; *Temple* v. *Partridge*, 42 Maine, 56; *Dewey* v. *Field*, 4 Met. 381, 38 Am. Dec. 376; *Bursley* v. *Hamilton*, 15 Pick. 40, 25 Am. Dec. 433; *O. Sheldon Co.* v. *Cooke*, 177 Mass. 441; *Dezell* v. *Odell*, 3 Hill, 215, 38 Am. Dec. 628.

IV. The defendant excepts to a ruling of the presiding justice that, under the pleadings, the defendant could not show himself not in possession of the chattels in controversy at the date of the writ for the purpose of defeating the action. The exceptions cannot be sustained, as the issue involved in the ruling is not raised by the plea.

The only question regarding the property raised by the plea is that of title.

Exceptions overruled. Judgment on the verdict.

HENRY J. CONLEY, Admr.

vs.

PORTLAND GAS LIGHT COMPANY.

Cumberland. Opinion March 18, 1902.

Pleading. Death by Wrongful Act. Immediate Death. Stat. 1891, c. 124. Mass. Pub. Stat. 1887, c. 24.

1. In an action by an administrator for negligently causing the death of his intestate, there was no averment in either count that the deceased died immediately; but in the first and second counts it is alleged that he died "within twenty minutes;" and in the third count that he "received injuries from which he thereafterwards died."
2. In the first count it also affirmatively appeared by express averment that he "suffered much in body and mind," and in the second count it failed to appear, either by inference or direct averment, whether he became unconscious from his injuries or endured conscious suffering while he survived. There is therefore no substantial ground for distinguishing the declaration in this case from that in *Sawyer* v. *Perry*, 88 Maine. It is true that in this case the decedent survived his injuries only twenty minutes, while in that he lived about an hour. But the agonies of body and mind which "no word can speak" may in one case be suffered in twenty minutes, and much larger damages may be required as compensation in such a case than for the suffering of many hours or days from injuries of a different character.
3. *Held;* that the plaintiff in this case claims in his declaration to recover compensation for the pecuniary injuries resulting to the widow and children from the death of the decedent; but describes only a cause of action at common law in which the damages recovered must be for the benefit of the estate generally, and not for the exclusive benefit of the widow and children.
4. As construed by our court it is obvious that the statute of 1891 affords a right of action for "injuries causing death" substantially like that given to employees by the Employers' Liability Act in Massachusetts. The third section of that act gives a right of action "where an employee is instantly killed or dies without *conscious suffering.*"

5. Whether in the case at bar it might not reasonably be considered an immediate death within the meaning and purpose of our statute, if the decedent immediately became unconscious after his injury and remained in a comatose state for twenty minutes, or even for several hours or days until life became extinct, it is unnecessary here to determine.

Sawyer v. *Perry*, 88 Maine, 42, affirmed.

Exceptions by defendant. Sustained.

Action against the defendant company to recover damages for negligently causing the death of William John Cary, one of its employees. The declaration contained three counts, and the defendant demurred generally to the declaration and specially to each count. The presiding justice overruled the demurrers pro forma.

The case appears in the opinion.

Plaintiff's declaration was as follows: —

In a plea of the case, and the plaintiff says that on the eleventh day of August, A. D. 1900, at Portland, in said Cumberland county, the defendant, by its servants and agents, controlled and used a certain building on West Commercial street, in said Portland, for manufacturing and furnishing gas to its patrons, and that at the same time the said William John Carey, then alive, now deceased, was lawfully in and about said company's building on said West Commercial street as an employee and in the performance of his duties, and that on said eleventh day of August there was in and about said building a receptacle for gas and pipes extending around through the building through which said gas passed; that there was then and there great danger of the escape of gas from the gas pipes if they were defective or negligently kept, and that said gases, either alone or mixed with atmospheric air or ignited by fire, were dangerous explosives, all of which were known to the defendant or, in the exercise of due care, should have been known, that said defendant owed to the said William John Carey the duty of so conducting itself and doing and acting on the premises in carrying on its business that said William John Carey should not suffer injury or damage by reason of any negligence on the part of the defendant in allowing or permitting the accumulation of dangerous gases in and about the building not

properly retained and confined, and in failing to guard or inspect said pipes and tanks in which the gases were to be retained, and in failing to have, at all times, men ready and able to repair any break, defect or leak which might occur in said tank and pipes. And the defendant well knew, through its servants and agents, or in the exercise of due care, ought to have known, that said tanks, gas pipes and the connections attached to them and the means of receiving and disposing of the gases then and there manufactured were old, broken, rotten and improperly constructed and not suitably arranged for the purpose of carrying on the business with safety to employees and persons then and there rightfully in and about said building in the performance of their duties. That the defendant negligently failed to guard and keep in proper repair said pipes and tanks and negligently permitted the building to be filled with explosive gases, negligently suffered said pipes and tanks to remain out of repair, weak, defective and dangerous and negligently failed to inspect said pipes and tanks or properly keep them in serviceable condition and to keep a sufficient number of men properly instructed to guard against accident from explosion by the escape and accumulation of dangerous and explosive gases into said building and the accumulation thereof and permitting fire to be where the gases would be ignited by fire and to speedily repair any breaks, defects or leaks which might occur. That, by reason of said negligent acts and omissions and negligent condition of the defendant, its servants and agents as aforesaid, the said William John Carey, on the eleventh day of August, A. D. 1900, while rightfully in and about said building and in the exercise of due care, was severely injured and killed by the explosion of gases within said space and suffered much in body and mind and died within twenty minutes, from the result of the injuries then and there received. By reason of all which said defendant has become liable, by force of the statute in such case made and provided, to the plaintiff in his said capacity for such damages not exceeding five thousands dollars ($5,000.00), as will be a fair and just compensation for the pecuniary injuries resulting from the death of said William John Carey to Margaret Carey, widow, and Margaret Amelia Carey and Mabel Agnes Carey and William J. Carey, children of said William John Carey.

And the plaintiff avers that said damages amount to the sum of five thousand dollars ($5,000.00).

Also, for that the said William John Carey, at said Portland, on the eleventh day of August, A. D. 1900, then alive, was in the employ of the defendant in its gas works, so-called, on West Commercial street, in said Portland, in the exercise of due care, and rightfully in and about the building where said works were then and there in operation, and whereas the said defendant was then and there and for a long time prior thereto had been in the possession, use and control of said gas works and was then and there in the possession of said works, including the tanks, pipes, machinery and running gear of the same, and the defendant then and there, by its servants, had the government and control of said works and pipes, tanks and machinery; yet the defendant, not minding or regarding its duty in this behalf, did then and there and for a long time prior thereto negligently and wrongfully maintain the said gas works, machinery, pipes, tanks and other vessels used in and about said works in a dangerous condition in carrying on the defendant's business, and that by reason of the same, and without notice to the said William John Carey and without fault of the said William John Carey, and by the neglect of the defendant to guard the gases and avoid explosions and to have the pipes and tanks and other appliances and other things used in carrying on the business of the gas company thereat properly adjusted, that the said gases escaped and exploded and the said pipes were torn asunder and the said William John Carey was severely injured in his head, lacerated and cut in different parts of his person and other bodily injuries were sustained by him, and solely from such injuries, and from no other cause, said William John Carey died within a short time, to wit, within twenty minutes after said injuries were received. And the plaintiff avers that all the injuries and damages which then and there resulted to the said William John Carey resulted solely from the negligence and want of care of the said defendant, its servants and agents and that the said William John Carey was without fault in the premises and suffered death as aforesaid solely through the defendant's negligence. By reason of all of which the defendant has become liable by force of the statute in such case made

and provided to the plaintiff in her said capacity for such damages not exceeding five thousand dollars ($5,000.00), as alleged a fair and just compensation for the pecuniary injuries resulting from the death of said William John Carey to Margaret Carey, widow, and Margaret Amelia Carey and Mabel Agnes Carey and William J. Carey, children of the said William John Carey. And the plaintiff avers that said damages amount to the sum of five thousand dollars ($5,000,00).

Also, for that the plaintiff says that he is the administrator of the estate of William John Carey late of Portland in said county of Cumberland, deceased, intestate, letters of administration having been duly issued to plaintiff by the judge of probate for the county of Cumberland; that the defendant owns and operates gas works on West Commercial street in said Portland and was in control and management of the same on the eleventh day of August, A. D. 1900, and that on said eleventh day of August, A. D. 1900 the deceased was in the employ of the defendant in said gas works; that it was the duty of the defendant to furnish a competent and suitable superintendent, an engineer or machinist or some party understanding the business and qualified by practical knowledge to manage and control the tanks, pipes and machinery of the gas works then and there used. That it was the duty of the defendant to furnish suitable machinery, pipes, tanks and valves and other things in proper condition for the services required of it in said works. That it was also the duty of the defendant to protect said deceased from dangers and give proper warning and instruction to him as to the dangers attending the work in which he was engaged. That it was the duty of the defendant to see that its works and machinery and different attachments connected with the gas works were in sufficient and proper condition so that the plaintiff doing his work should not be exposed to any dangers unreasonable or unnecessary or not ordinarily incident to his employment, but that the defendant regardless of its duties in this behalf employed an engineer and other employees not sufficiently informed in the management of the machinery, works and appliances of the gas works to properly manage the same so that they might be used with comparative safety and permitted defects to exist in the machinery, gearing, pipes, tanks and

connections, valves and other machinery and tools which were used in carrying on the business of the gas company and gave no sufficient warning or caution to the deceased as to the dangers attending the business in which he was employed and left the machinery and other portions of the works in a condition which greatly enhanced the peril of the deceased in performing his work. That the defects arose from or had not been discovered, owing to the negligence of the defendant, its servants and agents or of that person in its service by it intrusted with the duty of seeing that its works were in proper condition; that by reason of said negligence of the said defendant in the selection of said employees and by reason of the defective pipes, valves, connections and other gearing and attachments and machinery used in and about the works and on account of the negligence of the company in not giving suitable instructions to the deceased and warning him of the danger and unsafe condition of the works of the company and of the machinery, gearings, and attachments used and from the resulting dangers owing to the escape of gases from tanks, pipes, etc., resulting from the negligence of the defendant, its servants and agents and also from the negligence of the defendant in allowing the fires to be where the gases could come in contact with them and from the general negligence of the defendant its servants and agents in not properly attending to the machinery and gearing and in not furnishing suitable and experienced and competent managers and superintendents and employees, the deceased while in said employment in said works and rightfully engaged in the service of the defendant and while performing work for which he was hired by the defendant and while in the exercise of due care suffered personal injuries by the explosion of gases and by the flying pieces of metal, earth and rocks and by the destruction of the different pieces of machinery received injuries from which he thereafterwards died, by reason of all of which defects and negligence the said defendant has become liable by force of the statute in such case made and provided to the plaintiff in his said capacity for such damages not exceeding five thousand dollars ($5,000.00) as will be a fair and just compensation for the pecuniary injuries resulting from the death of said William John Carey to Margaret Carey, widow, and Margaret Amelia Carey, and Mabel Agnes

Carey and William John Carey, children of said William John Carey. And the plaintiff avers that said damages amount to the sum of five thousand dollars ($5,000.00).

Defendant's demurrer was as follows:—

And now the said defendant comes, etc., and says that the plaintiff's declaration is insufficient in law.

And the defendant, as to the first count of the declaration, says: That the said count is not sufficient in law.

And the said defendant shows to the court here the following causes of demurrer to the said declaration as set out in said first count, that is to say:

1st: That it does not appear by the said declaration whose employee the plaintiff's intestate was or by whom he was employed in and about said company's building.

2nd: That it does not appear by said declaration what contractual or other relations, if any, the plaintiff's intestate sustained to the defendant or whether he was in the employ of the defendant or some other person, or was a mere licensee.

3rd: That no cause is given or alleged for the explosion of gases as claimed by said plaintiff.

4th: That said declaration states no particular act or omission upon the part of said defendant which should cause the alleged injury to plaintiff's intestate.

5th: That the defendant is not informed by said declaration whether the alleged explosion occurred in said building, or about said building, nor within what space, nor where such alleged explosion is claimed to have occurred.

6th: That said declaration does not show in what particular respect, if any, the said defendant was negligent, so that such charge of negligence may be understood or answered by the said defendant; nor does it show that the alleged injury to plaintiff's intestate was caused by any of the general instances of negligence claimed.

And the defendant, as to the second count of the said declaration, says that the said count is not sufficient in law.

And the defendant shows to the court here the following causes of

demurrer to said declaration as set out in said second count, that is to say:

1st: It does not appear by said declaration in what capacity the plaintiff's intestate is claimed to have been in the employ of said defendant, whether as laborer, independent contractor, salesman on commission, or otherwise; nor does it appear what contractual or other relations, if any, the plaintiff's intestate sustained to the defendant.

2nd: That said declaration does not state, nor does it inform said defendant of any particular act of negligence of which said defendant is claimed to be guilty; nor does it state whether the said gas works as a whole, nor whether any particular portion, nor whether all of the machinery, pipes, tanks and other vessels used in and about said works are claimed to have been in a dangerous condition, nor in what respect any or all of them were dangerous.

3rd: That said declaration does not inform said defendant of any particular place where alleged gases are claimed to have escaped and exploded, nor of any particular cause for such alleged escape and explosion, nor any particular reason for such alleged explosion, nor any particular respect in regard to which said works, machinery, and other things named were dangerous or in regard to which said defendant is claimed to have been negligent.

4th: That said declaration does not state that said explosion was in, or whether it was about the said gas works, nor does it state that the plaintiff's intestate was at any place where such alleged explosion is claimed to have occurred, nor does it state that such alleged explosion was the cause of the injuries claimed to have been received by plaintiff's intestate, nor does it state any specific cause for such injuries.

5th: That said declaration does not show in what particular respect, if any, the said defendant was negligent, so that such charge of negligence may be understood or answered by the said defendant; nor does it show that the alleged injury to plaintiff's intestate was caused by any of the general instances of negligence claimed.

And the defendant, as to the third count of the said declaration, says that the said count is not sufficient in law.

And the defendant shows to the court here the following causes of demurrer to said declaration as set out in said third count, that is to say:

1st: That it does not appear by said declaration in what capacity the plaintiff's intestate is claimed to have been in the employ of said defendant, whether as laborer, independent contractor, broker, or otherwise; nor does it appear what contractual or other relations, if any, the plaintiff's intestate sustained to the defendant.

2nd: That said declaration does not state any particular thing connected with the management of the machinery, works and appliances named, concerning which it is claimed the said engineer and said other employees were not sufficiently informed, so as to properly manage the same; that it does not state any particular defect which it is alleged existed in the machinery, gearing, tools and other things named as being used in carrying on said defendant's business; nor does it state what the condition was which it is alleged enhanced the peril of said plaintiff's intestate; and that said charges of negligence alleged against said defendant in said declaration are in all respects wholly vague and indefinite and not sufficient to inform said defendant of any particular charge of negligence to which it can make answer.

3rd: That said declaration does not state that the alleged explosion of gases was caused by said defendant, either negligently or otherwise; nor does it state that the alleged destruction of the different pieces of machinery was caused by said defendant; nor does it state that the personal injuries claimed to have been suffered by said plaintiff's intestate were caused by or due to the said defendant.

4th: That said declaration does not state or show in what particular respect, if any, the said defendant was negligent, so that such charge of negligence may be understood or answered by said defendant; nor does it show that the alleged injury to plaintiff's intestate was caused by any of the general instances of negligence claimed; nor does it state that the said alleged personal injuries were caused by any person. Wherefore it prays judgment.

D. A. Meaher, for plaintiff.

The allegations showing the employment and contractual relations of plaintiff and defendant were sufficient. *Wachs* v. *Gawne,* 11 Ohio Dec. 22; *D. O. Marcho* v. *Builders' Iron Foundary,* 18 R. I. 514.

The declaration in *Boardman* v. *Creighton,* 93 Maine, 17, is easily distinguished from the one now under consideration.

In *Kansas City S. Co.* v. *Burton,* 97 Ala. 240, it was held to be sufficient to allege that plaintiff was defendant's servant and was injured while in the performance of his duties as such. *Ensley* R. *Co.* v. *Chewing,* 93 Ala. 24.

It was unnecessary to allege in what the defects in works, etc., consist, if they are such that it is impossible to describe them with any degree of particularity; or, if they are more in the knowledge of the defendant than of the plaintiff, less certainty of description is required. Vol. 13 Enclycl. Pl. & Practice, p. 908 et seq.; Vol. 14 Enclycl. Pl. & Practice, p. 335; *San Antonio, etc., R. Co.* v. *Adams,* 6 Texas Civ. App. 102; *Bridges* v. *North London, R. Co., L. R.* 6 Q. B. 377, 391; *Byrne* v. *Boodle,* 2 H. & C. 722; *Kearney* v. *London, Brighton, etc., Railway Co.* L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; 1 Shear. & Redf. on Negligence, §§ 59, 60, and cases; *Cox.* v. *Providence Gas Co.,* 17 R. I. 200.

In an action against a gas company for injuries to an employee caused by the explosion of a gas tank it is not necessary to allege in what the defect consists. *Cox.* v. *Providence Gas Co.,* 17 R. I. 199; *Schmidtkunst* v. *Sutro,* 16 N. Y. Civ. Pro. 143; *Wabash, etc., R. Co.* v. *Morgan,* 132 Ind. 430; *Walker* v. *Mitchell,* 17 Wash. 582; *Harper* v. *Norfolk, etc., R. Co.,* 36 Fed. Rep. 102; *Southwest Imp. Co.* v. *Andrew,* 86 Va. 270; *Galveston, etc., R. Co.* v. *Crawford,* 9 Texas Civ. App. 245; *Dehority* v. *Whitcomb,* 13 Ind. App. 588; *Georgia Pac. R. Co.* v. *Propst,* 85 Ala. 203; *Birmingham R. & E. Co.* v. *Allen,* 99 Ala. 359, 20 *L. R. A.* 457; *Evansville, etc., R. Co.* v. *Doan,* 3 Ind. App. 453; *Evansville, etc., R. Co.* v. *Maddux,* 134 Ind. 571; *Coal Bluff's Min. Co.* v. *Watts,* 6 Ind. App. 347; *Bender* v. *St. Louis etc., R. Co.* 137 Mo. 240; *Lyon* v. *Union Pac. R. Co.,* 35 Fed. Rep. 111.

The allegations as to defendant's negligence are sufficient to with-

stand demurrer. 14 Encycl. Pl. & Practice, 332 et seq.; *Mary Lee Coal Co.* v. *Chandiss*, 97 Ala. 171; *Leach* v. *Bush*, 57 Ala. 145; *McGonigle, etc., R. Co.* v. *Clemmitt*, 19 Ind. App. 21, 49 N. E. Rep. 38; *Grienbe* v. *Milwaukee, etc., R. Co.*, 42 Iowa, 376; *Rogers* v. *Truesdale*, 57 Minn. 126; *Central R. Co.* v. *Horn*, 38 N. J. L. 133; *Snyder* v. *Wheeling Elec. Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922; *Uren* v. *Mining Co.*, (Wash.) 64 Pac. Rep. 174. In an action for negligence the declaration need not state with particularity the act of omission or commission which constituted the negligence or wrong. *Berns* v. *Gaston Gas Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; citing *Hawker* v. *R. Co.*, 15 W. Va. 628, 36 Am. Rep. 825; *Cogswell* v. *R. Co.*, 5 Wash. 46, 31 Pac. Rep. 411; *Cunningham* v. *Los Angeles R. Co.*, 115 Cal. 561; *Cummings* v. *National Furnace Co.*, 60 Wis. 603; *Alberton Packing Co.* v. *Egan*, 86 Ill. 253, 29 Am. Rep. 28.

The declaration identifies with reasonable certainty the place where the explosion occurred and where the plaintiff was injured.

Aug. F. Moulton, for defendant.

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

WHITEHOUSE, J. This is an action against the defendant company to recover damages for negligently causing the death of William John Carey, one of its employees. The declaration contains three counts, and the defendant demurred generally to the declaration and specially to each count. It is unnecessary to consider the numerous objections to the form of the pleadings pointed out and insisted upon as the grounds of the special demurrer, for it is the opinion of the court that each of the counts must be held insufficient for a substantial reason common to them all, not specified as a cause of special demurrer, but interposed as an objection under the general demurrer.

Each count in the declaration was manifestly designed to set out a cause of action "for injuries causing death" under the provisions of chapter 124 of the Public Laws of 1891, for it is provided in the second section of that chapter that "the amount recovered in every such action shall be for the exclusive benefit" of the widow and children, and be "a fair and just compensation, not exceeding five thous-

and dollars, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought;" and each count in the plaintiff's declaration concludes as follows: "By reason of all which said defendant has become liable, by force of the statute in such case made and provided, to the plaintiff in his said capacity for such damages, not exceeding five thousand dollars, as will be a fair and just compensation for the pecuniary injuries resulting from the death of said William John Carey" to his widow and children. But it is nowhere averred in either count of the declaration that William John Carey died immediately from the effect of his injuries. The first count alleges that he "was severely injured and killed by the explosion of gases . . . and suffered much in body and mind and died within twenty minutes, from the result of the injuries then and there received;" the second count represents that he "was severely injured in his head, lacerated and cut in different parts of his person and other bodily injuries were sustained by him, and solely from such injuries, and from no other cause, said William John Carey died within a short time, to wit, within twenty minutes after said injuries were received;" and the third count simply states that he "received injuries from which he thereafterwards died." It is obvious that there is here no averment in either count equivalent to an allegation of immediate death.

A precisely similar question was presented on general demurrer in *Sawyer v. Perry*, 88 Maine, 42, for the express purpose of obtaining from this court a judicial construction of the statute of 1891, c. 124, here in question. In that case the conclusion was, that the act was intended by the legislature to apply to cases where the persons injured die immediately; and inasmuch as it was not alleged in the declaration that the injured person died immediately, but on the contrary it was averred that he lived "about an hour," it was held that the declaration described only a common law right of action in which the damages recovered must be for the benefit of the decedent's estate generally and not for the exclusive benefit of the widow, and that in the form presented, declaring that the action was brought for the benefit of the widow of the deceased, the declaration was demurrable. In the opinion it is said by the court: "And when we say that the

death must be immediate we do not mean to say that it must follow the injury within a period of time too brief to be perceptible. If an injury severs some of the principal blood vessels and causes the person injured to bleed to death, we think his death may be regarded as immediate though not instantaneous. If a blow upon the head produces unconsciousness and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes and then dies, we think his death may properly be considered as immediate though not instantaneous."

In the case at bar it has been seen that there is no averment in either count that the injured person died immediately, but in the first and second counts it is alleged that he "died within twenty minutes," and in the third count that he "received injuries from which he thereafterwards died."

In the first count it also affirmatively appears by express averment that he "suffered much in body and mind;" and in the second count it fails to appear, either by inference or direct averment, whether he became unconscious from his injuries or endured conscious suffering while he survived. There is, therefore, no substantial ground for distinguishing the declaration in this case from that in *Sawyer* v. *Perry*, supra. It is true, that in this case the decedent survived his injuries only twenty minutes, while in that he lived about an hour. But the agonies of body and mind which "no word can speak" may in one case be suffered in twenty minutes, and much larger damages may be required as compensation in such a case than for the suffering of many hours or days from injuries of a different character.

As construed by our court in *Sawyer* v. *Perry*, supra, it is obvious that the statute of 1891 in question affords a right of action for "injuries causing death" substantially like that given to employees by the Employers' Liability Act in Massachussets. The third section of that Act (c. 24, P. S. of 1887) gives a right of action "where an employee is instantly killed, or dies without conscious suffering;" and it was held in *Martin* v. *Boston & Maine Railroad*, 175 Mass. 502, that an action could not be maintained under this statute in a case where the injured person survived and endured conscious suffering less than one minute after the injury. See also *Hodnett* v.

Boston & Albany Railroad, 156 Mass. 86; *Green* v. *Smith*, 169 Mass. 485, 61 Am. St. Rep. 296; *Willey* v. *Boston Electric Light Co.*, 168 Mass. 40.

Whether, in the case at bar, it might not reasonably be considered an immediate death within the meaning and purpose of our statute, if the decedent immediately became unconscious after his injury and remained in a comatose state for twenty minutes or even for several hours or days until life became extinct, it is unnecessary here to determine. It is clear that the plaintiff in this case claims in his declaration to recover compensation for the pecuniary injuries resulting to the widow and children from the death of the decedent, but describes only a cause of action at common law in which the damages recovered must be for the benefit of the estate generally, and not for the exclusive benefit of the widow and children. The entry must therefore be,

Exceptions sustained. Demurrer sustained.

WILLIAM H. HARLOW

vs.

FRANK I. BARTLETT AND CITY OF BANGOR, TRUSTEE, AND J. F. WOODMAN & CO., CLAIMANTS.

Penobscot. Opinion March 18, 1902.

Trustee Process. Wages. Equitable Assignment.

1. A trustee process, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially when a claimant has appeared as in this case, and become a party to the suit.
2. As between the plaintiff and claimant equitable considerations must prevail so far as the nature of the process will admit.
3. Any order, writing or act which makes an appropriation of a fund amounts to an equitable assignment of that fund.

4. Equity disregards mere form; if the right exists, even if it is not formally manifested, it will afford both remedy and relief. In equity no particular form is necessary; any writing, or even an act, which plainly makes an appropriation of the fund or property, will be esteemed an assignment.

An instrument in writing, in which the defendant for value received "agrees to pay" to the claimants the amount due him from the city of Bangor for services as fireman, addressed to the city treasurer and recorded in the city clerk's office, may reasonably be deemed equivalent to a direction to that officer to pay to the claimants the balance due the defendant, and accordingly be held to operate as an equitable assignment to them of that particular fund. When duly recorded it was sufficient to protect the rights of the claimants against a subsequent attaching creditor.

On report. Judgment for claimant in trustee process.

The question was whether the funds disclosed in the hands of the trustee, the city of Bangor, belonged to the claimant under an assignment to him by the defendant, or to the plaintiff under his attachment.

The case appears in the opinion.

H. H. Patten, for plaintiff.

The writing under which the claimant seeks to recover the fund in dispute is simply a promissory note, not an assignment.

A recorded promissory note cannot be construed as an assignment of wages.

The paper given by defendant to claimant cannot operate as an assignment by any principle of law. *Luff* v. *Pope*, 5 Hill, 413; *Hall* v. *Flanders*, 83 Maine, 242, 23 Am. St. Rep. 774; *Bullard* v. *Randall*, 1 Gray, 605, 61 Am. Dec. 433.

While there are words in the note which purport to give notice to the city treasurer; yet, so for as the evidence discloses, no such notice was ever given, nor was there any verbal or written acceptance by the city or any authorized person. And the burden is on the claimant. *Jenness* v. *Wharff*, 87 Maine, 309; *Haynes* v. *Thompson*, 80 Maine, 125; *Thompson* v. *Reed*, 77 Maine, 425, 52 Am. Rep. 781.

The fact that the note was payable out of a particular fund, does not convert it into an assignment of that fund. *Whitney* v. *Eliot National Bank*, 137 Mass. 351, 50 Am. Rep. 316.

Equitable assignments seem to be in the nature of orders not accepted, rather than promissory notes. In this case no third person

is requested to pay, the promissor himself says "For value received I hereby agree to pay," etc.

While the courts have decided that the intention is to govern, yet the instrument must not be inconsistent with such an interpretation. *Garnsey* v. *Gardner*, 49 Maine, 167.

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

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

WHITEHOUSE, J. This is a trustee process in which the claimants, J. F. Woodman & Co., assert title to the fund disclosed by virtue of an instrument of the following tenor:

"Bangor, Oct. 15, 1900.

To Henry O. Pierce,
City Treasurer:

For value received I agree to pay to J. F. Woodman & Co. what there may be due me now, and also the balance due me January 1st, 1901, from the city of Bangor for services as fireman.

Frank I. Bartlett."

This instrument was duly recorded in the office of the city clerk of Bangor, October 16, 1900. The two services of the trustee writ were made December 14 and December 31, 1900, respectively. A process of this kind, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially when a claimant has appeared as in this case and become a party to the suit. *Jenness* v. *Wharff*, 87 Maine, 307. "As between the plaintiff and claimant equitable considerations must prevail so far as the nature of the process will admit." *Haynes* v. *Thompson*, 80 Maine, 125.

In the case at bar it is not in controversy that at the time of the alleged assignment to the claimants, the principal defendant was indebted to them in a sum equal to the amount disclosed by the trustee. There was, in fact, a valuable consideration for an assignment of the fund.

But the plaintiff contends that the paper of October 15, 1900, of

the tenor above given, by force of which the claimants seek to establish their right to the fund, is simply a promissory note which cannot under any principle of law operate as an assignment to the claimants.

It has been seen that the instrument is addressed to Henry O. Pierce, city treasurer, and that the defendant therein agrees to pay to the claimants the amount due "from the city of Bangor for services as fireman." The terms of the instrument itself conclusively negative the idea that it might have been intended as an ordinary promissory note. The direction of the paper to the city treasurer, the express mention of the particular fund which was to be paid to the claimants, and the omission to make the instrument negotiable in form, disclose an obvious intention on the part of the defendant to effectuate a transfer to the claimants of the entire balance of his salary as fireman for the city of Bangor for 1900, and to appropriate the amount to the payment of his indebtedness to them. That this was the mutual intention of the parties is also evidenced by the fact that the instrument was promptly entered for record in the city clerk's office in accordance with § 6, c. 111, R. S., which requires an assignment of wages to be so recorded.

Under such circumstances it is clearly the duty of the court to allow the intention of the parties to this instrument to prevail, if this may be done consistently with the established principles of law and equity.

"It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person, creates an equitable property in such fund. . . . In order that the doctrine may apply and that there may be an equitable assignment creating an equitable property there must be a specific fund, sum of money or debt actually existing or to become so in futuro, upon which the assignment may operate, and the agreement, direction for payment or order must be in effect an assignment of that fund, or of some definite portion of it." 3 Pom. Eq. Jur. § 1280; *National Exchange Bank of Boston* v. *McLoon*, 73 Maine, 498, 40 Am. Rep. 388. In *White* v. *Kilgore*, 77 Maine, 571, the opinion quotes with approval the language of Story's Eq. Jur. § 1047, that "any order, writing or act which makes an appropriation of a fund amounts to an equitable assignment of

that fund." In *Garnsey* v. *Gardner*, 49 Maine, 167, the court held that the assignment of a debt might be made by parol, and might be inferred from the conduct and acts of the parties. See also *Sprague* v. *Frankfort*, 60 Maine, 253, and *Simpson* v. *Bibber*, 59 Maine, 196. So in *Bower* v. *Hadden Blue Store Co.*, 30 N. J. 171, an instrument saying "I hereby agree to assign," etc., was held to operate as an equitable assignment. In the opinion the court said: "Equity disregards mere form; if the right exists, even if it is not formally manifested, it will afford both remedy and relief. In equity no particular form is necessary; any writing, or even an act, which plainly makes an appropriation of the fund or property, will be esteemed an assignment." See also *Walcott* v. *Richman*, 94 Maine, 364.

The instrument in the case at bar, in which the defendant "agrees to pay" to the claimants the amount due him from the city of Bangor for services as fireman, addressed to the city treasurer and recorded in the city clerk's office, may reasonably be deemed equivalent to a direction to that officer to pay to the claimants the balance due the defendant, and accordingly be held to operate as an equitable assignment to them of that particular fund. When duly recorded it was sufficient to protect the rights of the claimants against a subsequent attaching creditor.

Title of claimants sustained. Trustee discharged.

LEON DRAPEAU *vs.* INTERNATIONAL PAPER COMPANY.

Androscoggin. Opinion March 18, 1902.

Negligence. Master and Servant. Defective Machinery.

1. An inexperienced laborer is not held to assume the risk of perils which are not called to his attention and of which he has no knowledge, but of such only as he knows, or by the exercise of ordinary care ought to know.
2. The plaintiff was directed by the assistant superintendent to take a position near the capstan on the left-hand side of a wire cable seven or eight feet from the mill, used in drawing logs from a large pile into the water, and communicate to the operator of the drum-winder the signals received from the man at the log pile. But all the power that could be applied proved insufficient to move the logs to which the cable had been attached, and there was evidence to justify the plaintiff's contention that at the last attempt the cable slipped off of the capstan, vibrated against the corner of the building, rebounded over the head of the plaintiff, and then swept back with resilient force against the plaintiff's left leg, causing a fracture of both bones below the knee.
3. After a patient study of all the evidence in the case, it is the opinion of the court that the conclusion of the jury cannot be deemed unmistakably wrong in finding that such a capstan or winch-head, without an effectual guard to hold the cable in place, was not a reasonably suitable appliance to perform the work required under the circumstances existing at the time of the accident. It might reasonably have been anticipated by those in charge of the work, who had frequently seen the cable fly off from the capstan under similar conditions, and observed its tendency to vibrate to some extent after it left the capstan, that an accident would happen to the signalman either in the way it did happen or in some similar manner.
4. *Held;* that there was sufficient evidence to support the conclusion which the jury probably reached, that the plaintiff had not performed any regular service as a signalman in connection with the working of this cable prior to the day of the accident; that his knowledge of the working of it prior to that time was only of that general and indefinite character which might be derived from the casual observation of a laborer who was not charged with any special duty in regard to it; and that he did not comprehend and fully appreciate the perils incident to the operation of it under the conditions existing at that time, but unhesitatingly assumed that no danger would be incurred in following the directions of his superior. Under these circumstances his conduct is entitled to be viewed in the light of reasonable charity, and he should not be deprived of the benefit of a verdict in his favor which is not shown to be clearly wrong.

Motion by defendant for new trial. Overruled.

Case for personal injuries to the plaintiff caused by a wire cable flying from the capstan on which it ran and breaking the plaintiff's leg below the knee.

The case is stated in the opinion.

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

G. D. Bisbee and R. T. Parker, for defendant.

Counsel argued, among other things, that the danger was one necessarily incident to the work or was caused by the carelessness of Martin, the plaintiff's fellow-servant, in hitching to a log too high on the pile or in trying to haul down the whole pile at once.

But the plaintiff has alleged that this place was dangerous because of the defective condition of the capstan. And he must prove his case as alleged. It is not enough for him if the case shows that the nature of the work necessarily rendered the place more or less dangerous under certain conditions.

"The declaration must contain all the allegations necessary to make out the plaintiff's case. In this state the general rules of pleading are simple and must be adhered to." *Bennett* v. *Davis*, 62 Maine, 544; *Shorey* v. *Chandler*, 80 Maine, 409; *Coolbroth* v. *Maine Central Railroad Co.*, 77 Maine, 165.

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

WHITEHOUSE, J. In this case the plaintiff recovered a verdict of $510.19 for personal injuries sustained by him while in the employment of the defendant company at the Otis mill in Chisholm, and the case comes to this court on a motion to set this verdict aside as against the evidence.

In performing the work of drawing logs into the water from a large pile on the bank of the river, the defendant used a steel wire cable about three-fourths of an inch in diameter and 300 feet long. At the power end this cable was attached to a large spool or drum-winder set on the roof of the wood room about twelve feet above a platform that extended along the side of the paper mill close to the

bank of the river, a distance of about seventy feet. Over this platform and in line with it the wire cable was stretched from the drum-winder to the log pile, and was operated by water power. About half way down the platform the mill turns to the right at an angle of about 90 degrees, and at this point a capstan or winch-head was placed, about two feet above the platform, and so adjusted as to revolve upon a vertical shaft set in the platform as an axle. The purpose of this revolving capstan was to guide the cable around the corner of the mill and also to keep it in the middle of the drum-winder. The cable ran from the drum-winder on to the revolving capstan and thence bending to the right was drawn to the log pile 225 feet distant. But at the time of the accident the capstan was not only twelve feet lower than the drum-winder, but about the same distance lower than the wood pile, and there was no appliance to hold the cable on the capstan except a very narrow oblique flange around the top of it. Thus when the power was applied, and the strain exerted on the cable, both ends of which were high above the capstan, there was a constant tendency of the cable to fly off of the capstan. Its liability to fly off depended largely upon the angle at which the logs were drawn and the height of the logs above the capstan.

On the day of the accident the plaintiff was directed by the assistant superintendent to take a position near the capstan on the left-hand side of the cable, seven or eight feet from the mill, and communicate to the operator of the drum-winder the signals received from the man at the log pile. But all the power that could be applied proved insufficient to move the logs to which the cable had been attached, and there was evidence to justify the plaintiff's contention that at the last attempt the cable slipped off of the capstan, vibrated against the corner of the building, rebounded over the head of the plaintiff, and then swept back with resilient force against the plaintiff's left leg causing a fracture of both bones below the knee.

The plaintiff contended that the capstan, as then constructed, was unprovided with any sufficient guard or flange to prevent the cable from thus slipping off when in operation, and that it was an unsuitable and defective appliance to accomplish the purpose for which it was designed. On the other hand the defendant introduced evidence

tending to show that it was not practicable to devise any other mechanism to do the work required under the conditions existing at that time.

After a patient study of all the evidence in the case, it is the opinion of the court that the conclusion of the jury cannot be deemed unmistakably wrong in finding that such a capstan or winch-head, without an effectual guard to hold the cable in place, was not a reasonably suitable appliance to perform the work required under the circumstances existing at the time of the accident. It might reasonably have been anticipated by those in charge of the work, who had frequently seen the cable fly off of the capstan under similar conditions, and observed its tendency to vibrate to some extent after it left the capstan, that an accident would happen to the signalman either in the way it did happen or in some similar manner. The able and plausible argument of counsel for the defense against the probability that the slipping of the cable from the capstan would have been followed by such a strong vibratory motion of the wire as to cause the accident in the manner claimed by the plaintiff, is outweighed in the minds of the court by the verdict of the jury and the uncontroverted fact that the accident was caused in some way by the vibration of the cable.

But it is further contended, in behalf of the defense, that the danger incident to the duties of a signalman stationed on the platform near the capstan and the cable, were as well known to the plaintiff as to the defendant, and that in any event he must be deemed to have assumed all risks involved in that service.

The principles of law applicable to this branch of the case have been so fully considered and critically distinguished in the recent decisions of this court that any extended discussion of them in connection with this motion for a new trial as against evidence must be deemed superfluous. It is undoubtedly well settled law that if a laborer continues in the service of his employer after he has knowledge of the defective or unsuitable condition of any mechanical appliance in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have

waived a strict performance of the employer's obligation to furnish safe and suitable appliances, and to have voluntarily assumed all risks incident to service performed under such circumstances. *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400; *Conley* v. *Am. Express Co.*, 87 Maine, 352; *Cunningham* v. *Bath Iron Works*, 92 Maine, 501; *Jones* v. *Manufacturing and Investment Co.*, 92 Maine, 565, 69 Am. St. Rep. 535. But a general knowledge of the existence of some danger which is not fully appreciated is not conclusive evidence that the risk is assumed. *Frye* v. *Bath Gas and Electric Co.*, 94 Maine, 17. The inexperienced laborer is not held to assume the risk of perils which are not called to his attention and of which he has no knowledge, but of such only as he knows, or by the exercise of ordinary care ought to know. *Campbell* v. *Eveleth*, 83 Maine, 50; *Sawyer* v. *Rumford Falls Paper Co.*, 90 Maine, 354; *Dempsey* v. *Sawyer*, 95 Maine, 295.

The plaintiff had been in the employment of the defendant company at the Otis mill for nearly four years, and for a little more than a year had worked in the "wood room" from one door of which there was an unobstructed view of the capstan and cable; but with respect to his actual observation of the working of the cable, and the extent of his experience as a signalman, prior to the day of the accident, and whether any warning was ever given him respecting the danger of that service, the testimony was sharply conflicting. The plaintiff stoutly maintained that he had never performed any service as a signalman, or any duty whatever in connection with the use of this cable to draw logs from the pile into the river, prior to the day of the accident; and there were some facts and circumstances corroborating his testimony upon this point. He also insisted that he had never seen the cable fly off of the capstan under any circumstances prior to the special instance when the accident occurred, and that nothing was ever said to him about the danger of the work. On the day of the accident he was assigned to duty as a signalman between nine and ten o'clock in the forenoon, and the accident occurred about two o'clock in the afternoon. The position he was to occupy in relation to the cable and capstan, was specified and pointed out to him by the assistant superintendent, and it was

not in controversy that he stood precisely where he was directed to stand for the purpose of giving the signals. After examining and comparing the testimony of the several witnesses on this branch of the case, it is the opinion of the court that there was sufficient evidence to support the conclusion which the jury probably reached, that the plaintiff had not performed any regular service as a signalman in connection with the working of this cable prior to the day of the accident; that his knowledge of the working of it prior to that time was only of that general and indefinite character which might be derived from the casual observation of a laborer who was not charged with any special duty in regard to it, and that he did not comprehend and fully appreciate the perils incident to the operation of it under the conditions existing at that time, but unhesitatingly assumed that no danger would be incurred in following the directions of his superior. Under these circumstances his conduct is entitled to be viewed in the light of reasonable charity, and he should not be deprived of the benefit of a verdict in his favor which is not shown to be clearly wrong.

Motion overruled.
Judgment on the verdict.

MARCIA H. TRIBOU *vs.* FREDERICK C. TRIBOU.

Hancock. Opinion March 19, 1902.

Equity. Rescission. Fraud. Undue Influence.

On appeal in equity by the defendant from the decree of a single justice, confirming the facts found by the jury under issues framed and submitted to them by the court, that the plaintiff was induced and compelled by undue influence, duress and fraud to execute a deed and bill of sale for a grossly inadequate consideration, it was ordered, adjudged and decreed by the justice in the first instance that the deed and bill of sale specified in the bill of complaint be cancelled and annulled; and that the defendant execute and deliver to the plaintiff a sufficient deed and a sufficient bill of sale to convey and transfer to her all the property purported to be passed to the defendant by said instruments.

The plaintiff's title to the property in question was derived from the will of her grandfather, Silas K. Tribou, deceased, she having by law succeeded to the bequest, being one-third of the residue of the estate, given in said will to her father, Charles H. Tribou, who had deceased before the death of the testator. The plaintiff had no definite knowledge of the nature or amount of her grandfather's property or of the value of her share therein. The defendant knew that her interest under said will was worth at least twenty thousand dollars, and immediately after filing the will for probate he invited the plaintiff to come from her home in New York and make him a family visit in Paris, Maine, and began, immediately upon her arrival, to negotiate with her for a conveyance of her interest for the sum of ten thousand dollars. The defendant at the time of the negotiations did not notify the plaintiff of the value of her interest under the will of her grandfather, but gave her to understand that a codicil had been executed, under which she would receive nothing. He employed an attorney to prepare the instruments and superintend their execution.

In determining the character of these acts of the defendant, the relation of the parties at the time is to be considered. The plaintiff was the niece of the defendant, and upon his invitation was an inmate of his house, and she had a right to rely upon his good faith, and it was his duty to inform her fully of her rights and to protect her against inconsiderate business acts in reference to her property. In the relation of confidence he was the superior party; and the inadequacy of the consideration of the deed and bill of sale, the postponement of the payment of the purchase price without security, the execution of the instruments by the plaintiff without professional advice, her inexperience and his extensive experience in business affairs, and his concealment of the material facts subject the transaction to impeachment for fraud.

Held; that the decision of the court below be affirmed with additional costs for the plaintiff.

In equity. On appeal by defendant. Appeal dismissed.

The case appears in the opinion.

H. E. Hamlin, for plaintiff.

O. F. Fellows, for defendant.

SITTING: STROUT, SAVAGE, POWERS, PEABODY, JJ.

PEABODY, J. This is a bill in equity in which the complainant, Marcia H. Tribou, asks for a decree annulling and cancelling a deed and bill of sale which she alleges she was induced to give to the defendant, Frederick C. Tribou, by duress and fraud.

It comes before the law court by appeal entered by the defendant from the decree of a single justice, whereby the facts found by the jury were confirmed, viz:

That the plaintiff was induced and compelled, by undue influence, duress, fraud, fraudulent misrepresentation, or from the concealment on the part of the respondent, to execute and deliver to the respondent the deed and bill of sale referred to in the complainant's bill; that said deed and bill of sale were given without consideration; and that all the consideration, if any, for said instruments was so grossly inadequate under all the circumstances that the same should not be regarded by a court of equity as a valid consideration; and wherein it was ordered, adjudged and decreed:

That both the deed and bill of sale specified in the plaintiff's bill be declared void, cancelled and annulled and that the respondent execute and deliver to the said plaintiff a sufficient deed and a sufficient bill of sale, or other instruments properly stamped and cancelled under the laws of the United States, covering all the property specified in said deed and bill of sale specified in the plaintiff's bill, and sufficient to convey, transfer and deliver unto the complainant all of the property purported to be passed from the complainant to the respondent by said deed and bill of sale, specified in the complainant's bill, so that the complainant's property in question may be fully and absolutely restored to her.

The complainant's title to the property in question was derived from the will of her grandfather, Silas K. Tribou, deceased. She succeeded by law to the bequest made in said will to her father, Charles H. Tribou, who had deceased before the testator. The respondent and his sister Rebecca H. Tribou and the complainant's father, whose share she takes, were the residuary legatees under said will.

The father and mother of the complainant separated in her childhood, and as she lived with her mother in New York, the family ties were necessarily loosened. Her occasional visits to her former home had become less frequent, and she did not attend the funeral of either her father or grandfather.

Under the provisions of her father's will, executed January 11, 1889, she received only a nominal bequest. She had no definite knowledge of the nature or amount of the property of her grandfather, Silas K. Tribou, and had no reason to suppose she would have any share in his estate under any will he might execute.

Silas K. Tribou died in December, A. D. 1899, and a week later the respondent petitioned for the probate of his will. Previous to the filing of the will for probate, he learned that the testator had executed a codicil in 1891, after the death of his son, Charles H. Tribou, by which the complainant was disinherited. He had made search for the codicil; but it was not found deposited with the will and was either lost or had been destroyed by the testator.

The estate of Silas K. Tribou was about sixty thousand dollars in value, and the complainant's share under his will would be one-third of the residue and would amount to about twenty thousand dollars.

The deed and bill of sale given by the complainant to the respondent, by which she transferred her entire interest in the estate to him, were executed at his home in South Paris, Maine, on the second day of January, 1900, during a visit which she was making by his invitation.

It is claimed that the acts of the respondent initiated by his letter dated December 29, 1899, inviting the complainant to make him a family visit, and which ended with his procurement of the services of an attorney to prepare and direct the execution of the instruments

mentioned in the complaint were fraudulent in intent and result.

There were indicia of actual or constructive fraud in the unusual conduct of the respondent, inviting his niece to make him a visit in midwinter, commencing almost simultaneously with filing for probate the will which entitled her to an interest worth twenty thousand dollars to negotiate with her for the conveyence of the same for one-half of its value, making prominent in conversation with her the existence of a codicil which revoked her entire interest under the will, allowing her to understand that he did not know the amount of the estate; and upon learning that she had received messages of advice from her home, hastening to secure the services of an attorney at an unusual hour in the evening to complete the business of the transfer.

In determining the character of his acts, we should consider the relations of the parties at the time. The complainant was the respondent's niece and at his invitation was an inmate of his house; she had a right to rely upon his good faith, and he was under a moral and legal duty not only to inform her fully of her pecuniary rights, but to protect her against her own inexperience.

He was the superior party in the relation of confidence, and we think that, by reason of the inadequacy of the consideration of the deed and bill of sale, the postponement of payment of the price without security, the complainant's execution of the deed and bill of sale without professional advice, her youth and inexperience, the large acquaintance of the respondent with business affairs, and his concealment of material facts, the transaction is subject to impeachment for fraud. 1 Story Eq. 120, 329a; 2 Pomeroy's Eq. 922, 928, 943, 963; *Jordan* v. *Stevens*, 51 Maine, 78, 81 Am. Dec. 556; *Wheeler* v. *Smith*, 9 How. U. S. 55.

The decision of the court below is manifestly correct, and it is affirmed with additional costs for plaintiff.

IRENE A. WADE, and another, *vs.* THOMAS CURTIS.

ANDROSCOGGIN. Opinion March 19, 1902.

Stat. of Frauds. Payment. Evidence. Amendment. R. S., c. 111. War Rev. Law, 1898.

A memorandum in the following form: —

"Lewiston, Me., August 31, 1899. This is to certify that I bought a hack of Wade & Dunton, June 5, 1899, for which I promise to pay said Wade & Dunton $275.00 within three months. Thomas Curtis," is sufficient to satisfy the statute of frauds; and being a non-negotiable note is not presumed to have been taken in payment.

Even if regarded as a note, it does not require an internal revenue stamp to be affixed to it.

The U. S. statutes which prohibit the introduction of unstamped notes in evidence, apply only to courts of the United States, and has no application to state courts.

In an action upon account annexed, the court may properly allow as an amendment to the declaration another count for goods bargained and sold.

See *Wade* v. *Foss*, ante, p. 230.

Exceptions by plaintiffs. Sustained.

Assumpsit on account annexed and a promissory note.

The case appears in the opinion.

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

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

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

STROUT, J. The writ in this case contained two counts — one upon a promissory note and the other upon account annexed. One of the items in the account was, "June 5, 1899, one hack $275. The plea was the general issue, with brief statement of the statute of frauds. Before the charge by the presiding justice, in reply to a question from him, plaintiff's attorney said he did not rely upon the count upon a promissory note, nor that the paper introduced was evidence under that count, but he did rely upon it as a memorandum

in writing which satisfied the statute of frauds. This paper was as follows: —

"Lewiston, Me. August 31, 1899.

This is to certify that I bought a hack of Wade & Dunton June 5, 1899, for which I promise to pay said Wade & Dunton $275.00 within three months. Thomas Curtis."

This paper was objected to, because not stamped, as a note, and as an insufficient memorandum under the statute, and exception was taken to its admission. That it was a sufficient memorandum under the statute, is too plain for argument. As such, no stamp was required. Even if regarded as a note, it still would be admissible in a state court without stamp. The United States statute forbidding admission as evidence of unstamped instruments, which that statute requires to be stamped, applies only to the courts of the United States, and not to the courts of a state. *Wade* v. *Foss*, ante, p. 230. The fact that a stamp was subsequently placed upon the paper is immaterial.

In his charge, the presiding justice stated that negotiations were had between the parties on June 5, 1899, and that plaintiff claimed that at that time a trade was made for the hack, a price agreed upon and the terms arranged, but that the hack was left in possession of plaintiff for the convenience of defendant,—and he instructed the jury in effect, that even if the trade had been made in June, this memorandum made in August following, referring to and stating the prior sale and its terms, would be sufficient under the statute. The exception to this ruling is manifestly without merit.

At the close of the charge, defendant requested an instruction that the plaintiff could not recover because the hack had never been delivered, and that indebitatus assumpsit would not lie. Thereupon, on motion, plaintiff was allowed to amend, by adding a count for goods bargained for and sold. Exception was taken to allowance of this amendment. It introduced no new cause of action, but simply changed the form of declaring. Under either count the question involved the contract of sale of the hack. The amendment violated no rule of law. It was a matter within the discretion of the presiding justice, which cannot be reviewed on exceptions.

Defendant further asked an instruction, that the note contained in the memorandum was payment for the hack, and that the price of the hack could not be recovered, the note having been given therefor, which was refused. In this jurisdiction it is held that the giving and receiving a negotiable note for the price of an article sold, is presumptive evidence of payment, but the presumption may be rebutted. *Varner* v. *Nobleborough*, 2 Maine, 121, 11 Am. Dec. 48. No such presumption attaches to a non-negotiable note. This note was non-negotiable.

We perceive no error in the rulings or instructions of the court, and the entry must be,

Exceptions overruled.

INHABITANTS OF ATKINSON *vs.* INHABITANTS OF ORNEVILLE.

Piscataquis. Opinion March 20, 1902.

Pauper. Practice. Evidence. Declarations.

When exceptions are taken to the admission of evidence, in the absence of any exception to the charge, it is presumed that full and correct instructions were given to the jury.

The books of a collector of taxes upon which were marks of "paid" in his hand writing opposite the name and the tax for certain years, including 1884, of one subsequently a pauper, have no probative force to show that in the fall of that year the pauper did not move away from the town in which he was taxed, when it is admitted that he was living there at the date of the assessment.

When all the declarations accompanying the act have been admitted in evidence, exceptions will not be sustained to the exclusion of declarations of one claimed to have changed his residence and whose pauper settlement is later in dispute, made during a conversation held a few days prior to the alleged move.

Where there is evidence to support a verdict and there is nothing in the case which would justify the substitution of the judgment of the court, who did not see the witnesses, for that of the jury who did, and the parties have had a fair trial without prejudicial error in law, the verdict will not be disturbed.

Exceptions and motion by defendant. Overruled.

Assumpsit for pauper supplies, furnished by the overseers of the poor of Atkinson to one Charles R. Ayer.

The opinion states the case.

Henry Hudson and W. A. Burgess, for plaintiff.

J. B. Peakes and E. C. Smith, for defendant.

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

WHITEHOUSE, J. The question submitted to the jury was whether Charles Ayer, in November, 1899, continued to hold his derivative pauper settlement in the plaintiff town of Atkinson, or whether he had acquired a settlement in his own right in the defendant town of Orneville, by having his home in that town from December, 1882, to October, 1888, more than five successive years, without receiving supplies as a pauper. The jury sustained the latter contention and returned a verdict in favor of the plaintiff. The case comes to this court on exceptions and motion to set aside the verdict as against evidence.

I. The exceptions. It was contended in behalf of the defendants that the pauper's residence in Orneville was interrupted in 1883, by his removal to Milo in the summer of that year, and having his home with his father for a few months in that town, and again in 1884, by having his home for a few months in the autumn of that year in a "little shack or shanty" near Heald's Mills in the town of Lagrange. The books of the collector of taxes of Orneville for the years 1883-4-6-7 and 8 were received in evidence for the purpose of showing that the taxes assessed against the pauper in those years were in fact paid by him. The collector had deceased, and the books were admitted upon the testimony of his son identifying the books, and his father's handwriting in the entries in blue pencil opposite the name of Charles Ayer, showing that the tax for each of the years above named was marked "paid." The defendants excepted "to the admission of the collector's books and to the testimony of the son in relation to them."

But the learned counsel for the defendants very properly argues that evidence of the payment by Charles Ayer of a tax assessed against him April 1, 1884, has no "probative force to show that he did not move away into the town of Lagrange in the fall of that year." See *Monroe* v. *Hampden*, 95 Maine, 111, and cases cited. He expressly admits that Ayer lived in Orneville in the spring of 1884, but contends that he moved into Lagrange in the autumn. Neither was there any controversy that Ayer lived in Orneville on the first day of April, 1883. In the absence of any exception to the charge it is presumed that full and correct instructions were given to the jury with reference to the legitimate tendency of the collector's books as evidence in the case. It appears that this was only to establish propositions that were freely admitted by the defendants. Assuming, therefore, without deciding, that the collector's books with the pencil marks of "paid" against the name of Charles Ayer, were not legally admissible as evidence, the defendants cannot be considered aggrieved by their admission.

The defendants' second bill of exceptions is as follows: "It was in evidence that some time in 1883 Charles Ayer packed up his goods in the town of Orneville where he was then living, and moved somewhere and said he was going to Milo to live and take care of his father. The defendants undertook to show that a few days before Charles moved away, his father, who lived in Milo, came to see him, and the defendants offered to show the conversation between Charles and his father at that time as to moving away to Milo, but the court excluded it because it did not accompany some act, an act of preparation to leave town or while returning.

"It was in evidence that a few days after the conversation with his father, Charles packed up, moved from the house in Orneville and said he was going to Milo."

This bill of exceptions also utterly fails to show that the defendants were aggrieved by the ruling excepted to.

It is a familiar principle that "when an act is admissible in evidence as indicating an intention, declarations accompanying and explanatory of that act are also admissible." *Deer Isle* v. *Winterport*, 87 Maine, 37, and cases cited. But it appears from this bill of exceptions that

all such declarations accompanying any act in this case were admitted. The alleged conversation between Charles and his father did not accompany any act, and there is no suggestion in the exceptions that it tended to establish a definite contract under which he was to live with his father in Milo. It is represented to be a conversation "as to moving away to Milo." The exceptions do not bring the case within the principle of *Ripley* v. *Hebron*, 60 Maine, 379. It does not affirmatively appear that the defendants were aggrieved by the exclusion of this evidence.

II. The motion. The burden was undoubtedly on the plaintiffs who set up five years' continuous residence of the pauper in the defendant town, to establish that proposition by a preponderance of the evidence. *Monroe* v. *Hampden*, 95 Maine, 111; *Ripley* v. *Hebron*, 60 Maine, 379.

After a careful reading and comparison of all the evidence in the case and a review of the arguments of counsel, it is the opinion of the court that there is a preponderance of evidence tending to show that, notwithstanding an apparent change of dwelling-place in 1883, the legal home of Charles Ayer remained in Orneville during that year.

But more difficulty is experienced in regard to the defendants' second proposition that there was a removal to the town of Lagrange in the fall of 1884. Upon this branch of the case the testimony was sharply conflicting. The report discloses strong and apparently reliable testimony that Charles Ayer removed to Heald's Mills in Lagrange in October or November, 1884, with his family and household goods, and occupied a small "shanty" there, owned by Thomas S. Heald, as a dwelling-place for six weeks or two months in the fall of that year.

On the other hand, Thomas S. Heald, who owned and operated the mills there, testifies that he owned the "shanty" alleged to have been occupied by Ayer, and that it was occupied throughout that season by another man, and that Ayer never worked for him, never had permission to occupy the "shanty" and never did occupy it to his knowledge. This was corroborated by other testimony tending to show that Ayer did not dwell in Lagrange, but did live in Orneville during that season.

Here was a plain issue of fact which the jury were fully qualified to understand and appreciate. Under the appropriate instructions which were presumably given them, they could not fail to apprehend the proper relation of the evidence to that issue. They had the advantage afforded by an inspection of the manner and bearing of the witnesses. Able and experienced counsel were there to see that nothing was overlooked or forgotten. It is possible, but by no means certain, that the court would have reached a conclusion different from that reported by the jury. But there was evidence sufficient to support the verdict, and there is nothing in the case which would justify the substitution of the judgment of the court, who did not see the witnesses, for the judgment of the jury who did. The parties had a fair trial without prejudicial error in law, and must abide the result.

Motion and exceptions overruled. Judgment on the verdict.

M. ABBIE BARNES *vs.* INHABITANTS OF RUMFORD.

Oxford. Opinion March 20, 1902.

Way. Defect. Notice. Contributory Negligence. R. S., c. 18, § 80.

1. A town is made chargeable by statnte with the consequences of the neglect of its officers to make necessary repairs of its highways after receiving notice of the defect; and it is immaterial whether the notice is to one of the officers for the municipal year in which the accident occurred, or for some previous year, provided the defective condition of the way remained unchanged.
2. It is provided by § 80 of c. 18, R. S., that, "if the sufferer had notice of the condition of such way previous to the time of the injury, he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way."
3. In an action to recover damages caused by a defect in the highway, there was evidence tending to show that the driver, who had control of the carriage in which the plaintiff was riding, prior to the accident, had not given notice of the defect to any one of the municipal officers; but there was no claim that the plaintiff who was the "sufferer" had any notice of the condition of the way prior to the accident.

4. *Held;* that while this requirement of the statute imposes upon the traveler a distinct personal duty, as a condition precedent to his right to recover for injuries suffered on account of such defect, yet with respect to the discharge of this particular statutory obligation, it would be an unwarranted construction of the act to hold that the sufferer was chargeable with the knowledge of the driver of a public carriage in which the plaintiff was a passenger, and thus responsible for his failure to notify the municipal officers.

5. This express statutory duty is, of course, clearly distinguishable from the obligation imposed by the doctrine of contributory negligence or concurring causes, which, under the construction placed upon the statute by our court, has uniformly been held specially applicable to this class of actions against towns for defective highways.

6. Upon this question of contributory negligence the plaintiff was held responsible for the conduct of the driver, and in that respect she was chargeable with his knowledge of the existence of any defect at the point where the accident happened. But a breach of this distinct statutory duty of the traveler to give to the municipal officers the benefit of any knowledge he may have of the existence of the defect, is sufficient to defeat his right to recover independently of the doctrine of contributory negligence or concurring causes. In that respect the "sufferer" in this case was not chargeable with the knowledge which the driver had, but which she did not have, and was not responsible for his failure to communicate it to the municipal officers.

7. *Held;* that while a declaration made by the driver out of court is admissible for the purpose of impeaching his credibility as a witness, it cannot be considered by the jury as evidence of the fact stated tending to show how the accident happened. Said declaration was made three or four minutes after the accident happened. The driver was not then performing any act. The occurrence had terminated. His statement was not a spontaneous exclamation accompanying an act and tending to explain or illustrate it, but a simple narration of a past event. It was not a part of the res gestae.

8. Whether the condition of the way at the point of the accident, in this case, was reasonably safe and convenient within the meaning of the statute as construed by our court, is a question of fact not entirely free from difficulty. A jury of practical men, a majority of whom had doubtless had experience in repairing highways, evidently found the road defective for want of an appropriate railing or guard to prevent travelers from driving into the ravine in the night-time, and the court considers that their conclusion was not unmistakably wrong. The evidence appears to have satisfied the jury that the municipal officers must have observed the condition of the road at that point unless grossly inattentive to their duty, and in the absence of any positive testimony to the contrary from these officers the jury drew the inference that they had actual notice of the defective condition which caused the accident. It is the opinion of the court that this question of notice is attended with less difficulty than that respecting the

existence of a defect, and that the verdict of the jury should not be disturbed on this ground.

On motion and exceptions by defendant. Overruled.

This was an action on the case, under § 80, chap. 18, R. S., to recover for bodily injuries claimed to have been received by the plaintiff through an alleged defect in the highway in the defendant town; the defect claimed was the want of a railing at the point where plaintiff sustained her injuries; the defendant town defended mainly on the ground that the town through its proper officers did not have the twenty-four hours actual notice of the defect required by statute.

Also that Thomas the plaintiff's driver who was carrying her for hire, and who owned and controlled the team, had actual knowledge of the condition of the way prior to the accident, and had not notified the municipal officers of the same.

That Thomas the driver was negligent in driving the horses and did not exercise proper care, that the hole or "V" shaped place into which the wheel dropped was made at the time of the injury by the slumping of the near horse and the near wheel of the carriage breaking down the turf and did not exist prior to the injury.

The presiding justice among other things, in charging the jury in regard to the several claims made both by plaintiff and defendant, charged as follows:—

First: In regard to twenty-four hours actual notice: "The statute does not say actual knowledge in the sense that the town officers must have actually seen it." "Or it would be competent to show that the selectmen were seen looking at it; that would be notice and knowledge both, for what a man sees he has notice of."

Second: As to the ruling in regard to actual knowledge of Thomas the driver as to the condition of the way and not notifying the municipal officers previous to the accident, as claimed by defendant, he was obliged by law to do, the presiding justice said: "Gentlemen, I overrule that contention of the defendant and do not sustain it. The statute says that if the sufferer—that is the plaintiff in this case—had notice of the condition of such way previous to the time of the injury he cannot recover. It isn't claimed that the sufferer in this

case had any knowledge of the condition, and she is not chargeable in that respect with the knowledge of her driver, so that you will have no difficulty on that proposition."

Third: As to declarations and statements of Thomas the driver made at the immediate time of the injury and early the following morning. The court said: "Mr. Thomas the driver was upon the stand as a witness, and after he became a witness, the defendant, as it had a right to do, put upon the stand several witnesses who testified to declarations made by Mr. Thomas afterwards, that is, that night and some the next morning, which it is claimed are somewhat inconsistent with the story he has told here upon the stand and weaken it or impeach it, as we say. Now so far as any declarations made by Mr. Thomas that night to Mr. Richardson or Mr. Howe or the next day to the other two parties, whose names I do not now recall, but whose depositions were read—I say so far as any declarations he made that night to these parties or to other parties the next morning are concerned, they are properly before you for one single purpose and only one purpose, and that is to attack or impeach the credibility of Mr. Thomas as a witness. Mr. Thomas is not a party to this suit, he is an outsider, a bystander so to speak, and parties in court must not have their rights jeopardized by outside talk, any outside talk they may make themselves is of course to be considered as weighing upon the principal facts at issue, but talk of other parties is simply hearsay, and if Mr. Thomas hadn't been introduced as a witness, it wouldn't have been competent for the defendant to show any of his declarations outside; but inasmuch as he was a witness, the defendant had a right to show if he could that he had made varying and different statements elsewhere, but that should be taken into account simply in judging of the weight to be given to Mr. Thomas' story. What he said outside that night or the next morning is not to be weighed, and must be carefully excluded as bearing upon what actually took place that night; it only bears upon his statements as a witness and does not prove any different state of facts."

Fourth: The plaintiff offered testimony tending to prove that one of the selectmen and the road commissioner for 1898 (year prior to

injury) were upon the way adjacent to the alleged defect and had an opportunity to notice the defect. This testimony was seasonably objected to by defendant as not being admissible, claiming notice could only be given to officers of the town for the year the injury was received, November 1899.

The presiding justice overruled this objection and admitted the testimony of the witnesses subject to the exceptions of the defendant as will appear in the case.

To all these rulings, and instructions, and refusals to instruct the defendant excepted.

The writ was dated March 28th, 1900, and was entered at the May term 1900; ad damnum, $4000. The plea was the general issue. Verdict for plaintiff for $1304.33, October 17th, 1900.

Jas. S. Wright, for plaintiff.

Geo. D. Bisbee and Ralph T. Parker, for defendant.

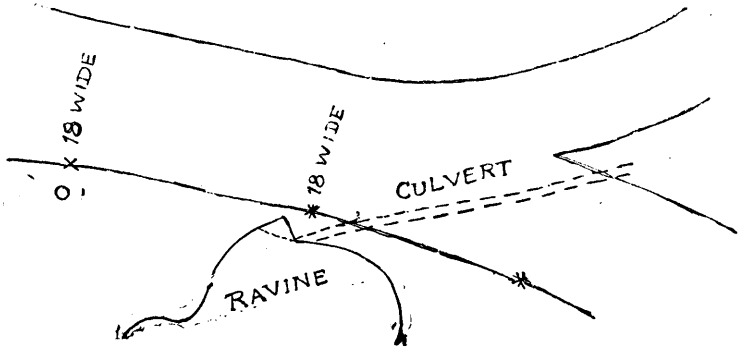
SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, STROUT, FOGLER, PEABODY, JJ.

WHITEHOUSE, J. The plaintiff recovered a verdict of $1304.33 for personal injuries alleged to have been received through a defect in one of the highways of the defendant town, and the case is before this court on exceptions and a motion for a new trial as against evidence.

On the first day of November, 1899, in the evening, the plaintiff was traveling on the highway leading from Rumford Point to Andover by way of the covered bridge near the mouth of Ellis river. She was one of four passengers in a public carriage drawn by two horses driven by A. W. Thomas. The night was very dark and rainy, and when they arrived at a point opposite the southeast corner of the dwelling-house of M. E. Barker, where the road bends around the steep bank going from Rumford Point to the bridge, the driver suddenly discovered that his near horse was traveling on the grass-ground, and the next instant the horse slumped, the forward wheel dropped into a "V" shaped hole about twenty-one inches deep and eighteen or twenty inches outside of the wheel-tracks of the usually

traveled road, and thereby the plaintiff was thrown out and injured.

It was not in controversy that there was an embankment on the side of the road where the accident happened, with a precipitous descent into a ravine the end of which, next to the traveled way, had assumed the shape of the letter V near the crown of the curve in the road. A culvert had also been built across the road at this point, extending into the embankment about three feet beyond the wrought part of the road. The condition may be approximately shown by the following lines:



The plaintiff claims that the road was defective at that point, for want of a sufficient railing or guard of any kind, to prevent those traveling in the night-time from driving out over the bank into the ravine.

I. The exceptions. There was evidence tending to show that the driver, who had control of the carriage in which the plaintiff was riding, had actual notice of the condition of the road at that point, prior to the accident, and had not given notice of the defect to any one of the municipal officers. It was therefore contended in behalf of the defense that the plaintiff was barred of her right to recover by one of the provisions of § 80 of c. 18 of the revised statutes. But the presiding justice overruled the plaintiff's contention on this point and instructed the jury that under that statute the plaintiff was not chargeable in that respect with the knowledge of the driver.

This ruling was undoubtedly correct. The statute in question says, "if the sufferer had notice of the condition of such way previous to

the time of the injury, he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way." There was no claim that the plaintiff, who was the "sufferer" in this case, had any notice of the condition of the way prior to the accident. This requirement of the statute imposes upon the traveler a distinct personal duty as a condition precedent to his right to recover for injuries suffered on account of such a defect. But with respect to the discharge of this particular statutory obligation, it would be an unwarranted construction of the act to hold that the sufferer was chargeable with the knowledge of the driver of a public carriage in which the plaintiff was a passenger, and thus responsible for his failure to notify the municipal officers.

This express statutory duty is of course clearly distinguishable from the obligation imposed by the doctrine of contributory negligence or concurring causes, which, under the construction placed upon the statute by our court has uniformly been held specially applicable to this class of actions against towns for defective highways. In ordinary actions at common law, if an injury appears to be the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable. *Lake* v. *Milliken*, 62 Maine, 240, 16 Am. Rep. 456. But in this state it is familiar law, settled by a long line of decisions, that in order to render a town liable under our statute for an injury sustained by reason of a defect in the highway, it must appear that the accident happened "through the defect" alone. If the negligence of the plaintiff, or any other efficient independent cause for which neither the plaintiff nor the town is responsible, contributes to produce the injury, the plaintiff cannot recover. It must appear that the defect in the way was the sole cause of the injury. *Moore* v. *Abbot*, 32 Maine, 46; *Moulton* v. *Sanford*, 51 Maine, 127; *Aldrich* v. *Gorham*, 77 Maine, 287.

So in *State* v. *Boston & Maine R. R.* 80 Maine, 431, 445, our court held, that in ordinary actions at common law, the negligence of a driver is not to be imputed to a passenger who exercises no control over the team, but distinguished these actions against towns as

follows: "A class of cases against towns for injuries caused by defective highways, being statutory actions, stand upon a ground of their own, unaffected by the rule under consideration."

In accordance with this view, the presiding justice in the case at bar properly gave the defendant the full benefit of this distinction by instructing the jury that it was not only incumbent upon the plaintiff to prove that she herself was in the exercise of ordinary care, but that she must go further and show that the driver of the team was also in the exercise of due care. "Although," it was said in the charge, "she may be entirely faultless herself and the town have been at fault with regard to the condition of the way, the law is that if the driver was at fault, negligent or careless, and his carelessness, or his want of ordinary care — for that is the standard always — contributed to the injury, she cannot recover. Now you will take into consideration just how it happened. They were driving along there in the road on a very dark and stormy night. Was the driver familiar with the road? Did he know where he was, or in the exercise of ordinary care ought he to have known where he was?"

Thus it will be seen, that upon this question of contributory negligence the plaintiff was held responsible for the conduct of the driver, and in that respect she was chargeable with his knowledge of the existence of any defect at the point where the accident happened. But a breach of this distinct statutory duty of the traveler to give to the municipal officers the benefit of any knowledge he may have of the existence of the defect, is sufficient to defeat his right to recover independently of the doctrine of contributory negligence or concurring causes. In that respect the "sufferer" in this case was not chargeable with the knowledge which the driver had, but which she did not have, and was not responsible for his failure to communicate it to the municipal officers.

There was also evidence that A. W. Thomas, the driver of the team, stated to a witness, after the accident, and before they had left the scene of it, that "the first he knew of the accident his near horse slumped and made a spring and another foot went down and he made another spring and then the wheel dropped." As this was a materially different version of the occurrence from that given by him as a

witness on the stand, the presiding justice instructed the jury that this declaration made by the driver out of court was admissible for the purpose of impeaching his credibility as a witness, but that it could not be considered by the jury as evidence of the fact stated tending to show how the accident happened. The defendants took exceptions to this instruction, claiming that the declaration made by Thomas so soon after the accident should be deemed a part of the res gestae.

It is the opinion of the court that the instruction to the jury was correct. As stated in *Vicksburg M. R. R. Co.* v. *O'Brien*, 119 U. S. 99, a declaration "is not to be deemed part of the res gestae simply because of the brief period intervening between the accident, and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made." See also *State* v. *Maddox*, 92 Maine, 348. The true principle upon which such evidence is admissible seems to be that the statement testified to is a verbal act, illustrating, explaining or interpreting other parts of the transaction; that the declaration is contemporaneous with the principal fact, and so far explains or characterizes it as to be in a just sense a part of it and essential to a complete understanding of it. It appears from the testimony in this case that the declaration in question must have been made three or four minutes after the accident happened. The driver was not then performing any act. The occurrence had terminated. His statement was not a spontaneous exclamation accompanying an act and tending to explain or illustrate it, but a simple narration of a past event. It was not a part of the res gestae, and was only admissible for the purpose of impeaching the testimony of the driver given upon the stand. It was not original evidence of the fact to which it related.

Finally, there was evidence tending to show that the road commissioner and one of the selectmen for the year 1898, the year preceding that of the injury, had actual notice of the defect which caused the injury, and the presiding justice ruled that if the condition of the way had remained unchanged, so that these officers had notice the year before of the identical defect which caused the injury, it would fulfil the statutory requirement of twenty-four hours' actual notice

of the defect. The defendants took exception to this instruction, contending that there must be twenty-four hours' actual notice to one of the municipal officers, or a road commissioner, in power at the time of the accident. But this position of the defendants is clearly untenable. The object of this particular requirement of the statute was "to allow a town a reasonable opportunity to remove a defect after receiving information of its existence." *Holmes* v. *Paris*, 75 Maine, 559. The town is made chargeable with the consequences of the neglect of its officers to make the necessary repairs after receiving such notice of the defect, and it is immaterial whether the notice is to one of the officers for the municipal year in which the accident occurred, or for some previous year, provided the defective condition of the way remained unchanged. In a great majority of instances it would doubtless be very improbable that a defective condition of a way would remain precisely the same for many years, and the lapse of time would become chiefly important in determining that question. Under the construction of the statute contended for by the defendants, several contingencies might arise in which the fulfilment of this requirement would become impossible and the sufferer's remedy would be entirely destroyed. If an accident should happen on the first day of a municipal year after the election of a new board of officers, it would be impossible to prove twenty-four hours' actual notice to the officers in authority at the time of the accident. So also, if a change of officers should occur at a later period in the year by reason of death or resignation, and an accident should afterwards happen through a defect of which only the deceased or retired officers had notice, the remedy prescribed by the statute would be lost. The culpability of the town is precisely the same whether the failure to repair occurs under one administration or another, provided there is notice of the identical defect which caused the injury. The language of the statute neither requires nor justifies the construction claimed by the defendants.

The other exception is waived by the counsel for the defendants.

II. The motion. Whether the condition of the way at the point of the accident was reasonably safe and convenient within the mean-

ing of the statute as construed by our court, was a question of fact not entirely free from difficulty. At the point in question the traveled part of the road was at least eighteen feet in width, level and smooth, and undoubtedly safe and convenient for travel in the daytime, and it is contended by the defendants that a railing on the embankment opposite the ravine would not only fail to improve the condition of the road, but would itself be an obstruction, and a source of danger instead of a measure of safety, to public travel. But highways are established and maintained for the accommodation of those who are under the necessity of traveling in the darkness of the night, as well as those who travel in the light of the day. A jury of practical men, a majority of whom had doubtless had experience in repairing highways, evidently found the road defective for want of an appropriate railing or guard to prevent travelers from driving into the ravine in the night-time, and we are unable to say that their conclusion was unmistakably wrong.

But the defendants further insist that there was no evidence to warrant the jury in finding that either the municipal officers or the road commisioner had twenty-four hours' actual notice of the defect which caused the injury. This statutory notice is a conclusion of fact capable of being established by circumstantial as well as by direct evidence. There was uncontroverted evidence in this case that the condition of the road in question had remained the same for several years; that in the fall of 1898 the street commissioner repaired the traveled part of it directly in front of the ravine, running the road machine three times within eighteen inches of the place where the wheel went down over the bank at the time of the accident, and he was not called as a witness. It also appeared that one of the selectmen in 1899 was accustomed to pass this place frequently during the summer and fall of that year, a portion of the time as often as twice a day, and that one of the selectmen in 1898 also passed it repeatedly during that year, driving out of another road directly in front of the ravine. This evidence appears to have satisfied the jury that these officers must have observed the condition of the road at that point unless grossly inattentive to their duty, and in the absence of any positive testimony to the contrary from these officers, the jury drew

the inference that they had actual notice of the defective condition which caused the accident. It is the opinion of the court that this question of notice is attended with less difficulty than that respecting the existence of a defect, and that the verdict of the jury should not be disturbed on this ground.

Exceptions and motion overruled. Judgment on the verdict.

VESTA A. WITHAM

vs.

BANGOR & AROOSTOOK RAIL ROAD COMPANY.

Piscataquis. Opinion March 26, 1902.

Railroads. Right of Way. Reasonable Use. Repairs. Negligence.

While driving along the highway near the railroad track of the defendant, the plaintiff was thrown from her wagon and injured, by her horse becoming frightened at three pieces of culvert pipe some seventeen feet outside of the highway, and upon the defendant's right of way, and which had been deposited there four days before for the purpose of repairing and improving its road-bed by substituting a culvert for a bridge at that point. The appearance of the pipe was such as was calculated to frighten horses of ordinary gentleness.

The defendant in repairing and improving its roads was in the exercise of a right conferred by its charter, and a duty which the law imposes upon it for the safety of the public who travel over its road.

In doing this it must act reasonably, and with a due regard for the rights and safety of persons who have occasion to use the highway. It cannot act negligently, improperly or unreasonably; but to create a liability on its part for the resulting injury, there must be something in the time, or manner, or circumstances under which the act is done, which charges it with a want of proper regard for the rights of others.

The defendant corporation was created by the public for public purposes. The public safety and convenience demand that its road-bed be kept in repair. If it exercises due care in making repairs and improvements upon its own premises, no action will lie for such inconveniences, or even injurious consequences, as are necessarily incident to its management and operation.

The appearance of the pipe being such as was calculated to frighten horses of ordinary gentleness, the defendant would not be justified in letting it remain so near the highway for an unreasonable length of time.

Held; that in view of the nature of the repairs for which the pipe was intended, the constant and regular use of the defendant's road for public travel and commerce, and the extent of its line which must be kept in repair at all times, and in all places, four days was not an unreasonable length of time, under the circumstances of this case.

On report. Judgment for defendant.

Action of tort to recover damages sustained by the plaintiff, by being thrown from her carriage while traveling on the highway in Guilford adjoining the defendant's railroad. The cause of the accident, as the plaintiff alleged, was due to her horse taking fright at some culvert pipe placed in close proximity to the highway. There were three pieces of pipe, black in color, three feet eight and one-half inches in diameter at one end, four feet and three inches at the other end, and twelve feet and six and one-half inches long. They weighed 6147 pounds, each.

By agreement of the parties, the case was reported to the law court to determine whether the action was maintainable.

H. Hudson, for plaintiff.

Counsel argued: The placing of the pipes where they were placed was a nuisance.

If the pipes had been placed where they were by an individual, such individual would have been liable therefor.

The same rule applies to a railroad corporation that applies to an individual.

The defendant cannot justify under its charter. When such charter was granted, it was not within the contemplation of the legislature that nuisances were to be created.

The plaintiff admits that the defendant has the right to repair its railroad track, its bridges, and to do what is necessary to keep the road in good condition; and that in making said repairs it has the right to do everything necessary to be done in order to make the repairs, provided it does not create a nuisance. It is not contended that, if it was absolutely necessary to do a given piece of work on the railroad and it could not be done in any other way than to create a

nuisance, that the railroad might have the right to create such nuisance; but when the work can be done by the road without creating such a nuisance and endanger the lives and property of persons, then the railroad should adopt such course as would not endanger such lives and the property of persons. If the road, however, sees fit to adopt the course to create a nuisance and thereby damage any person either in property or an injury to the person, then the railroad is liable for such damage.

The placing of such objects on its right of way in such close proximity to the traveled portion of the highway, which are naturally calculated to frighten horses ordinarily gentle and well broken, is not a reasonable use of its right of way; that such use is unlawful and constitutes a nuisance. *Lynn* v. *Hooper*, 93 Maine, 46, 47 L. R. A. 752.

An object at the side of the highway, or in close proximity thereto, of such a character that it is naturally calculated to frighten horses ordinarily gentle may constitute a nuisance. Elliot on Roads, § 649, 2nd Ed.; *Cook* v. *Charlestown*, 98 Mass. 80, 93 Am. Dec. 137; *Kingsbury* v. *Dedham*, 13 Allen, 186, 90 Am. Dec. 191; *Horton* v. *Taunton*, 97 Mass. 266; *Ayer* v. *Norwich*, 12 Am. Rep. 396, (39 Conn. 376).

The following have been held to constitute a nuisance:

A heap of refuse on land near the highway liable to frighten horses. *Brown* v. *Eastern R. R. Co.*, 21 Q. B. Div. 391, S. C. 37 Am. & Eng. R. R. Cases, 558. A hand car left on the track so loaded as to frighten horses. *Cincinnati R. R. Co.* v. *Commonwealth*, 80 Ky. 139, Am. & Eng. Enc. of Law, Vol. 19, 921; *Broughton* v. *Carter*, 18 Johnson, 406. The placing of anything near a highway calculated to frighten horses, is a public nuisance. Wood on Nuisances, 3rd Ed. p. 94.

Public or common nuisances affect the community at large, or some considerable portion of it, such as the individuals of a town, and the person therein offending is liable to criminal prosecution. A public nuisance does not necessarily create a civil cause of action for any person, but it may do so under certain conditions. A private nuisance affects only one person or a determinate number of persons,

and is the ground of civil proceedings only. Am. & Eng. Enc. Vol. 16, 926. See also *Baltzeger* v. *Carolina Midland Ry. Co.*, 71 Am. St. Rep. 789, 54 S. C. 242.

Objects in the highway that do not prevent passage, but render it dangerous from the tendency to frighten horses, are nuisances. Cooley on Torts, p. 617, and cases cited.

If one, for his own benefit, violates the rights of another, it is a nuisance, and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication and redress. *Davis* v. *Winslow*, 51 Maine, 264, 81 Am. Dec. 573; *Shrewsbury* v. *Smith*, 12 Cush. 177; *Heeg* v. *Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Gorham* v. *Gross*, 125 Mass. 232, 28 Am. Rep. 224.

The testimony in this case from nine different witnesses introduced by the plaintiff shows that horses which were ordinarily kind were frightened at the pipes. These witnesses were prominent business men in the village of Guilford and Sangerville. Each witness testified that the horse he drove, and was frightened, was in most cases a horse that had been owned for some time, a family horse, and was not frightened before nor since that time. The plaintiff contends, therefore, that the pipes placed where they were, of the color, size, and the manner of placing them, were well calculated to frighten horses, and therefore were a nuisance. The plaintiff claims that the authorities already cited show that had the pipes been placed where they were by some person owning the land, then such person would have been liable for the damage that the plaintiff suffered.

The same rule that applies to individuals applies to corporations as well. The maxim "sic utere tuo,"—so use your own property as not to injure the rights of another,—applies alike to corporations and to individuals.

In *Hill* v. *Portland & Rochester R. R. Co.*, 55 Maine, 438, 92 Am. Dec. 601, the plaintiff's horse was frightened by a loud and sudden blowing of defendant's locomotive whistle at a railroad crossing near the Buxton station. Defendant denied its liability. The court say: A railroad company has an undoubted right to establish rules and regulations in reference to the mode and manner in giving notice at stations or at other places, but all such rules must be subjected to

the test of reasonableness in view of the rights and duties of citizens who may be affected by them. No corporation can rightly disregard these rights when adopting its own rules of action or giving directions to its servants. The great maxim of "sic utere tuo" applies to corporations as to individuals. *Shaw* v. *Boston & Worcester R. R. Corp.*, 8 Gray, 45. "We cannot sanction the claim of any railroad to establish and execute its own rules at its own pleasure without reference to others rights and privileges." *Hill* v. *P. & R. R. R. Co.*, 55 Maine, 438, 92 Am. Dec. 601.

In every case, then, it becomes a question whether in that particular case the act was reasonable and within the rule of ordinary care under all the circumstances of time and place, and all the surroundings. *Hill* v. *P. & R. R. R. Co.*, supra.

Counsel cited: *Cogswell* v. *N. Y. N. H. & H. R. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701; *Morton* v. *Mayor of N. Y.* 140 N. Y. 207, 22 L. R. A. 241; *Walsh* v. *Fitchburg R. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 27 L. R. A. 724; *Balt. & Pot. R. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317; *Sinnickson* v. *Johnson*, 2 Harr. (N. J.) 129, 34 Am. Dec. 184; *Pa. R. R. Co.* v. *Angel*, 56 Am. Rep. 1, S. C. 41 N. J. Eq. 316, and notes; *Matthews* v. *W. L. Water Works*, 3 Camp. 403; *Pine City* v. *Murch*, 42 Minn. 342, 6 L. R. A. 763; 2 Wood on Nuisances, p. 1049; *Jones* v. *Housatonic R. R. Co.*, 107 Mass. 261; *Brown* v. *Eastern Midland R. R. Co.*, App. Cas. Q. B. Div. 25 & 23, Feb. 13, 1889.

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

The pipes were not deposited on the highway or upon the land of any other person or corporation, but upon its own right of way, in which by operation of law, it had a distinct and peculiar easement; not such an easement as is limited to the ordinary right of way, such as is acquired for highways, but an easement that justifies a use by the company of the land for all the purposes of a railroad. *Brainard* v. *Clapp*, 10 Cush. 6, 57 Am. Dec. 74; *Conn. & Pass. Rivers R. R. Co.* v. *Holton*, 32 Vt. 44. The easement in lands taken for the purpose of a railroad is obviously vastly different from that in land appropriated to the various kinds of other public ways. *Hayden* v. *Skillings*, 78 Maine, 413; *Brainard* v. *Clapp*, 10 Cush. 6, 57

Am. Dec. 74; Pierce on Railroads 159, 161, 263; 2 Elliot on Railroads, § 718; *Conn. & Pass. Rivers R. R. Co.* v. *Holton*, 32 Vt. 44. It is the largest possible description. *Curtis* v. *Eastern R. R. Co.*, 14 Allen, 58. Great care is required from railroad companies in the construction of their roads, not only must the road be properly constructed, but it must be kept in good condition. They were bound to exercise that degree of care and skill which cautious persons would use in the construction by competent engineers and workmen of the road-bed, track, culverts and all the appliances and means of transportation to carry on the business of the road and operate its trains. To make frequent and careful examinations and inspections of the same in order to avoid accidents as far as human skill and foresight can reasonably secure such a right. *Libby* v. *M. C. R. R. Co.*, 85 Maine, 34, 20 L. R. A. 812. By virtue of the easement in its right of way which it acquired under and by virtue of its charter and franchise, the defendant had the right to deposit within its location, such material as it deemed necessary to the construction or maintenance of its road, and the only possible question in this case is, whether the defendant reasonably exercised in this instance the legal rights with which it was invested. The plaintiff's right to travel over the highway is in no way superior to the railroad's right to use its right of way for legitimate railroad purposes in the construction or in the maintenance of its road. The public easement of travel is not superior to the easement which the defendant has within its right of way. On the contrary, the passenger on the highway must submit to such incidental inconvenience and dangers as necessarily flow from the operation of a railroad chartered under the laws of a state. *Macomber* v. *Nichols*, 34 Mich. 212, 22 Am. Rep. 522. So long as it keeps within the scope of the powers and authority granted, a railroad company is not liable, either civilly or criminally for a nuisance which is the necessary result of the construction and operation of its road, in accordance with its charter. 2 Elliot on Railroads, § 718, and cases cited. The mere fact, assuming it to be true, that the culvert pipes were calculated to frighten horses, does not necessarily constitute them a nuisance. Horses may be and often are frightened by locomotives in both town and country, but it would

be as reasonable to treat the horse as a public nuisance from its tendency to shying and be frightened by unaccustomed objects as treat the locomotive as a public nuisance, from its tendency to frighten the horses. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential, but only the paramount authority of the legislature can give to either the owner of the horse or the owner of the locomotive exclusive privileges. *Macomber* v. *Nichols*, 34 Mich. pp. 212, 219, 22 Am. Rep. 522; Cooley on Torts, 617. And it has been commonly held by a great majority of the courts in this country that a railroad company is not liable for injuries resulting from horses becoming frightened upon the highway at the mere sight of its trains or the noises necessarily incident to the running of the trains and the operation of the road. 3 Elliot on Railroads, § 1264, and cases cited. *Lamb* v. *Old Colony Railroad*, 140 Mass. 79, 54 Am. Rep. 449. The materials that enter into the construction and repair of a railroad, as a rule, are large and ponderous and handled with great difficulty and of necessity have to be deposited convenient to the point where they are intended to be used. Railroad bridges, and sections of bridges, large and heavy timbers of all kinds, telegraph poles, railroad ties, culvert pipes, rails, fencing, derricks, pieces of granite weighing tons for abutment work, etc., all of these things are necessary in the construction and repair of a railroad, and because any or all of them are calculated to frighten horses, this fact does not necessarily constitute them a nuisance. Repairs have to be made upon railroads constantly to keep them in a safe condition for the transportation of travelers and freight, and railroad companies are compelled to make these repairs and are compelled to use these materials in making such repairs. It is not a matter in the discretion of a company. It is a matter of legal compulsion that a railroad company shall renew and repair its bridges and road-bed from time to time so that they shall be safe for travel; and along with that burden, necessarily goes the right to use all needed material, although in such use it might be calculated to frighten horses traveling upon the highway. All these things were within the knowledge of the legislature and must be presumed to have been anticipated when it granted the fran-

chise to construct, operate and maintain this railroad; so that it would appear, that under its charter, the company had the right to assemble its material within the bounds of its location for purposes of repair, and would not be liable under any circumstances therefor unless it unreasonably exercised this right. This is the utmost limit of the law to which the plaintiff can ask you to go. Injury alone will never support an action on the case for a nuisance; there must be a concurrence of injury and wrong. Did the railroad company make a reasonable and proper use of the rights vested in it by its charter? If so, it cannot be held to have created or maintained a nuisance *State* v. *Louisville, etc., R. R. Co.*, 10 Am. & Eng. R. R. cases, 286.

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

POWERS, J. From the report we find the following facts. As the plaintiff was driving along the highway in Guilford where it runs adjacent to and nearly parallel with the track of the defendant, her horse became suddenly frightened at three pieces of culvert pipe, and she was thrown from her wagon and injured. The pipe was lying upon the right of way of the defendant corporation some seventeen feet outside of the limits of the highway, and had been deposited there by the defendant four days before for the purpose of repairing and improving its road-bed at Cooper brook, by substituting a culvert for a bridge at that point. Each piece of pipe weighed something over three tons, and they were as near to the railroad track and the brook as it was practicable to unload and use them. The plaintiff was at the time in the exercise of due care; her horse was kind, safe, and broken for travel upon the public roads, and the appearance of the pipe was such as was calculated to frighten horses of ordinary gentleness.

While every person is bound to use and enjoy his own property in such a manner as not to unreasonably injure another's, yet no action will lie for the reasonable exercise or use of a person's right. If a man unreasonably leaves upon his own premises an object whose appearance is such that it will frighten horses which are kind, safe,

and broken for travel upon our public roads, he is liable for the injuries which result therefrom. The appearance of the object, and the resulting injury alone, are not sufficient to create the liability. There must be something in the time, or manner, or circumstances under which the act is done which charges him with a want of proper regard for the rights of others. The plaintiff in traveling along the highway was in the exercise of her lawful right. The defendant also, in repairing and improving its road, was in the exercise of a right conferred by its charter, and a duty which the law imposes upon it for the safety of the public who travel over its road. In doing this it must act reasonably, and with a due regard for the rights and safety of persons who have occasion to use the highway. It cannot act negligently, improperly, or unreasonably. The rights of the parties are to be harmonized, but if due care is exercised by a railroad corporation in making repairs and improvements upon its own premises, it is not responsible for the inconveniences, or even injurious consequences, that may arise from such acts. The public which creates these great channels of travel and commerce, and whose safety and convenience demand that they be maintained in repair, must submit to such inconveniences as are necessarily incident to their management and operation.

Each case must necessarily stand upon its own facts. Applying these principles to the case before us we think the plaintiff has failed to show that the defendant acted negligently or unreasonably. The pipe was upon the defendant's own premises, placed there for a lawful purpose, and close to the spot where it was to be used. Its weight, 6147 pounds to the piece, was such as precluded it from being placed on the other side of the railroad, or further away from the highway.

It is true that, in view of the fact that the appearance of the pipe was calculated to frighten horses of ordinary gentleness, the defendant would not be justified in allowing it to remain so near the highway for an unreasonable time. Under the circumstances, however, we do not think four days an unreasonable time. The nature of the repairs for which the pipe was intended, the constant and regular use of the defendant's road for public travel and commerce, the extent of its

line which must be kept in repair at all times and in all places, make it unreasonable to require that such material should not be moved to the place of its use until the very day that the use is to be made of it. Some latitude and discretion must be allowed to those intrusted with the construction and operation of great public works as to the manner in which, and the means by which, they will perform the duties imposed upon them. If they act in good faith, with a proper regard for the rights of others, and without carelessless or negligence, they are exempt from liability.

Judgment for defendant.

JAMES H. BONNEY, and another, *vs.* CHESTER GREENWOOD.

Franklin. Opinion March 24, 1902.

Easement. Destruction of Servient Estate. Estoppel. Party-Wall.

It is among the essential qualities of every easement that there are two distinct tenements or estates, the dominant to which the right belongs, and the servient upon which the obligation is imposed. Hence an easement, properly so-called, may survive the destruction of a part of the servient estate when there is anything remaining upon which the dominant estate may operate.

The right to the use and enjoyment of a privilege in a particular building of another, which does not involve any interest in the soil apart from the building, is extinguished by the destruction of the building, for the obvious reason that nothing remains upon which it can operate.

A party-wall is one without openings for windows.

In an action for destruction of easements in the hall and stairway of defendant's building and a partition wall and obstructing a passage-way on land of the defendant, it appeared that after the destruction of the buildings and wall by fire in 1886, new buildings, erected pursuant to mutual covenants made in 1887, were so constructed that all parts of each could be occupied and enjoyed independently of the other; and that one of plaintiffs was a party to the said covenants and the other plaintiff, Metcalf, had actual notice of them and accepted from defendant his proportional part of the cost of the wall, and allowed defendant to erect his building, with a solid brick wall, across the five foot strip in question.

Held; that the conduct of both parties was wholly incompatible with the continued existence of the easement claimed.

Held; that plaintiff Metcalf was silent when he should have spoken, and he must be deemed to be equitably estopped to assert any right of easement in the hall and stairway of the defendant's building and the passage-way on his land.

Openings for windows made by one party in an existing party-wall in violation of the rights of the other, may lawfully be closed by him, provided no unnecessary injury is thereby done to the adverse party.

On report. Judgment for defendant.

Case, for destroying easements claimed by plaintiffs in a building and party-wall and for obstructing a passage-way.

The first count in the declaration was as follows:—

In a plea of the case, for that the plaintiffs, on the tenth day of April, A. D. 1899, and long before had, and continually afterwards hitherto hath been, and now are seized of a certain store and lot situated in Farmington Center village in said Farmington aforesaid, and bounded and described as follows, to wit:

"Beginning on the south side of Broadway at the north-west corner of what was formerly Joel Phinney's store lot, running southerly on Joel Phinney's westerly line eighty-two feet and continuing in the same direction eighteen feet to stakes and stones; thence westerly parallel with said Broadway about twenty-two and one-half feet to stakes and stones; thence northerly to a given point six inches east of the westerly side of the westerly wall of the Arcade, or Post-office, continuing through the westerly wall (regarding the center of said wall as the dividing line) to Broadway, it being one hundred feet from the south-west corner; thence easterly on the southerly line of said Broadway about twenty-two and one-half feet to the place of beginning, together with the building thereon," in their demesne as of fee; and whereas the said plaintiffs at said Farmington on the said tenth day of April, A. D. 1899, and long before were, and ever since have been, and still are lawfully possessed of, and in the messuage aforesaid, and, by reason thereof for all the time aforesaid of right had and still ought to have a certain right of way to pass and repass on foot or otherwise from the common highway or street called Broadway in Farmington Center village in Farmington

aforesaid, through and over the land which is now the said defendant's and being the lot lying westerly of the plaintiffs' said lot above described, and of five feet in width (more or less) and said right of way running North thirty-five feet more or less to Broadway, so-called, and said plaintiffs further had forever the right to the free and unobstructed use of the stairway leading to the second story of a building formerly built by one Perkins on the lot now owned by defendant, and being the lot next westerly of your said plaintiffs' lot and building and the free and unobstructed use of the hall in the second story of said building, and said stairway to be not less than three feet in the clear and the hall not less than five feet in the clear, the center of the stairway to be not more than twenty feet from the west wall of plaintiff's said building upon their lot aforesaid and the said hall to run east and west the entire width of the building aforesaid and the said hall to be a continuation of the hall in the building then on the lot of said plaintiffs described as aforesaid, and that said hall and stairway were to be well built and finished and thoroughly lighted by day by large and modern windows over the door leading to the stairway in the west end of the hall and said light from the windows never to be obstructed and said stairway and hall to be kept in good repair by defendant forever, and the right to the free use forever of the water in the well located on the lot of defendant aforesaid with right to enter said well with three pipes for purposes of drawing water and free access to said well and right to make any necessary repairs on said well, pipes and pumps forever, and that the roof of the said building at its highest point adjoining the west wall of plaintiffs' said building should be at least six inches below the eaves of plaintiffs' said building and that said building should go no farther than the plaintiffs' said lot.

Nevertheless the said defendant, well knowing the premises, but contriving and intending to hinder, and as much as in him lay, to deprive the said plaintiffs of the use of their said way and rights in the building of said defendant upon land of said defendant next westerly of and adjoining the lot of plaintiffs aforesaid (the said building erected by said Perkins having been destroyed by fire) on the tenth day of April, A. D. 1899, erected a certain other building

on his said lot and over said right of way five feet in width and refused your said plaintiffs any rights in the stairway of said new building, and did not build a hall in said building and has wholly deprived the plaintiffs of said right of way and of the use of the stairway in the building on defendant's said land, and the hall in the second story of the same, and the light from the windows which was never to be obstructed, and the use of said well of water; and said defendant has ever since continued said building erected by him, so that the said plaintiffs hath ever since been totally hindered and deprived of their said way aforesaid, and right to the free and unobstructed use of the stairway leading to the second story of the building erected by said defendant, and the free and unobstructed use of the hall in the second story of the building, and said stairway and hall in said building, and the light from said hall from windows to be built as aforesaid over the doorway leading to the hall and that said light as aforesaid has been obstructed by said building erected by said defendant as aforesaid, and the well of water as aforesaid and the said new building at its highest point is more than six inches higher than the old building and extends back further than the old building as aforesaid and all from said tenth day of April to the present time.

The second count in the declaration was for stopping up the windows in the party-wall.

J. C. Holman, for plaintiffs.

Counsel argued, among other things, that the destruction of the partition wall cannot in any way affect plaintiffs' right of way in the five-foot strip.

F. W. Butler, for defendant.

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

WHITEHOUSE, J. This is an action on the case to recover damages for the destruction of an easement, claimed by the plaintiffs in a stairway and hallway of the defendant's building; and also for the

obstruction of a passage-way five feet in width on the land of the defendant.

In 1884, F. C. Perkins was the owner of two adjoining lots of land situated on the southerly side of Broadway in the village of Farmington. The easterly lot, now owned by the plaintiffs, is 22½ feet in width on the street, and the westerly lot, now owned by the defendant, is 40 feet in width. There were buildings standing on the easterly lot, but none on the westerly lot. March 31st, 1884, Perkins conveyed the easterly lot to C. W. Keyes and A. T. Tuck, by separate deeds, conveying to each an undivided half, making the center of the westerly wall of the Arcade or post-office, then standing thereon, the dividing line between this lot and the vacant lot on the west side owned by Perkins as above stated. The deeds to Keyes and Tuck contained the following clause: "Said Keyes [Tuck] to have forever the right to the free and unobstructed use of the stairway leading to the second story of the proposed building to be built by said Perkins adjoining the post-office building now so-called, and the hall in the second story of the proposed block, the stairway to be not less than three feet in the clear and the hall not less than five feet in the clear, the center of the stairway to be not more than twenty feet from the west wall of the said post-office building or block, and said hall to run east and west the entire width of the proposed building or block in which said stairway is to be located and a continuation of the hall now in the upper story of the post-office building, both stairway and hall to be well built and finished and thoroughly lighted by day by large and now modern windows over the door leading to the stairway and in the west end of the hall in the Perkins block, and the light from these windows never to be obstructed," etc. The plaintiffs derive title from Keyes and Tuck, through several mesne conveyances, all of which purport to convey the rights and privileges described in the covenants found in the deeds to Keyes and Tuck as above stated.

It is not in controversy, that very soon thereafter Perkins erected a building upon his vacant lot as proposed in those deeds, and that the owners of the plaintiff block enjoyed the use of the stairway and hall therein, according to the stipulation in the deeds, until October 22,

1886, when the buildings on both lots, including the partition wall, were destroyed by fire. Thereupon, on the twelfth day of the next May, 1887, the owners of the plaintiff lot, namely, the plaintiff Bonney, and A. S. Butterfield, the grantor of the other plaintiff Metcalf, entered into an agreement under seal with F. C. Perkins for the construction and maintenance of a new partition wall between the lots in question, the material provisions of which are as follows:

"The said Almas S. Butterfield and James H. Bonney do hereby covenant and agree to erect a partition wall of brick with a proper foundation under the same of stone, one-half of said wall to set on the lot of said Butterfield & Bonney on Broadway in Farmington village corporation occupied by C. W. Keyes as the Chronicle office at the time of the fire which destroyed the same October 22d, 1886, and the other half on the lot of said Perkins which was occupied by E. G. Blake as a jewelry store at the time of said fire.

"Said wall is to be erected at the expense of the said Butterfield & Bonney, and whenever said Perkins shall erect a building on his lot aforesaid he shall have the right to use said wall as the east wall of his building which he shall erect, and shall become the owner of the west half of said wall by paying to the said Butterfield & Bonney one-half the costs, at the time said wall is used by said Perkins, of a similar brick wall similarly made and constructed as the brick wall herein described.

"And it is further agreed that neither party hereto or any person shall project timbers or finish into said wall more than four inches in depth.

"And the said Frederick C. Perkins hereby agrees to allow and hereby gives permission for the erection of said wall on his said lot as above described, and hereby further agrees that whenever he shall erect a building on his said lot he will pay to the said Almas S. Butterfield and James H. Bonney one-half the costs at the time said wall is first used by said Perkins of a similar brick wall similarly made and constructed as the brick wall herein described and shall thereby become the owner of the west half of said wall.

"And it is hereby agreed by the parties hereto that neither party hereto shall remove or destroy said wall or allow it to be removed or

destroyed except by the act of God, without the consent and permission of the other party hereto."

This agreement was recorded in the registry of deeds March 9, 1888.

In pursuance of this agreement another building with a new partition wall was erected by Butterfield & Bonney, the owners of the plaintiff block, and subsequently, in the year 1897, Butterfield conveyed his undivided-half interest in the lot, building and wall to the plaintiff Metcalf. In 1898 the devisees of Perkins conveyed the adjoining lot in question to the defendant who erected the present building thereon in 1899, and paid to the plaintiffs one-half of the cost of the new partition wall, according to the agreement.

The plaintiffs now contend that they have the same rights of passage through the stairway and hall of the new building that the owners of the plaintiff block had in the original building on the Perkins lot which was destroyed by fire.

The defendant contends that by the destruction of both buildings all easements in the Perkins building were extinguished, or if not extinguished, that they have been lost by voluntary abandonment and acts incompatible with their continued existence.

An easement may be concisely defined as "a privilege without profit which one has for the benefit of his land in the land of another." Washburn on Easements, 2; Jones on Easements, 1. It is among the essential qualities of every easement that there are two distinct tenements or estates, the dominant to which the right belongs, and the servient upon which the obligation is imposed. 10 Am. and Eng. Enc. of Law, 401. Hence an easement, properly so-called, or right appurtenant to one tenement to the enjoyment of some privilege in neighboring land, may survive the destruction of a part of the servient estate when there is anything remaining upon which the dominant estate may operate. But the right to the use and enjoyment of a privilege in a particular building of another, which does not involve any interest in the soil apart from the building, is extinguished by the destruction of the building, for the obvious reason that nothing remains upon which it can operate. Jones on Easements, 838, 839. In *Shirley* v. *Crabb*, 138 Ind. 200 (46 Am.

St. Rep. 376), the owner of a building containing a store conveyed to the owner of an adjoining store the right to use a stairway in the former, in common with the grantor, as a means of access to the rooms in the upper part of both stores. There was a party-wall between the two buildings. Subsequently the building in which the stairway in question existed was wholly destroyed by fire; and it was held that the easement in the stairway thereupon ceased. In the opinion the court said: "We feel entirely certain that the reservation was not intended to create an interest in the soil; and if it possessed the quality of an easement, in that it became an interest in real estate, it was only to the extent of affording the use of the stairway and hall in the building as it existed, and independently of any right to or interest in the soil. If this was the extent of the interest, it follows that the destruction of the building destroyed the right as effectually as if the interest had been in the soil and the floods had carried away the soil; nothing would remain upon which the right could operate. A new structure would not recreate the right, for such right had been destroyed, and not simply suspended, as would probably have been the case if the right had attached to the soil."

It is further provided in the Perkins deeds of the plaintiff lot that "the west wall of the post-office block or building shall forever remain as a partition wall between said post-office building and any building that said Perkins or his heirs or assigns may join thereto." But it is equally well settled, in the absence of any agreement to the contrary, that the destruction of a party-wall destroys an easement therein created by building the wall along the dividing line of two lots and conveying one or both of the buildings by deeds in which the line is described as running through the center of the party-wall. *Pierce* v. *Dyer*, 109, Mass. 374, 12 Am. Rep. 716; *Heartt* v. *Kruger*, 121 N. Y. 386, 18 Am. St. Rep. 829, 9 L. R. A. 135; Jones on Easements, 840, and cases cited. The progressive development of social and industrial life in our cities and villages is constantly demanding buildings and structures of different size and character from those required in the generation gone before; and a division wall adapted to necessities of one proprietor, may soon become inapplicable to the purposes and needs of the other.

In the case at bar, furthermore, it is manifest that after the fire in 1886, the parties interested acted upon the assumption that all easements in the building and partition wall in question had been extinguished by the destruction of both buildings.

It appears from the evidence that in 1884, at the date of the Perkins deeds of the plaintiff lot, the entrance to the second story of the Arcade or post-office building, was then up a flight of stairs in the west side of the building over the vacant lot, then owned by Perkins, and now owned by the defendant. But this stairway was removed in order to make way for the original building soon after erected on this lot by Perkins. In accordance with the agreements in Perkins' deeds to Keyes and Tuck in 1884, this building covered the entire width of the vacant lot; the existing west wall of the post-office block on the plaintiff lot became the east wall of the Perkins building and the partition wall between the two; and in pursuance of the further stipulation in the deeds, provision was made for access to the upper story of the post-office building by means of the stairway in the middle of the Perkins building and the hallway therein leading through the partition wall.

It also appears that in May 1887, following the fire in October 1886, the respective owners of these adjoining lots entered into a contract of the tenor above given for the construction of a "partition wall of brick" between the buildings to be erected thereon. In making this contract the parties must be presumed to have employed the words "partition wall of brick" with the meaning which they have acquired by usage; and "by usage the words 'party-wall' and 'partition wall' have come to mean a solid wall. Various reasons of inconvenience or peril have been assigned for the doctrine, but they are all referable, we think, to the general doctrine that the easement is only a limited one, and is not to be extended so as to include rights and privileges not belonging to the character of a wall which is to be owned in common, and in which the right of each owner are equal." *Normille* v. *Gill*, 159 Mass. 427, 38 Am. St. Rep. 441, and cases cited. In *Volmer's Appeal*, 61 Pa. St. 118, the court said: "From this review of the doctrines applicable to party-walls, it is clear that it must be a solid wall, without openings, of brick or stone or other

incombustible material." See also *Trante* v. *White*, 46 N. J. Eq. 437; Jones on Easements, § 687. Such was undoubtedly the understanding of the parties to the contract in this case; for the owners of the plaintiff lot thereupon actually constructed a solid "partition wall of brick" without any openings for windows, and erected a block of stores on their lot with means of access to the upper story by a stairway between the two stores, wholly on their own land. In harmony with this understanding the defendant subsequently erected a building on his lot without any hallway leading to the plaintiff's block, using the "partition wall of brick" for his east wall, and paying the plaintiffs therefor one-half of the cost of such a wall according to the stipulation in the contract, as before stated. Both buildings were thus constructed in such a manner that all parts of each could be occupied and enjoyed independently of the other. The inference from these facts is irresistible that there was then a mutual understanding that the right of access to their building, which the owners of the plaintiff lot once had through the former building on the defendant's lot, had been extinguished. The conduct of both parties was wholly incompatible with the continued existence of such an easement. The presumption that it was terminated by the destruction of the buildings was confirmed by their subsequent conduct. The agreements in the Perkins deeds of 1884 to Keyes and Tuck, relating to the use of the stairway and hall in the Perkins building and the maintenance of the old wall as a party-wall, do not purport to bind the "heirs and assigns" of the respective parties, but appear to have been regarded by them as applicable only to the west wall of the plaintiff building then standing, and to the particular building which Perkins himself might erect on his lot. But if those agreements could be deemed capable of being construed as covenants running with the land, they were manifestly superseded by the mutual covenants of 1887 for the erection of the new partition wall; and any easements created by those agreements of 1884 appear beyond question to have been intentionally abandoned by acts entirely inconsistent with the further enjoyment of such rights. Jones on Easements, 849, 852, and cases cited.

In the party-wall agreement of 1887, the parties "bind themselves

and their respective heirs, executors and administrators and assigns" to the faithful performance of the covenants therein contained; the instrument was under seal and appears to have been recorded in the registry of deeds, but it bears no certificate of acknowledgment. It is not controverted that such an agreement under seal creating mutual easements, and expressly binding the heirs and assigns of the respective parties, would run with the land if duly recorded after proper acknowledgment. See *King* v. *Wight*, 155 Mass. 444; Jones on Easements, 668. But it is suggested, in behalf of the plaintiff Metcalf, that the registration of such an instrument without acknowledgment was unauthorized, and therefore inoperative as constructive notice to any subsequent purchaser; and as it appears from Metcalf's testimony that he had no actual knowledge of the existence of such an agreement at the time he purchased his interest in the plaintiff lot, it is contended that while the plaintiff Bonney may be bound by that agreement as a party to it, the plaintiff Metcalf cannot be affected by it. But it satisfactorily appears that before the erection in 1899 of the building now standing on the defendant's lot, the plaintiff Metcalf had actual notice of the agreement of 1887 respecting the party-wall, accepted payment from the defendant of his proportional part of the cost of such a wall according to the stipulation in that agreement, and allowed the defendant to erect his building in the belief that all agreements purporting to create easements in the plaintiffs' lot or building had been superseded by the mutual covenants of 1887. The defendant was justified in assuming that Metcalf by accepting payment under the agreement acquiesced in it as a valid and binding one, and was thereby induced to erect his building upon a different plan from what he would have adopted if he had understood his lot to be subject to the easements now claimed in favor of the plaintiffs. Metcalf was silent when he should have spoken, and he must now be deemed to be equitably estopped to assert any such right in the defendant's building. *Martin* v. *M. C. R. R. Co.*, 83 Maine, 100; *Leavitt* v. *Fairbanks*, 92 Maine, 521; *Hussey* v. *Bryant*, 95 Maine, 49.

But, the plaintiffs finally insist that if the plaintiffs' easement in the defendant's building was extinguished or abandoned, they

acquired an easement and right of way on the defendant's lot by virtue of the following clause in the Perkins deeds of 1884, to wit: "Also to five feet in width (more or less) of land on the west line of my land adjoining the above described piece or parcel of land and running northerly thirty-five feet more or less." The owners of the plaintiff lot never used or claimed any right of way on the "west line" of the defendant's lot, and as it is the east line of defendant's lot which is "adjoining" the plaintiffs', it is not improbable, as suggested by counsel, that it was the scrivener's mistake in writing "west" instead of "east." At the date of that deed, as before stated, the entrance to the second story of the plaintiff building was up a flight of stairs on the west side of the building, being the east side of the defendant's lot; and this provision for a right of way five feet in width seems to have been inserted to protect the use of the old stairway until the other mode of access should be provided by the stairway and hall of the new building to be erected by Perkins, as provided in the agreement. The latter was evidently understood to be a substitute for the former, and Perkins was accordingly allowed to erect his building with solid brick walls over and across the five-foot strip in question without objection from the owners of the plaintiff lot.

Again, after the destruction of both buildings by fire and the execution of the mutual agreement for a new party-wall above considered, the defendant, as already shown on the former branch of the case, was permitted to erect his building over and across the same strip of land without question, upon paying one-half of the cost of such a party-wall; and both parties constructed their buildings so that all parts of each could be occupied without regard to the other. Here, again, the inference is irresistible that in consideration of having one-half of the thickness of the party-wall on the defendant's lot, and of the payment by the defendant of his proportional part of the cost of building it, the owners of the plaintiff lot intentionally relinquished all rights and privileges previously enjoyed in the defendant's lot as well as in the building thereon. The acts of the dominant owners relating to this claim are also wholly inconsistent with the continued existence of any such easement.

The openings for windows made by the plaintiffs in the existing party-wall were made in violation of the rights of the defendant, and could lawfully be closed by him, provided no unnecessary injury was thereby done to the adverse party. *Normille* v. *Gill*, 159 Mass. 427, 38 Am. St. Rep. 441; Jones on Easements, 692, 891.

Judgment for defendant.

CHARLES H. MCGILLICUDDY

vs.

A CERTAIN HORSE, JONAS EDWARDS, OWNER.

Sagadahoc. Opinion April 9, 1902.

Lien Jurisdiction. Municipal Court. Stat. 1901, c. 262; R. S., c. 91, §§ 41, 48, 51, 55, 56.

A petition to enforce a lien for board of a horse is purely a proceeding in rem, and the jurisdiction given to a municipal court to enforce such a lien, by R. S., c. 91, § 56, is not limited by ch. 262 of the Public Laws of 1901, relating to jurisdiction of municipal courts in civil matters.

Such a petition may be enforced by a municipal court in the county where the petitioner resides, although the owner of the horse does not reside in that county.

Exceptions by claimant. Overruled.

Petition to enforce a lien on a horse the property of Jonas Edwards, of Auburn, Androscoggin county, for food and shelter under R. S., c. 91, § 41, as amended by statute of 1887, c. 1, and begun in the Bath Municipal Court, where the claimant moved its dismissal for want of jurisdiction by that court. His motion was overruled and the lien sustained. The claimant appealed to this court, sitting at nisi prius, where the motion to dismiss was overruled. He then brought the case to the law court, upon exceptions to the overruling his motion.

F. L. Staples, for plaintiff.

Tascus Atwood, for defendant.

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

SAVAGE, J. Petition to enforce a lien for board of a horse. The sole question presented by the bill of exceptions is whether, since the enactment of c. 262 of the Laws of 1901, a municipal or police court has jurisdiction of proceedings to enforce liens for pasturing, feeding or sheltering animals, under R. S., c. 91, § 41, in cases where the alleged owner of the animals does not reside within the county within which such court is established. The act of 1901 in question provides that "a municipal or police court shall not have jurisdiction in any civil matters unless the defendant resides within the county in which such court is established," with other alternative provisions not material here.

We think the act of 1901 does not limit the jurisdiction given to municipal and police courts by R. S., c. 91, § 56, to enforce liens of this character. A petition to enforce such a lien is purely a proceeding in rem. No personal judgment is rendered against the owner of the animal, except for costs. The issue to be adjudicated is whether the petitioner has a lien or not. And if he has, the amount for which he has a lien is determined, and the animal is ordered to be sold to pay the claim and costs. No execution issues against the goods or estate of the owner. To be sure, § 51 of the same chapter provides that if, after notice, the owner appears, "the proceedings shall be the same as in an action on the case in which the petitioner is plaintiff and the party appearing is defendant." This relates to procedure merely. The owner in such case is really a respondent or claimant, rather than a defendant, as that term is used in legal proceedings. Hence the statute of 1901 is not in terms properly applicable to this proceeding. Nor is it applicable in spirit.

The venue in proceedings to enforce such liens is fixed by § 48 of c. 91, R. S., which provides that "the person claiming the lien may file, in the supreme judicial or superior court in the county where he resides" a petition for the enforcement of the same. The venue is fixed regardless of the residence of the owner. So by § 55, even trial justices for the county where the person having the lien resides have

jurisdiction of cases of liens for less than twenty dollars, regardless of the residence of the owner. By § 56, municipal and police courts are given jurisdiction concurrent with the supreme judicial and superior courts, and trial justices. Though no mention is made of venue, undoubtedly municipal and police courts have jurisdiction only when the supreme judicial or superior courts or trial justices would have, and that is, in the county where the person claiming the lien resides. The jurisdiction is concurrent, and exists under precisely the same conditions in one case that it does in the other. The evident intent of the statute is that the residence of the lienor, and not that of the owner, shall determine the venue. It does not require the lienor, having the animal in possession, to go to remote counties, nor to wait for distant terms of the court in those counties, in order to enforce his lien. Such a requirement would greatly impair the usefulness of the statute, for while the lien procedure slumbers, the animal continues to eat at the expense of another than its owner. The statute recognizes the truth that the remedy, to be efficacious, must be prompt and convenient. The statute of 1901 should not be extended beyond the reasonable interpretation of its terms to impair this remedy.

We think, therefore, that neither the language nor the apparent purpose of c. 262 of the Laws of 1901 require us to hold that that act is a limitation of the jurisdiction of municipal and police courts under R. S., c. 91, § 56.

Exceptions overruled.

RUFUS F. PIERCE *vs.* INHABITANTS OF GREENFIELD.

Penobscot. Opinion April 11, 1902.

Towns. Debts. Town Orders. Ratification. Evidence.

1. An action will not lie against a town for money loaned its officers upon the credit of the town, but without its previous authorization, although the money so loaned be applied to payment of its debts and liabilities, unless the town subsequently ratifies the act.
2. The question of ratification is not irrevocably disposed of by one or more refusals of the town to ratify, upon the question being presented. The town may yet ratify at a subsequent meeting duly called and held, and such ratification will be binding.
3. The town itself, however, cannot authorize nor lawfully ratify a borrowing of money for any purpose not within its municipal duties and purposes, and the burden of proof is upon a plaintiff relying upon such authorization or ratification, to show affirmatively that the money was in fact borrowed for a valid municipal purpose.
4. Evidence that the money was borrowed to pay a town order, which order was the last of a large series of renewals of orders extending back some thirty years, which successive orders had during that time often been reported to the town as outstanding and valid, and had never been objected to or questioned by the town,—is sufficient to sustain the plaintiff's burden of proving that the original debt was incurred for a valid purpose and hence that the borrowing to pay the last order was for a valid purpose.

On report. Judgment for plaintiff.

Assumpsit for money lent by the plaintiff to the town of Greenfield upon a town order. There were special counts upon the order, also counts for money lent and advanced, money due upon account stated and for money had and received. Plea, the general issue.

The facts appear in the opinion.

L. C. Stearns and G. T. Sewall, for plaintiff.

P. H. Gillin and T. B. Towle, for defendant.

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

FOGLER, J. This is an action of assumpsit to recover for money loaned by the plaintiff to the defendant town upon a town order. The declaration contains special counts upon such order, and also counts for money lent and advanced, for money due upon an account stated, and for money had and received. Plea, the general issue.

The case comes to this court upon report.

The order declared upon, introduced by the plaintiff, is of the following tenor:

$440. Greenfield, March 25, 1893.

To James Doyle, Town Treasurer, or his successor:— Pay to R. F. Pierce four hundred and forty dollars it being for balance of town order No. 52 for the year 1893. M. C. White, Jere Avery, Selectmen of Greenfield.

No. 67.

Indorsed: Accepted James Doyle Tr. Rec'd on the within one years interest (26.40) to March 25, 1894. Rec'd on the within 2 years int. 52.80 to March 25, 1896.

It appears by the report that in March, 1893, Mr. Arthur B. Godfrey was the holder of two town orders, numbers 69 and 70 respectively, drawn by the selectmen of Greenfield and payable to Mr. Godfrey, the amount of which aggregated $694.35. These orders were written on the same paper never having been separated, and on that account are referred to in the report as the "double orders." Both orders bore date of Oct. 20, 1886. Order number 69 was for $300, and stated upon its face "being for part of old order taken up, No. 67, given in the year 1880."

Order numbered 70 was for $394.35 and stated upon its face "it being for part of old order taken up No. 67 given for the year 1880."

March 24, 1893, Mr. Godfrey presented the orders above named to the town officers for payment. There was no money in the town treasury from which payment could be made. There was, however, in the hands of the tax collector of the town the sum of $94 which

was paid to Mr. Godfrey and indorsed on order number 70. Mr. White, chairman of the board of selectmen, then paid to Mr. Godfrey of his own money $600.75, the balance due on the "double" orders, and received the orders from Mr. White.

Mr. White testifies that he bought the orders of Mr. Godfrey and the $600.35 was in payment thereof, while his counsel contends that the fact and circumstances show rather that the money was paid by Mr. White as an advancement to the town. We do not think, for reasons to be hereafter given, that it is material which of the positions is correct.

After the payment to Mr. Godfrey of the amount of his orders, the selectmen requested a loan of $600.75 from the plaintiff with which to pay the amount paid by Mr. White, and an order for that amount payable to the plaintiff was drawn and signed by the selectmen, but before its delivery to the plaintiff the town paid Mr. White $160.35, leaving a balance of $440, and the order drawn in favor of the plaintiff was cancelled. The selectmen thereupon drew and signed the order in suit which was delivered to the plaintiff, who paid into the hands of Mr. White the sum of $440. This sum was not paid into the town treasury, but was retained by Mr. White in payment of the balance due him on the amount paid to him by Mr. Godfrey.

At the annual town meeting of the legal voters of the town of Greenfield duly called, held on the 29th day of March, 1897, under an article in the warrant "to see if the town will ratify the following orders: Order No. 67, dated March 20, A. D. 1893, payable to Rufus F. Pierce for four hundred and fifty dollars," the town voted not to pay R. F. Pierce's order.

Again at a special town meeting of the legal voters of Greenfield, duly called and notified, under an article in the warrant to see if the town will ratify certain orders drawn by the selectmen of the town upon the treasurer thereof as follows: "An order dated November 25, A. D. 1893, for four hundred and fifty dollars payable to R. F. Pierce numbered 67," it was voted not to pay R. F. Pierce's order numbered 67.

At a special meeting of the voters of the town, duly called and

notified, held on the 6th day of December, 1897, under an article in the warrant, "To see if said town will ratify certain orders drawn by the selectmen of said town upon the treasurer thereof, as follows: An order dated March 25, A. D. 1893 for four hundred and fifty dollars payable to R. F. Pierce numbered 67," it was voted to pay R. F. Pierce order.

It is the law of this State, settled by a line of decisions, summarized in *Lovejoy* v. *Foxcroft*, 91 Maine, 367, that an action will not lie against a town for money loaned to its officers upon the supposed credit of the town, but without the authority of the town, although the money so loaned be applied to the debts and liabilities of the town, unless the town make the act valid by its subsequent ratification. *Parsons* v. *Monmouth*, 70 Maine, 262; *Lincoln* v. *Stockton*, 75 Maine, 141; *Otis* v. *Stockton*, 76 Maine, 506; *Brown* v. *Winterport*, 79 Maine, 305; *Hurd* v. *St. Albans*, 81 Maine, 343; *Lovejoy* v. *Foxcroft*, supra.

To maintain an action for money borrowed by the officers of a town without authority, the plaintiff must prove affirmatively three propositions. 1st. That the money was in fact loaned to the town officers upon the credit of the town as for the town. 2nd. That the money so obtained was either paid into the town treasury or was applied in fact to the discharge of lawful liabilities of the town to that extent. 3rd. That the town has ratified the action of the town officers in so borrowing and applying the money. *Brown* v. *Winterport*, supra.

In the case at bar it is not denied that the plaintiff loaned his money to the selectmen of the town of Greenfield on the supposed credit of the town. It is not contended that the selectmen were authorized by the town to borrow the money.

Assuming that the money so borrowed was applied to the payment and extinguishment of a liability of the town, has the town ratified by its corporate vote the action of the selectmen in borrowing and applying the money? The town at a special meeting under a proper article voted to pay the order. We think this vote was an effectual ratification of the acts of the selectmen in borrowing and applying the money, provided the money was applied for a purpose within the

scope of the corporate powers of the town. *Brown* v. *Winterport*, supra.

Nor do we think, as contended by the counsel for the defendants, that the former votes, "not to pay," preclude the town from a subsequent ratification (at least until the former votes shall have been rescinded). It is true, that when a town has once ratified the unauthorized acts of its selectmen it cannot subsequently rescind such vote. The reason is that the ratification relates back to the transaction. The vote of ratification at once applies to the act and adopts it as the act of the town. The act is as binding on the town, as if the vote were prior in time to the act. A ratification after the act is as potent as authority before the act. *Brown* v. *Winterport*, supra.

These reasons do not exist when the town votes "not to pay." In the case at bar, before such votes, the plaintiff had no legal claim against the town; the town was under no legal obligation to the plaintiff. Those votes did not affect the parties in the least. The positions were not changed by the votes, but each is left in statu quo. Notwithstanding those votes we think the voters of the town, upon reflection, or upon further information, retained the powers to ratify the acts of the selectmen.

The question now arises whether the selectmen applied the money borrowed of the plaintiff to the payment of lawful debts or liabilities of the town.

When the selectman White received the money, he turned the "double order," the Godfrey order, over to the town treasurer as paid, and it was cancelled. From this it is apparent that the money was in fact applied to the payment of the balance of that order, and effected its surrender, cancellation and extinguishment. That the money was paid directly to the holder of the order instead of being first paid to the town treasurer, and then by him to the holder of the order, is immaterial, since the effect was the same. The question therefore is practically this, was the "double order," or Godfrey order, thus paid with the plaintiff's money or the claim it represented, a valid claim against the town?

From the evidence we gather that the "double order," or Godfrey order, was the remnant residuum of a long succession of orders some

of which were issued as far back as 1859. There seems to have been a series of town orders issued at various times, in and after 1859, to one Blake and to different persons of the Godfrey family. These at different times had been partially paid, but mainly taken up by new orders. At various times, also, various Blake and Godfrey orders were consolidated by being taken up and one new order issued for them. It seems to have been the purpose of the town to take up the Blake orders and to convert its indebtedness on these orders into the Godfrey orders, and to reduce the number of these orders into larger orders less in number.

The town records in this case do not, except in a few instances, disclose for what municipal purposes the original orders were issued. In a few instances it is recited on the order book in 1863, that the order was given on account of relief to families of volunteer soldiers. It appears, however, that at the special town meeting of Sept. 1876, called "to see if the town will authorize the selectmen to hire money to pay on outstanding debts," it was voted "to instruct the selectmen to hire money to pay the Blake and Godfrey orders, so-called, and to have the town to pay the interest on said money annually." It further appears that at various town meetings, after 1876 down to 1882 inclusive, the selectmen reported the Godfrey orders by name as part of the indebtedness of the town. These reports were usually formally accepted by the town and do not appear to have ever been questioned. After 1882, the gross amount of the town's indebtedness is reported, reference being made to former reports. The amounts thus reported necessarily included the Godfrey orders to account for the amount. At these various meetings votes were passed to raise various small sums of money to pay on town debts.

In the absence of opposing evidence we think these repeated recognitions of these orders by the town officers and the town meetings, as representing a valid indebtedness, justify the court in finding that they did in fact represent such indebtedness. *Brown* v. *Winterport*, 79 Maine, 305; *Lovejoy* v. *Foxcroft*, 91 Maine, 367. It is true, there is little or no record evidence of the purpose for which the first orders in the series were issued. There is something, however, in the legal maxim "omnia rite acta presumuntur." There is some

presumption that the town officers and inhabitants of that day knew the facts, and would not have issued and approved the orders for an illegal purpose. There is also some presumption that the immediately succeeding town officers and inhabitants would not have renewed the orders without inquiry into their origin. There is some presumption that had their origin been illegal some officer or inhabitant at the time of their issuance or their renewals, would have challenged them. These presumptions have some weight as evidence, and sufficient weight to sustain the plaintiff's burden of proof in the absence of all evidence to the contrary.

It is claimed by the town that the various renewals of the successive orders by the selectmen were never authorized by the town, and hence the orders in renewal were invalid. This defense could perhaps have been effectually interposed to actions upon those orders, but the original indebtedness would have remained. The town could have ratified the previously unauthorized renewals and even if it has never done so formerly by express vote, it has now expressly ratified the issuance of this final order which closed the series. This ratification is sufficient to now bind the town to pay it, whatever the irregularities or omissions in the issuance of the prior orders, it being found by the court from the evidence that the first orders were issued for valid municipal purposes.

Judgment for the plaintiff for $440 and interest from March 25, 1896.

JAMES LUMSDEN, In Equity, *vs.* JOHN W. MANSON, and others.

Somerset. Opinion April 11, 1902.

Mortgage. Assignment. Discharge. Tender. Redemption. R. S., c. 90, § 15.

1. The purchaser of an equity of redemption cannot require the mortgagee or his assignee to assign the mortgage and mortgage debt to him upon being tendered the amount thereof. The only duty of the mortgagee or his assignee upon being tendered the amount of the debt is to discharge or cancel the mortgage.
2. That the assignee of the mortgage has agreed with the original mortgagor to purchase the mortgage and foreclose it, and, if not redeemed, to afterward convey the property to him upon agreed terms, does not entitle the purchaser from the mortgagor to have the mortgage and debt assigned to him.
3. A bill in equity cannot be maintained to redeem from a mortgage without a previous tender of performance of the condition of the mortgage or proof of facts lawfully excusing the omission of such tender. The bill itself must contain allegations of such previous tender or of such facts as will lawfully excuse the omission to so tender.
4. A tender to the mortgagee or his assignee of the amount due upon the mortgage coupled, however, with the demand and condition that the mortgage shall be assigned to the person proffering the money, is not a sufficient tender of performance. The tender must be unconditional or at least accompanied only by a demand for a discharge or cancellation of the mortgage.
5. When the bill contains no allegations of lawful tender of performance nor of any facts lawfully excusing the omission, the bill cannot be maintained as a bill to redeem; but when such facts may perhaps exist, it may be dismissed without prejudice.

On report. Bill dismissed without prejudice.

Bill in equity, heard on bill, answers and proofs, praying, among other things, that the defendant Manson may be required to assign the mortgages and the notes thereby secured, held by him, to the plaintiff.

The case appears in the opinion.

A. K. Butler and L. L. Walton, for plaintiff.

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

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

EMERY, J. This equity case was submitted on report of bill, answers and evidence, and, of course, as to the facts found we simply state them without giving any reasons for such finding. So far as material for an exposition of the questions of law involved, we think the facts found may be briefly stated as follows:

The defendant, Samuel Whittemore, being then the owner of the parcel of real estate described in the bill, mortgaged it on July 3, 1890, to one Warren Loomis to secure his debt and promissory note of that date to Loomis. The defendant Ella M. Whittemore, wife of Samuel, joined in the execution of this mortgage by releasing dower.

November 24, 1898, Samuel Whittemore conveyed to his wife Ella, one undivided half of the described parcel of real estate by deed duly recorded the same day. February 9, 1900, Samuel quit-claimed all the described real estate to his wife by deed duly recorded on that day.

August 7, 1897, before the first deed from Samuel Whittemore to his wife, he was indebted to one Merrill, who on the 23rd day of January, 1899, (after the first but before the second conveyance to the wife) began suit against Samuel on that indebtedness, and on that day attached all his interest in real estate. Merrill recovered judgment in that suit on January 13, 1900, and on the 19th day of March, 1900, he caused all Samuel Whittemore's interest in this real estate to be sold upon execution, at which sale the plaintiff Lumsden became the purchaser and received the sheriff's deed.

In the meantime the wife, Ella Whittemore, consulted the other defendant, John W. Manson, an attorney at law, as to her interest in the real estate. Manson thereupon purchased the mortgage debt and security of the mortgagee, Loomis, and took an assignment of both to himself. He did this with his own money and not upon Mrs. Whittemore's credit, though it was done at her request and with the verbal understanding that if the mortgage was not redeemed before foreclosure perfected, he would nevertheless quit-claim the

premises to her upon being paid for his services and advances with interest. There was no understanding, however, that Mrs. Whittemore was bound to repay him the money he paid for the mortgage. Manson relied entirely on the mortgaged property for that.

The plaintiff Lumsden, having thus acquired the title of Samuel Whittemore in the premises and claiming his title thus acquired to be better than the title of Ella the wife, but apparently thinking there might be a question as to that, tendered to Manson the assignee of the Loomis mortgage the full amount due thereon, but demanded an assignment of the mortgage to himself. This Manson refused to do, but did offer to effectually discharge the mortgage. The plaintiff was not content with a mere release or discharge, and coupled with his tender a demand for an assignment. This bill in equity was then begun against Samuel and Ella Whittemore and Mr. Manson, for the purpose of procuring an assignment of the mortgage from Manson, and for the further purpose of removing from the plaintiff's title the cloud of Mrs. Whittemore's claim under the conveyances to her. Many other matters of fact were alleged and proved, but those above stated are all that are necessary for an exposition of the law of the case.

I. We have first to consider the plaintiff's rights against Manson as the assignee and owner of the mortgage debt and security, ignoring for the present the relations between Manson and the other defendants.

In cases where the party paying the mortgage debt is entitled to the benefit of the security by way of subrogation, as in the case of a surety, it may be that an equity court, to more easily and readily effectuate the subrogation, can require the mortgage security to be assigned instead of cancelled. So where one buys property as free from mortgage, the vendor agreeing to pay the mortgage debt, if the purchaser is himself obliged to pay the debt to save his property, it may be he would be entitled to an assignment of the mortgage. In such cases the party thus paying the debt to save his own property acquires by such payment a claim against the mortgagor or debtor, for reimbursement and is entitled in equity to have and to hold the

original mortgage as security for that claim. We have, however, no occasion here to say what is the law in such cases.

But in this case before us the plaintiff was not a surety, nor guarantor. He was under no liability to, or for, the mortgagor or his wife; nor was he a creditor of either; nor was either of them in any way bound to him to pay the mortgage debt. At the most, he was a mere purchaser and owner of the equity of redemption, without acquiring any claims against the mortgagor or his grantees. He acquired, not the land itself free of mortgage, but a mere right to redeem the land from the mortgage. This right of redemption was not a right to acquire and hold the mortgage. It was merely a right to free the property from the mortgage, to remove or extinguish the mortgage and hold the property free from it. Mr. Manson, the owner of the mortgage, was not bound to consider the conflicting claims of the plaintiff and Mr. and Mrs. Whittemore, nor to aid one more than another. He was not bound to sell or assign his mortgage to either. He was only bound to remove or extinguish the mortgage by proper cancellation, when the mortgage debt was paid or tendered him by the owner of the equity of redemption. Jones on Mortgages, § 792; *Butler* v. *Taylor*, 5 Gray, 455; *Ellsworth* v. *Lockwood*, 42 N. Y. 89; *Hubbard* v. *Ascutney Co.*, 20 Vt. 402. The language of our statute R. S., c. 90, § 15, that the court may compel the mortgagor "to release to him (the owner of the equity of redemption) all his right and title" in the mortgaged premises does not imply an assignment of the mortgage, but only its release or removal.

The plaintiff contends, however, that Manson bought the property for Mrs. Whittemore and holds it in trust for her, and will assign or convey it to her upon being paid by her for his services and advances; that they thus conspired to hinder him from redeeming or otherwise to obtain an advantage over him. If this be so, we do not see how that enlarges the plaintiff's rights. If Mrs. Whittemore had purchased and taken an assignment of the mortgage in her own name with her own money, we do not see why she would have been obliged to assign the mortgage to the plaintiff. If the plaintiff pays the mortgage debt there will be no mortgage for Manson to assign to

Mrs. Whittemore. If the plaintiff does not pay the mortgage debt, he has no cause to complain of any disposition Manson may choose to make of his interest or title. However much it might be to the advantage of the plaintiff to purchase and hold the mortgage as a subsisting mortgage against Mrs. Whittemore, we do not see that he has acquired the right to do so. He cannot compel Mr. Manson to assign to him nor can he restrain him (except by payment of the debt) from assigning to Mrs. Whittemore if he chooses.

II. The bill not being sustainable to compel an assignment of the mortgage, can it be sustained as a bill to redeem? In this State no bill in equity can be sustained for the redemption of mortgaged real estate without a performance or tender of performance of the condition of the mortgage, or the existence of facts preventing or hindering such performance or tender. The bill itself must contain an allegation of such performance or tender, or of such facts as will excuse non-performance or non-tender. The mortgagor has no occasion to invoke the equity power of the court until he has performed or tendered performance of the condition or been prevented from so doing. He has no cause of complaint until then and the refusal of the mortgagee to release. It is his equitable as well as his legal duty to perform or tender performance, or show cause why he cannot, if he would have the mortgage discharged. He must do equity before he invokes equity. *Wing* v. *Ayer*, 56 Maine, 138; *Dinsmore* v. *Savage*, 68 Maine, 191.

In this case there was a tender of a sum of money equal to the full amount of the mortgage debt. The bill was filed immediately after this tender, and the defendant Manson makes no point that the tender, such as it was, has not been kept good. The money was tendered, however, not in payment of the mortgage debt, but practically only for its purchase; not for an extinguishment of the mortgage incumbrance, but for acquiring it and keeping it in existence. Mr. Manson offered to accept the money as a performance of the condition of the mortgage, and to at once effectually discharge the mortgage. As already explained this was all the defendant Manson was bound to do, but the plaintiff would not part with the money on those terms, but only for an assignment. Clearly there was in this no performance

nor tender of performance of the condition of the mortgage such as the law requires as a preliminary to a bill to redeem. *Burrill* v. *Parsons*, 73 Maine, 286; *Munro* v. *Barton*, 95 Maine, 262; *Holton* v. *Brown*, 18 Vt. 224; *Richardson* v. *Boston Chemical Laboratory*, 9 Met. 42. Nor are there in the bill any allegations of matters of fact showing any lawful excuse for non-performance. Doubt in the mind of the plaintiff as to whether he could sustain his title to the equity of redemption against the claim of the wife under her deeds does not of course increase his rights against the mortgagee, nor the duty of the mortgagee as to him. Notwithstanding such doubts, he was no more than the owner of the equity of redemption, bound to perform or tender performance of the condition of the mortgage (unless prevented) before asking for a release of the mortgage. This he has not done, nor shown any excuse for not doing, and hence cannot maintain this bill as a bill to redeem.

III. The plaintiff further asks for relief by way of a decree removing the cloud from his title caused by the claims of the defendant Ella M. Whittemore under deeds from Samuel Whittemore. The plaintiff, however, is not in possession of the real estate and has never had possession, so far as appears, and hence has no occasion to resort to the equity powers of the court to clear his title. No reason is shown why he cannot enforce all his rights against either of the Whittemores, and have determined all questions of title between him and them, by actions at law.

IV. The plaintiff has not shown any right to any relief under this bill; but as he may in fact have some equitable rights in the matter not yet disclosed which the unqualified dismissal of this bill might embarrass, we think the dismissal may properly be without prejudice.

Bill dismissed without prejudice. One bill of costs for respondents.

STATE *vs.* CLEVELAND GROVER.

Cumberland. Opinion April 11, 1902.

Evidence. Confessions. Practice.

1. The rule in this state governing the admission in evidence of extra-judicial statements of the respondent in a criminal trial is, that they are admissible unless it appears they were prompted by some hope of a personal benefit or fear of a personal loss of a temporal nature, excited by some other person apparently having some power or influence to bring about the benefit or loss.
2. Whether the statements of a respondent offered in evidence in a criminal trial were voluntary, or were prompted by such hope or fear excited by a third person as above stated, is itself a question of fact to be determined by the presiding justice at the trial from the evidence adduced to him on that issue. The law court will not reverse his decision upon that question of fact, at least until it is made to appear that the contrary decision is the only possible one in reason.
3. *Held;* that the decision of the presiding justice that the statements were voluntary, and therefore admissible in evidence, does not seem to be without evidence or reason.

Exceptions by defendant. Overruled.

The defendant was indicted, tried and found guilty under R. S., of Maine, c. 119, § 1, for wilfully and maliciously setting fire to the dwelling-house of another with intent to burn and burning the same in the night time. The defendant took exceptions to the rulings of the presiding justice in admitting the testimony of two witnesses as to a confession made to them by the respondent, on the ground that the confessions were obtained by inducements or threats and were therefore not voluntary.

R. T. Whitehouse, county attorney, for state.

W. H. Gulliver, for defendant.

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

EMERY, J. The exceptions in this case raise the question of the legal admissibility in evidence of extrajudicial confessions by the respondent in a trial for crime. The decided cases upon this question are so numerous and conflicting that it is useless to attempt their consideration. They vary in different jurisdictions, and also from time to time in the same jurisdiction. Hence we shall content ourselves with the statement of a few principles and with few citations.

Confessions by the respondent that he committed the offense for which he is being tried have prima facie some probative force, and hence as a general rule are admissible in evidence against him. The value of such evidence is of course wholly for the jury. When, however, the confession was made under such circumstances as show that it was extorted from the respondent by some threat, or drawn from him by some promise, and was made to avoid the evil threatened, or to obtain the good promised, rather than from a desire to relieve his conscience or to state the truth, it is regarded by the law as involuntary and hence not to be used against him. This rule of exclusion was adopted, not because such a confession has no probative force at all, but rather out of tenderness for the respondent in view of his unfavorable and even dangerous position. In earlier days when the respondent could not have counsel and could not testify in his own behalf, the courts were ordinarily and properly quite strict in keeping from the jury evidence of confessions when there was any reasonable doubt of their being voluntary. Since the respondent is now allowed counsel, and is also allowed to testify in explanation of his acts and statements, there is less reason for such restrictions and more may be left to the jury as to the probative force of such confessions.

In this state in *State* v. *Grant*, 22 Maine, 171, this court quoted the old rule of exclusion laid down by Warickshall's case, 1 Leach, 298, and then said apparently with approval, "This rule appears to have been limited by subsequent cases, so that there must appear to be some fear of personal injury, or hope of personal benefit of a

temporal nature, to exclude the confession." In that case the respondent was told that he had better confess in order to save his brother from jail, but no assurance was given him that he, himself, would fare any better by confessing. A confession thus made was held admissible. The statement of the rule above quoted from *State* v. *Grant*, was approved in *Commonwealth* v. *Morey*, 1 Gray, 461. In a later case in Maine, *State* v. *Gilman*, 51 Maine, 206, 223, this court again said, concerning the rule of exclusion of statements made by a respondent: "The true test of admissibility in this class of cases is, was the statement offered in evidence made voluntarily, without compulsion? If this proposition be answered in the affirmative then the statement is clearly admissible in principle; but if not voluntary, if obtained by any degree of coercion, then it must be rejected." In 1 Greenl. Ev. 219, it is said, "The material inquiry, therefore, is whether the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind."

To make a confession voluntary in the legal sense, it is not necessary that it should be volunteered, or made without request or interrogatory. It is voluntary, though made in answer to questions or even solicitations, if it be made from the free, unrestrained will of the respondent. Again, the constraint to make a confession involuntary must come from without, be imposed by some other person apparently vested with power to punish or reward. Hence if without such outside interference the respondent himself reasons that he better confess simply in order to avoid some temporal evil impending over him or to obtain some temporal personal good, his confession is still voluntary, being from his unconstrained will. The foregoing we think is a sufficient exposition of the law of this state applicable to this case.

But the question whether a particular confession offered in evidence was voluntary or was obtained by constraint or coercion as above defined, is not a question of law. It is to be determined by evidence. The evidence upon this issue may be conflicting and confused. Even when the evidence is uncontradicted, different inferences may often be drawn from it by different men and each inference be

logically possible. Hence, the question must be determined by the presiding justice as a question of fact. In 1 Greenl. Ev. 219, it is stated that the matter rests wholly in the discretion of the judge. Upon exceptions to his opinion on this question the law court should not reverse his decision merely because it would itself have come to a different conclusion, but only when the circumstances are such that it can say as matter of law, that the confession was not voluntary in the legal sense. It will regard the findings of the presiding justice upon this question of fact, as it does the findings of a jury upon questions of negligence, as entitled to stand unless the contrary inference is the only reasonable one. For the law court to set aside a verdict of conviction merely because it differs from the presiding justice upon a preliminary question of fact which must necessarily be decided by him, would cause intolerable delays and expense in the enforcement of the criminal law. At the second trial the evidence upon this preliminary question might be very different from that at the first trial and require a new decision upon the new evidence, subject to be set aside by the law court, and so on until it shall happen that the trial judge and the reviewing judges agree in their views of the same evidence.

It should be remembered that if the presiding justice does err in his finding of fact and admits the confession in evidence, when the justices of the law court would not, the respondent can then appeal to the jury to exclude it from consideration as improperly obtained, and can show all the circumstances tending to destroy or weaken its probative power. He can also require the presiding justice to instruct the jury it should not give credit to the confession if thus improperly obtained.

In *Commonwealth* v. *Preece*, 140 Mass. 276, the court said: "When a confession is offered in evidence the question whether it is voluntary is to be decided by the presiding justice. If he is satisfied that it is voluntary it is admissible; otherwise it should be excluded." After reviewing the evidence the court further said: "As the evidence was conflicting we cannot say as matter of law that the decision of the presiding justice admitting the evidence was erroneous." In *Commonwealth* v. *Culver*, 126 Mass. 464, it was held that upon

this preliminary question the presiding justice was bound to hear evidence offered by the respondent as well as the evidence offered by the state.

It remains to apply these legal principles to the case at bar. The respondent was arrested and indicted for setting fire to the dwelling-house of Mrs. McKeen. After the constable had arrested the respondent, he drove with him to the selectmen's office and called out the chairman of the board. On the chairman reaching the carriage, the constable said "This is the boy that set the fire." The selectman said "Did you set this fire, Cleve?" He answered that he did. The selectman then asked how he did it, and he answered that he wanted to get even with Mrs. McKeen. The next day the insurance commissioner, Mr. Carr, in company with the selectman and the constable, visited the respondent in his room in the police station, and after introducing himself told him he was under no obligation to make any statement. The respondent answered "That is all right, I committed the crime and I know I have got to be punished for it."

It is not contended that at either of these interviews anything was said in the way of threat or promise to induce a confession of guilt; but the respondent does contend that these confessions were directly induced by threats and promises made by the constable at the time of the arrest. The only evidence as to these is from the constable himself. Upon cross-examination he detailed his conversation with the respondent as to his whereabouts at night during the week of the fire, and on the night of the fire and as to his trouble with Mrs. McKeen, and then said, after respondent denied his guilt, "I told him I thought I had evidence enough of some matches he had purchased and told him I didn't think it would be any worse for him, if he done it, not to lie about it than it would to own up. And we talked along a little while and he says, "Everybody in Brunswick dislikes me. I don't care what happens to me. I might just as well own up that I set the fire." The constable also testified that he might have said to the respondent that it would be better for him to tell the truth, that he used the words "I don't want you to lie to me; I want you to tell me the truth." The constable vigorously denied that he made any threats or promises of what would or might

happen to the respondent in case he denied or admitted his guilt.

The presiding justice excluded from the jury the confession thus made to the constable, but admitted the confessions made to the chairman of the selectmen and to the insurance commissioner. The ruling admitting those confessions was of course based on his finding as matter of fact that they were not made as the result of any threats or promises made by the constable which constrained the free will of the respondent.

When it is remembered that in the absence of evidence all confessions are presumed to be voluntary, and the burden is on the respondent to rebut that presumption by evidence, we cannot be expected to say, upon this evidence and against the finding of the presiding justice, that his inference from the evidence was logically impossible, that as matter of law the confessions admitted were the result of threats or promises of a temporal nature.

Exceptions overruled. Judgment for the state.

INHABITANTS OF KITTERY *vs.* CHARLES C. DIXON.

York. Opinion April 14, 1902.

Insane Hospital. Commitment. Certificate. R. S., c. 143, §§ 13, 21, 34.

1. To maintain an action, to recover of a husband expenses paid by the town for the support of his insane wife in the insane hospital, the plaintiff must show that in the commitment to the hospital the requirements of the statute were fully complied with.
2. The statute requires that "the evidence and certificate of at least two respectable physicians, based upon due inquiry and personal examination of the person to whom insanity is imputed" must be had.
3. *Held;* that a certificate of the physicians is not enough — they must be examined as witnesses by the municipal officers, and testify from actual examination of the patient.
4. Where there is no evidence that any physicians gave evidence before the municipal officers, and their certificate does not state that they had made "due inquiry and personal examination of the person," the statute requirement is not complied with; and no action can be maintained.

5. For aught that appears, they may have given their certificate upon hearsay information, and have never seen the patient. In a matter as important as the determination that a person is insane, and depriving such person of his or her liberty, all the investigation and evidence required by the statute should be had before a commitment can legally be ordered, and the record should show it affirmatively. It does not so appear here. The nonsuit was rightly ordered.

Exceptions by plaintiff. Overruled.

This was an action to recover of the defendant money paid by the plaintiffs to the Maine Insane Hospital for the support therein of his wife, an insane person committed to said hospital by the selectmen of said Kittery. It was admitted by defendant that his wife was insane when committed, and that the defendant was then, and is still resident in said Kittery, and that the plaintiffs had paid to said hospital the money sued for.

The plaintiffs put in evidence the following copies of the papers from the selectmen accompanying the commitment and left on file at said hospital relating to said commitment.

Said copies of papers put in evidence were admitted to be true copies of the originals and to have the same effect as evidence as the originals themselves.

The court ordered a nonsuit and the plaintiffs excepted to its ruling.

STATE OF MAINE.

To the Superintendent of the Maine Insane Hospital:

Whereas, the undersigned, selectmen of the town of Kittery, in the county of York, this day, on complaint to us made, in writing, by (a) Frank E. Rowell, Justice of the Peace, the town of Kittery, in said county, who bears the relationship of ———— to (b) Amanda Dixon, of said town of Kittery, who therein says that said (b) Amanda Dixon is insane, and is a proper subject for said hospital, made due inquiry into the condition of said (b) Amanda Dixon, and called before us such testimony as was necessary to a full understanding of the case; whereupon it appeared to us that said (b) Amanda Dixon, was insane, and we were of the opinion that the safety and comfort of said (b) Amanda Dixon, and others interested,

would be promoted by a residence in said hospital, and accordingly determined that said (b) Amanda Dixon, be sent forthwith to said Institution.

We therefore certify, that said (b) Amanda Dixon, is insane, and that she was residing, commorant, and found in the town of Kittery, aforesaid, at the time of arrest and examination aforesaid; and you the said superintendent, are hereby ordered and required to receive said (b) Amanda Dixon, into said hospital, and detain her in your care until she shall become of sound mind, or be otherwise discharged by order of law, or by the Superintendent, or Trustees.

Given under our hands, at said Kittery, this fifteenth day of July, in the year of our Lord one thousand eight hundred and eighty-seven.

FRANKLIN H. BOND, } Selectmen of
MARK C. FERNALD, } Kittery.

a, Complainant's name. b, name of person to be committed.

PHYSICIANS' CERTIFICATE OF INSANITY.

We, the undersigned, practicing physicians in the town of Kittery, and State of Maine, have examined into the state of health and mental condition of Mrs. Amanda Dixon, of said town, and we hereby certify that in our opinion she is insane.

W. F. WENTWORTH, M. D.
A. W. JOHNSON, M. D.

Dated Kittery, this 15th day of July, 1887.

A true copy.

Attest, C. F. PERRY, Clerk.

July 15, 1887.

TO THE TRUSTEES OF THE MAINE INSANE HOSPITAL:

The undersigned, selectmen of Kittery, hereby certify that Amanda Dixon, has not property or means sufficient to pay her board at the hospital, or relations liable by law for her support, of sufficient ability to pay the same.

FRANKLIN H. BOND, } Selectmen of
MARK C. FERNALD, } Kittery.

J. M. Goodwin, for plaintiff.

S. W. Emery, for defendant.

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

STROUT, J. Plaintiff claims to recover of defendant a sum of money paid for the support of his wife in the insane hospital. She was committed to that institution by the selectmen of plaintiff town, and her expenses there have been paid by the plaintiff.

Section 21 of c. 143, R. S., provides that a town made chargeable in the first instance and paying for the support of the insane person at the hospital, may recover the amount paid from the insane, if able, or "from persons liable for his support." It is not disputed that defendant, the husband, was under a general liability for the support of his wife. But in the absence of any agreement on his part, or any agency in her commitment, he can only be liable to the town which has paid the bill at the hospital, where the officers of the town have followed the statute in making the commitment.

In this case, two physicians gave a certificate, probably intended to be such as required by § 34 of c. 143, and the municipal officers made inquisition and gave the certificate intended to be such as is mentioned in § 13 of that chapter, all which were forwarded to the insane hospital. But it does not appear in this certificate, that the municipal officers examined any physicians in regard to her condition. Section 34 expressly provides that "in all preliminary proceedings for the commitment of any person to the hospital, the evidence and certificate of at least two respectable physicians, based upon due inquiry and personal examination of the person to whom insanity is imputed, shall be required to establish the fact of insanity, and a certified copy of the physicians' certificate shall accompany the person to be committed." The certificate of the physicians is not enough; they must be examined as witnesses, and testify from actual examination of the patient,—a wise precautionary provision. *Naples* v. *Raymond*, 72 Maine, 213.

Here, there is no evidence that any physicians gave evidence before the municipal officers, nor does the certificate given by the physicians state that they had made "due inquiry and personal examination of the person," as required by statute. For aught that appears they

may have given their certificate upon hearsay information, and have never seen Mrs. Dixon. In a matter as important as the determination that a person is insane, and depriving such person of his or her liberty, all the investigation and evidence required by the statute should be had before a commitment can legally be ordered, and the record should show it affirmatively. It does not so appear here. The commitment, therefore, was unauthorized,—the payment by the town voluntary. From such payment no right of action arises against the defendant. The nonsuit was rightly ordered.

Exceptions overruled.

ELIZA J. WILLOUGHBY, Executrix,

vs.

THE ATKINSON FURNISHING COMPANY.

Knox. Opinion April 14, 1902.

Judgment. Pleading. Rent. R. S., c. 94, § 10.

The law does not permit a party to bring one suit and recover damages for a part of the injury resulting from a single breach of contract, and after obtaining judgment and satisfaction for that, to institute another suit for another part of the injury from the same cause.

In a former suit plaintiff recovered judgment for the same breach of contract complained of here, which has been paid. There was but one breach of contract, and only one suit for that breach can be maintained. In the absence of fraud or concealment by defendant, which is not shown, plaintiff could have recovered her full damages in her first suit. If she neglected to include therein all items which she could have recovered for, she cannot subject the defendant to another action therefor. *Held;* that the judgment in the prior suit is a bar to this.

See *Willoughby* v. *Atkinson Furnishing Co.*, 93 Maine, 185.

On report. Judgment for defendant.

Assumpsit to recover the sum of seven hundred and thirty-one dollars and twenty-five cents, being the amount claimed by plaintiff

for loss of use and rent of a three-story brick building, situated in Rockland, and being part of the testate estate of the late J. S. Willoughby, deceased, late of said Rockland.

The case is stated in the opinion.

D. N. Mortland, for plaintiff.

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

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

STROUT, J. Plaintiff's testator, on the fifteenth day of August, 1893, leased to defendant, by a lease under seal, the "Willoughby block" in Rockland, for a term of three years from the first day of September, 1893, "with the privilege at the end of said term of releasing for a term of ten years or any part thereof at the same yearly rental." On August 31, 1896, defendant exercised its option to extend the term for three months, and gave the lessor written notice thereof. Defendant continued its occupancy till December 1, 1896, when it vacated the premises and tendered the keys to the lessor. All rent up to December 1, 1896, has been paid.

The lease authorized defendant to remove whatever partitions in the building they desired during their occupancy, "provided said company replace said partitions in as good condition as they find them." The defendant under this permission made extensive alterations, but did not replace the partitions at the end of the term. This constituted a breach of defendant's obligation. It was one breach entire and indivisible. For this breach the lessor brought an action of assumpsit on August 18, 1897, under the provisions of R. S., c. 94, § 10, which authorized "sums for rent on leases under seal or otherwise, and claims for damages to premises rented" to be recovered in that form of action, "on account annexed to the writ, specifying the items and amount claimed." In that action the items specified in the account were rent for three months after the premises had been vacated by defendant on December 1, 1896, and damages to the block for not restoring the premises to their condition at date of lease, and for cost of elevator put in by lessor, and cost of removing

same. In that action the law court held that rent could not be recovered after termination of the tenancy and vacation of the premises by the defendant, and that the claims in regard to the elevator could not be upheld, but that the damages for not restoring the building could be recovered. *Willoughby* v. *Atkinson Furnishing Co.*, 93 Maine, 185. That action then proceeded to judgment, and the lessor recovered as damages the sum of sixteen hundred and forty dollars, which was paid by defendant before this suit was brought.

In the present suit, plaintiff seeks to recover from defendant loss of rent, income and use of the Willoughby block, from November 30, 1896, to June 1, 1897, at the rental named in the lease, "by reason of its failure to restore the partitions and other changes made as per agreement and lease." To this claim the defendant pleads the former suit and judgment as a bar. We think it must be so regarded.

There was but one breach, the failure to restore the premises to their former condition. The damages resulting from that breach, included not only the cost of restoration, but any other loss incident to and resulting from that breach. It could and should have been included in the first suit brought by the lessor. There was no concealment of any portion of the loss. Whatever injury resulted from the defendant's failure to perform its obligations, was as well known when that suit was brought, as it is now. The law does not permit a party to bring one suit and recover damages for a part of the injury resulting from a single breach of a contract, and after obtaining judgment and satisfaction for that, to institute another suit for another part of the injury from the same cause. If it did, litigation would be interminable.

If plaintiff failed to specify or prove in the first suit all the items of his damage, from carelessness or neglect, he must abide the result. He cannot have another action for the omitted part. He has had one recovery for the same breach complained of here. *Smith* v. *Way*, 9 Allen, 472; *Stevens* v. *Tuite*, 104 Mass. 328; *Doran* v. *Cohen*, 147 Mass. 342; *Ware* v. *Percival*, 61 Maine, 391, 14 Am. Rep. 565; *Blodgett* v. *Dow*, 81 Maine, 197; *Foss* v. *Whitehouse*, 94 Maine, 491.

Judgment for defendant.

ELLA A. M. WIGGIN *vs.* JOSEPH H. MULLEN and others.

Waldo. Opinion April 14, 1902.

Real Property. Parol Gift. Boundary. Town-House Lot. Adverse Possession.

In 1819, Josiah Stetson gave by parol to the town of Lincolnville a lot of land one hundred feet square for a town-house. The lot was bounded on two sides by highways, and on the other two sides it was not fenced, till within a few years, when the defendants, by direction of the selectmen, erected a fence there. This fence was within the one hundred feet square. The action is trespass for entering and building the fence.

In 1820, Lincolnville built a town-house upon the lot, and has used it as a town-house for town purposes ever since. Plaintiff owns the adjoining land. She claims that the title of the town extended only to the space occupied by the town-house.

Upon all the evidence it is the opinion of the court, that the town has acquired, and now has absolute title to a lot one hundred feet square, according to the original gift. The fence complained of being within that limit, the defendants are not guilty of trespass.

On report. Judgment for defendants.

Trespass q. c. involving title and boundary lines of town-house lot in Lincolnville.

The case appears in the opinion.

R. W. Rogers, for plaintiff.

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

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

STROUT, J. Lincolnville town-house is located at the corner of the Searsmont and Belfast roads. The defendants, by direction of the selectmen of Lincolnville, a short time before this suit was brought erected a fence upon the two unfenced sides of the town-house lot, which, with the fences upon the two roads enclosed the lot. The space thus enclosed is somewhat less than one hundred feet on either side. The building stands on the southeast corner of this lot. The

plaintiff owns the land north and west of the town-house lot. This suit is trespass quare clausum for entering and building the fence.

The whole contention depends upon the size and boundaries of the town-house lot. Plaintiff claims that the title of the town covers only the space occupied by the building, and defendants claim that it is a square of one hundred feet each way. The case is here upon report, upon which it becomes our duty to determine both law and fact.

In 1819, Josiah Stetson was the owner of the premises now owned by plaintiff, and also the town-house lot. At a town meeting of Lincolnville, on September 20, 1819, it was voted "to build the town-house at the corner near Farwell's. Josiah Stetson agreed to give 100 feet square of land for it to stand on." The town-house now standing was built in 1820, upon the lot at the intersection of the two roads before mentioned, and "has been used as a town-house for town purposes from that time till now." No deed from Stetson to the town is shown, and probably none was ever given.

This vote is contained in what purports to be a book of record of the town, which is found in possession of the town clerk, and by him produced. It contains strong internal evidence of its verity, and there is no evidence to impeach it. Being more than eighty years old, and a public record of the doings of the town, it is admissible as the best evidence attainable of the acceptance by the town, by express declaration, of a parol gift of the land by Stetson. It was immediately followed by the building, by the town in 1820, of a town-house upon the lot, which has ever since been used by it, without objection. *Goodwin* v. *Jack*, 62 Maine, 414, 16 Am. Rep. 473.

It is conceded by the plaintiff that the town has title to so much of the lot as is actually covered by the building. Is it limited to that?

The vote recites that the gift was of one hundred feet square. The town was interested to have a lot large enough, not only for the building to rest upon, but sufficiently large to accommodate the citizens in its use, and for possible needed enlargement in the future. It cannot be supposed that the town would have accepted a lot not larger than the building to be placed upon it. The limit specified in

the vote, was not an unreasonable one, having reference to its convenient use by the citizens. It is evident that the town then understood Stetson's gift to be of a lot one hundred feet square.

Josiah S. Miller, a grandson of Josiah Stetson, seventy years of age, who lived with him in his boyhood, testifies that somewhere from 1843 to 1845, when Josiah Stetson was ploughing towards the town-house, he said to the witness, "when we get down a little further to stop. He said the town owned a piece in there, but didn't say how much." He says they did stop about five rods from the town-house, about where defendants have placed the fence complained of. He also states that on the Searsmont road there was a fence, partly of stone, which came near the town-house, but that "there was a place right close to the town-house where we always drove in,—always a place there." That at town meetings the citizens drove in there, and left their teams. This testimony is corroborated by the witnesses Mariner and Allen H. Miller, both of whom say that they never saw the land within the present enclosure plowed up till within a few years.

Josiah Stetson owned the premises adjoining the town-house lot until April 27, 1853, when he conveyed to Daniel Stetson, excepting from the deed "the lot on which the town-house now stands." Daniel Stetson conveyed the same premises to Samuel W. Heal, July 3, 1855, who conveyed to Mrs. Wadsworth, in 1870, and she conveyed to Thomas B. Wiggin, in 1883, from whom the plaintiff derived title July 4, 1898. It is true that during these years a little grass, of poor quality, and of very slight value, was cut and gathered by these various owners,—but it is evident that this was done, not under a claim of ownership, or as an act of disseisin, because, to a time as late as 1870, when Wadsworth bought, all the prior owners carefully refrained, while cultivating the adjoining land, from doing so on this lot. The town lot had not been enclosed by a fence on the north and west sides, until shortly before this suit was brought, and the line of the lot was not accurately defined upon the face of the earth; but the acts of the several owners for more than fifty years prior to 1870, in all matters of cultivation, were practically outside and not within the one hundred feet square lot, which they all recognized

as the property of the town. That this state of facts existed until 1870, is not controverted by evidence. If then, the original gift was by parol, such occupancy, as of right, by the town for so great length of time and recognized by the adjoining owners, ripened into full title in the town, to the whole lot of one hundred feet square. *Jewett* v. *Hussey*, 70 Maine, 433; *Martin* v. *M. C. R. R.*, 83 Maine, 101; *Wheeler* v. *Laird*, 147 Mass. 421. The cutting of grass, under the circumstances testified to, were not such acts of claim, ownership or adverse possession as interrupted the gaining of title by the town.

Wadsworth acquired title to the adjoining land in 1870. Since then has there been any act of disseisin or adverse possession, to any part of the town lot, sufficient to devest the title of the town? Wadsworth says he "occupied the land up to the wall of the town-house on the two sides adjoining the fields,"—that he ploughed a piece on the Searsmont road, three or four years before he sold in 1883, and that in ploughing, his "horses stopped just before they reached the wall of the town-house." But he refers to a ridge there, apparently made by former ploughing, and evidently the same ridge spoken of by several witnesses, which he thinks was fifteen or twenty feet from the building, but which other witnesses say was about where the fence now is. He also says that he built a "temporary rail fence," at the gap on the Searsmont road, where the inhabitants had been in the habit of driving in to leave their horses at town meetings, and that that fence remained there while he owned "except at town meeting days, of course, it would be removed,"—that "it was necessary for teams to occupy the ground on election days, to have a chance to pass in." He also says he ploughed to the ridge and not beyond it; that he did not know where the line of the town lot was, but he did not claim to own any of that lot. Josiah S. Miller says Wadsworth plowed a little nearer the building than Josiah Stetson had, but not nearer than about three rods. Both of these witnesses appear to have recognized the ridge as at or near the boundary of the town lot. The distance from the west side of the building to the present fence is fifty-two feet. In view of this testimony, we are satisfied that the fence is within the one hundred feet square lot. If

Wadsworth ever plowed or cultivated nearer the town-house than the present fence, it is evident that he did it, not under adverse claim, but in subordination to the use of the town, when its inhabitants had occasion to use it for town purposes. Such use by him was neither adverse nor exclusive, and cannot be regarded as a disseisin. He never claimed any portion of what was in fact the town-house lot.

In 1883, Thomas B. Wiggin acquired title to the adjoining land, and conveyed it to plaintiff in 1898. The description in Wiggin's deed, includes the entire town-house lot, but as his grantor had no title to that lot, he of course could convey none. Since Thomas B. Wiggin acquired title, he and the plaintiff appear to have encroached upon the town-house lot, and plowed and cultivated there to a certain extent. This may have been, and probably was, done under a claim of right, adverse to the town. But it does not appear that their possession of such portion of the lot as they have used, has been exclusive. However this may be, the disseisin, if it amounted to that, has not continued for a sufficient length of time to ripen into title.

Upon all the evidence in the case, we think the gift from Josiah Stetson to the town, was of a lot one hundred feet square, and the title thereto has become and is perfect in the town. The fence complained of is within the limits of that lot, and the defendants are not guilty of trespass in erecting it, under authority of the selectmen.

Judgment for defendants.

TICONIC NATIONAL BANK *vs.* MARY C. TURNER.

Somerset. Opinion April 14, 1902.

Action. Judgment. Execution. Costs. Executors and Administrators. Levy. R. S., c. 66, § 18; c. 76, § 42; c. 87, §§ 1, 2. R. S., 1841, c. 120, §§ 1-5.

A judgment should follow the writ and declaration. When the suit is against an executor, judgment for the debt or damage should be entered up against the goods and estate of the testator. If it is not so entered, it is the error of the clerk and not of the court, and the court will order it to be corrected.

In an action against an executor or administrator, wherein judgment is rendered for debt and damages, and for costs also, two executions should be awarded, one for the debt or damages against the goods or estate of the deceased in the hands of the executor or administrator, and the other for the costs, against the goods, estate and body of the executor or administrator.

The amount of such execution for costs is to be allowed to the executor or administrator in his administration account, unless the judge of probate decides that the suit was defended without reasonable cause.

R. S., c. 87, § 2, is not intended to give a creditor a cumulative remedy, of which he may avail himself or not at his election, without depriving him of the right to have an execution for costs against the goods and estate of the deceased. The remedy for costs there given is exclusive, and is intended for the protection of the estates of deceased persons, to prevent them from being frittered away in frivolous and groundless suits by indiscreet or litigious executors or administrators.

Where, in an action against an executor, one execution issues for both debt and costs against the goods and estate of the deceased in his hands, and is satisfied by levying the same upon the lands of the testator, such levy is void.

On report. Judgment for defendant.

Real action, both parties claiming under Napoleon B. Turner, deceased, the defendant as devisee under his will, and the plaintiff by a sale on execution against his estate.

D. D. Stewart and G. K. Boutelle, for plaintiff.

J. and J. W. Crosby; D. Lewis, for defendant.

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

POWERS, J. Writ of entry to recover land in St. Albans. Both parties claim under Napoleon B. Turner, deceased, the defendant as devisee under his will, and the plaintiff by virtue of a sale on execution against his estate. After Turner's decease the plaintiff brought suit against his executor upon a demand due from Turner in his lifetime, and obtained judgment for $2251.20 damages, and $15.26 costs of suit. The execution issued for both debt and costs, and was satisfied by a sale of the land under R. S., c. 76, § 42.

The defendant attacks the judgment on two grounds; first, that it is a personal judgment against the executor, and that upon it no execution could issue against the goods and estate of the testator; second, that, under R. S., c. 87, § 1 and 2, judgment and execution for costs against the goods and estate of the testator is unauthorized and illegal. The first objection cannot be sustained. Amendment of the judgment, in matter of form, was asked for and allowed by the presiding justice, if necessary. An examination of the writ shows that it was in proper form, commanding an attachment of the goods and estate of the testator in the hands of his executor, and setting forth a cause of action against the deceased on notes indorsed or signed by him in his lifetime. The judgment should have followed the writ and declaration, and been entered up against the goods and estate of the deceased for the amount of the debt or damages. If it was not so entered it was the error of the clerk and not of the court, and the court will order it to be corrected. *Piper* v. *Goodwin*, 23 Maine, 251.

This brings us to the defendant's second objection, which involves the construction of R. S., c. 87, § 1 and 2, and presents the question, whether, in view of the provisions there found, a judgment can be rendered and execution issued for costs against the goods and estate of the deceased, in an action commenced against an executor or administrator. "Executions for costs run against the goods and estate, and for want thereof against the bodies of executors and administrators, in actions commenced by or against them, and in actions commenced

by or against the deceased in which they have appeared, for costs that accrued after they assumed the prosecution or defense, to be allowed to them in their administration account, unless the judge of probate decides that it was prosecuted or defended without reasonable cause." Section 2, supra.

The learned counsel for the plaintiff contends that this is a cumulative provision, intended to favor the creditor, giving him an additional remedy of which he may avail himself at his election, but not depriving him or his right to have judgment and execution for costs against the goods and estate of the deceased. There is nothing in the statute indicative of such an intention. Its language is general; "executions for costs" in the cases named are to run against the goods and estate of the executors or administrators, and for want thereof against their bodies. We do not perceive how this can mean any more or less than if it read "all executions for costs." Moreover, § 1 militates strongly against the plaintiff's theory. No question can be raised but that in the cases named in § 2 executors and administrators are personally liable for costs. But by the preceding section it is only in those cases where they are not personally liable for costs, that execution therefor is to run against the goods and estate of the deceased in their hands. Here is an express negation of any cumulative remedy.

Neither has any plausible reason been suggested why the legislature should be so exceptionally and unusually tender of the interests of creditors in suits against the estates of the dead. In suits against the living, they have but one security, one remedy and one execution for their costs. Why should they have a two-fold security and remedy for costs in suits against the estates of those deceased? On the contrary we believe that the statute was enacted for the protection of estates of deceased persons, and to prevent them from being frittered away in frivolous and groundless suits by indiscreet or litigious executors and administrators. They, and they alone are liable for the costs. If in the judgment of the judge of probate, the suits were prosecuted or defended with reasonable cause, the costs paid are to be allowed to them in their administration accounts; if without reasonable cause, the costs are not to be allowed, and the consequences of

their contentious spirit or lack of discretion fall, and rightly fall, upon them and not upon the estate which they represent. R. S., c. 87, § 2, c. 66, § 18.

For these reasons it was held in 1819, while the District of Maine was still a part of Massachusetts, and long before the enactment of the statute under consideration, that where an administrator commences an action, and fails to support it, judgment for costs cannot be rendered against the goods and estate of the intestate, but should be rendered against the administrator de bonis propriis. *Hardy* v. *Call*, 16 Mass. 530. That decision remained unquestioned, but in cases prosecuted or defended by administrators and executors under other circumstances, it was held that judgment for costs should be rendered against the goods and estate of the deceased. *Crofton* v. *Ilsley*, 6 Maine, 48; *Eaton* v. *Cole*, 10 Maine, 137. In 1841 the legislature, doubtless to give uniformity to the practice, and for the reasons assigned in *Hardy* v. *Call*, supra, extended the rule in that case to all actions against the executor or administrator, and to all actions commenced by or against the testator or intestate, and prosecuted or defended by the executor or administrator.

The act of 1841, R. S., 1841, c. 120, § 1, 2, 3, 4, and 5, has never been amended, but has been condensed in the process of revision. No change of legislative purpose is to be inferred from a mere condensation of a prior statute in a subsequent revision. Turning to the original act we find, "When the judgment is for debt or damages, and costs also, an execution for the debt or damages shall be awarded against the goods or estate of the deceased, in the hands of the executor or administrator, and another execution for the sum due for costs, against the goods or estate of the executor or administrator, and also against his body, as if it were for his own debt." R. S., 1841, c. 120, § 4. Can clearer language than this be framed? There are to be two executions; an execution for debt and "another execution" for costs; the first one against the goods and estate of the deceased; the other against the goods, estate and body of the executor or administrator "as if it were his own debt." And this court so held in *Ludwig* v. *Blackinton*, 24 Maine, 25. Our statute of 1841, was taken from R. S., Mass. 1836, c. 110, § 2 et seq., now R. S.,

Mass. 1902, c. 172, § 5, 6 and 7, and the two are substantially identical. Under the Massachusetts statute it has there been held that in an action brought against an administrator, in which a judgment is recovered against him, separate executions shall issue for debt and for costs, *Greenwood* v. *McGilvray*, 120 Mass. 516, one against the estate of the intestate for the damages only, and the other for the costs against the administrator personally; and in such case a levy of an execution, which includes both damages and costs, upon the estate of a deceased person, is void. *Look* v. *Luce*, 136 Mass. 249. See also *Perkins* v. *Fellows*, 136 Mass. 294; *Gibbs* v. *Taylor*, 143 Mass. 187.

The cases cited by the counsel for the plaintiff, to show that the practice in this state in such cases has been to issue one execution for debt and costs against the goods and estate of the deceased, do not sustain his contention. In *Wyman* v. *Fox*, 55 Maine, 523, 92 Am. Dec. 613, for aught that appears in the report of the case, the suit may have been commenced, and the costs accrued before the administrator assumed the defense, and the question here presented was not considered. In *Piper* v. *Goodwin*, 23 Maine, 251, the judgment in question was rendered in 1837, before the enactment of the present statute.

The debt in *Baker* v. *Moor*, 63 Maine, 445, was the debt of the executor, and judgment was properly awarded against him personally for both debt and costs; while in *Bourne* v. *Todd*, 63 Maine, 427, the judgment was held void on other grounds. While there may have been some diversity of practice in this state, that cannot override the plain intent and meaning of the statute and its settled construction by the courts of this state and Massachusetts.

To consider further the contentions of the parties would be unprofitable and unnecessary. The judgment in this case being illegal, rendered without lawful authority, the defendant has a right to impeach it. *Sidensparker* v. *Sidensparker*, 52 Maine, 481, 83 Am. Dec. 527. With it must fall the execution and levy based upon it. *Look* v. *Luce*, supra.

Judgment for defendant.

FRED J. WILKINS *vs.* MONSON CONSOLIDATED SLATE COMPANY.

Piscataquis. Opinion April 15, 1902.

Negligence. Estoppel. Evidence. Damages.

In an action to recover damages resulting from rocks thrown upon the plaintiff's land by blasting in defendant's quarry, and injury from water pumped from the quarry, and allowed to flow on plaintiff's land, the defendant asked an instruction that plaintiff having conveyed the premises occupied by the defendant, with knowledge that they were to be opened and used as a quarry, he was estopped from claiming any damages arising from the proper use of the quarry, as a quarry, when carried on in the ordinary, usual and proper business of a slate quarry.

This request was refused, and the jury was instructed that "plaintiff could maintain the action, providing he proves damages, although he sold the land with the understanding that it was to be used as a slate quarry," and that it was not necessary for the plaintiff to prove negligence or carelessness on the part of the defendant. Upon exceptions taken to the refusal to instruct, and to the instruction given, *held;* that the refusal was correct, as was also the instruction given.

Evidence is not admissible to show that, between the date of the writ and the time of trial, rocks had been thrown upon plaintiff's land by defendant.

The plaintiff also claimed to recover for probable future damages, but the court instructed the jury that no damages subsequent to the date of the writ could be recovered. *Held;* that the instruction is correct.

Exceptions by plaintiff and defendant. Overruled.

Case to recover damages for the injury to the plaintiff's dwelling-house and land, by reason of rocks thrown upon the plaintiff's premises by the use of explosives in blasting in defendant's slate quarry.

The case was tried to a jury, and the plaintiff obtained a verdict. The defendant filed exceptions, the plaintiff also filed exceptions.

The exceptions appear in the opinion.

H. Hudson, for plaintiff.

J. B. Peaks, for defendant.

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

STROUT, J. This case comes up on exceptions by both parties. It is a suit to recover damages resulting from rocks thrown upon plaintiff's land by blasting in defendant's quarry, and injury from water pumped from the quarry and allowed to flow upon plaintiff's land. The quarry which lies on the opposite side of the road from plaintiff's residence was conveyed by the plaintiff to defendant's grantor, with knowledge that it was to be used as a quarry.

Defendant's exceptions. An instruction was asked that plaintiff, having conveyed the premises occupied by the defendant with knowledge that they were to be opened and used as a quarry, he was estopped from claiming any damages arising from the proper use of the quarry as a quarry, when carried on in the ordinary, usual and proper business of a slate quarry. This request was refused by the presiding justice, who instructed the jury that the plaintiff could "maintain the action, providing he proves damages, although he sold the land to the predecessor in title of the defendant with the understanding that it was to be used as a slate quarry," and that it was not necessary for the plaintiff to prove negligence or carelessness on the part of the defendant. The defendant excepts to the refusal to instruct, and to the instruction actually given.

The owner has the right to use his property in any manner he pleases, provided such use is lawful and inflicts no injury upon another. The maxim sic utere tuo ut alienum non lædas, expresses not only the law, but the elements of good neighborhood and mutual right. The fact that plaintiff granted the quarry, to be used as a quarry, cannot be regarded as conferring a right upon defendant to make an illegal use of the quarry, to his detriment, nor as a release of damages resulting therefrom. With suitable precautions, blasting can be done in the quarry, without throwing rocks upon plaintiff's premises. Such noise as necessarily results from blasting, may be supposed to have been considered at the time of the grant, and been an element in making the price. But the unnecessary throwing of rocks or other debris upon plaintiff's land, cannot be so regarded.

The plaintiff might well rely upon the assumption that defendant would conduct his operations in compliance with law, and with that regard to his rights which the law imposes. The elements of estoppel do not exist upon the facts of this case. *Lyman* v. *B. & W. R. R.*, 4 Cush. 288; *Wilson* v. *New Bedford*, 108 Mass. 261, 11 Am. Rep. 352. The cases of *Vickerie* v. *Buswell*, 13 Maine, 289, and *Francis* v. *B. & R. Mill Corporation*, 4 Pick. 365, cited by counsel, are not applicable to the facts of this case. These principles are elementary. The instructions given were in accordance with them.

Plaintiff's exceptions. The writ bore date January 24, 1900. Plaintiff introduced evidence tending to show that from December first, 1898, to the date of the writ, rocks were blasted from the quarry by defendant, and thrown upon the dwelling-house of plaintiff and upon his land. He also offered evidence to show that between the date of the writ and the time of trial, rocks had been so thrown upon plaintiff's land by defendant, which was excluded, and exception taken. It was claimed that such evidence tended to show that rocks were so thrown prior to the date of the writ,—but this was clearly non sequitur. Evidence of a wrong or trespass of this kind at one time has no legitimate tendancy to prove a like wrong or trespass at some prior time. The offered evidence was clearly inadmissible.

Plaintiff also claimed to recover in this suit not only damages to the date of writ, but probable future damages. The court instructed the jury that no damages subsequent to the date of the writ could be recovered. That this instruction was correct is too plain for argument. Non constat that any more rocks would ever be thrown upon plaintiff's land. The quarry might not be operated, or precautions might be taken to prevent a recurrence of the injury complained of. There was no basis upon which future damages could be assessed. If they occur, it is matter for a subsequent suit.

Exceptions of plaintiff and of defendant overruled.

PHILIP PELLERIN *vs.* INTERNATIONAL PAPER CO.

Androscoggin. Opinion April 15, 1902.

Negligence. Evidence. Presumption. Fellow-Servant.

In an action to recover damages by the plaintiff, who was injured by the falling of a stage upon which he was at work, the declaration alleged that "the staging was insecure and unsafe, the iron rods were unable to sustain the weight and broke and precipitated the plaintiff a distance of fifteen feet to the floor of the room."

After verdict for the plaintiff, and on motion for a new trial it appeared that there was no affirmative proof of culpable negligence on the part of the defendant company. *Held;* that no presumption of such negligence arises from the mere fact that an accident happened. If there is any presumption in such a case it is that the defendant has complied with the obligations resting upon it equally with other men. The fact that two of the dependent hooks broke may be some evidence tending to show that they were not suitable for the use to which they were applied, but it is not alone sufficient to establish negligence on the part of the defendant company.

The defendant kept in its store-house sufficient materials for the construction of the staging required by the workmen in painting the ceilings, and there was no direct evidence that these materials were not suitable for that purpose. There was no evidence that the defendant undertook to furnish the staging in question for the workmen as a completed structure. The company did not assume the responsibility of adapting specific hooks or planks to the construction of a particular staging. The plaintiff's fellow workmen obtained the hooks and the planks from the company's store-house, and erected the staging themselves, and there was no suggestion that they were not competent workmen. *Held;* that if the plaintiff's fellow workmen failed to exercise due care in the adjustment of the planks to the hooks, and the accident resulted from that cause, the defendant company is not responsible.

Motion by defendant. New trial granted.

Case to recover damages for personal injuries received by the plaintiff, while in the employ of the defendant company.

The plaintiff recovered a verdict for $431.59.

The facts are stated in the opinion.

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

Counsel cited: *Twomey* v. *Swift*, 163 Mass. 273; *Arkerson* v. *Dennison*, 117 Mass. 407; *Clark* v. *Soule*, 137 Mass. 380.

Geo. D. Bisbee and Ralph T. Parker, for defendant.

Counsel cited: *Kelley* v. *Norcross*, 121 Mass. 508; *Arkerson* v. *Dennison*, 117 Mass. 407; *Robinson* v. *Blake Mfg. Co.*, 143 Mass. 533; *Colton* v. *Richards*, 123 Mass. 486; *Floyd* v. *Sugden*, 134 Mass. 563; *Adasken* v. *Gilbert*, 165 Mass. 443; *Carmody* v. *Boston Gas Light Co.*, 162 Mass. 539; *Coleman* v. *Mech. Iron Found. Co.*, 168 Mass. 254.

Accident not prima facie evidence of negligence.

Nason v. *West*, 78 Maine, 253.

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

WHITEHOUSE, J. In this action the plaintiff seeks to recover damages for personal injuries sustained by reason of the fall of a staging upon which he was at work for the defendant company. The jury returned a verdict for the plaintiff of $431.59, and the defendant asks the court to set it aside as against law and evidence.

The plaintiff introduced testimony tending to establish the following facts: The plaintiff was employed in painting the ceiling of a room in the defendant's pulp mill, and at the time of the accident was standing or sitting with three other workmen upon a staging suspended about five feet below the ceiling by six iron rods or painters' hooks attached to the ceiling. The staging was about twenty feet long and ten feet wide with three of the depending iron rods on each side. The lower ends of these rods were bent in the form of rectangular hooks or loops into which were placed edgewise three planks two inches thick to serve as stringers or floor timbers. Upon these stringers were laid the planks constituting the stage upon which the workmen were seated while engaged in painting, but as these planks were only about eleven or twelve feet long it required two of them to reach the entire length of the stage, the ends lapping over on the middle stringer. Thus constructed the staging could be readily taken

apart and removed or set up in another part of the room, as necessity or convenience might require in the progress of the work.

The defendant company furnished the iron rods and the planks to be used in the erection of such stagings, and when not in use they were stored with like materials in the company's store-house. The plaintiff's fellow workmen brought the rods and planks from the store-house for the erection of the staging in question, and although the plaintiff himself took no part in the selection of the materials he had several times assisted in moving the staging by taking it down and putting it up again. At the time of the accident the plaintiff was engaged in painting with a fellow workman at one end of the stage, when the two workmen at the other end, having finished painting there, went over to that part of the stage where the plaintiff sat. Thereupon two of the iron rods broke, one at the inner angle of the hook and the other at the outer angle, the stage fell and caused the injuries to the plaintiff of which he complains. There was evidence tending to show that the planks placed edgewise in the rectangular iron hooks filled only about five-eighths of the space between the rods of some of the hooks and were not secured in a vertical position, but allowed to incline outward as shown by the following diagram:

The defendant introduced no evidence, contending that the plaintiff had failed to show any actionable negligence on the part of the company.

It is the opinion of the court, that this contention on the part of the defense was justified by the evidence, and that a nonsuit might properly have been ordered by the presiding justice.

The action set forth in the plaintiff's writ rests upon the allegation that "the staging was insecure and unsafe, the iron rods were

unable to sustain the weight, and broke and precipitated the plaintiff a distance of fifteen feet to the floor of the room." But there is no affirmative proof of culpable negligence on the part of the defendant company, and no presumption of such negligence arises from the mere fact that an accident happened. "If there is any presumption in such a case it is that the defendant has complied with the obligations resting upon it equally with other men." *Nason* v. *West*, 78 Maine, 253. The fact that two of the dependent hooks broke may be some evidence tending to show that they were not suitable for the use to which they were applied, but it is not alone sufficient to establish negligence on the part of the defendant company. *Coleman* v. *Mechanics' Iron Foundry Co.*, 168 Mass. 254. The testimony is silent respecting the size and condition of the iron rods. There is no direct evidence of any patent or visible defect or imperfection of any kind in the hooks that broke. All the testimony is entirely consistent with the theory that if any defects existed in those hooks, they were latent ones which were not discoverable by the exercise of ordinary care in the inspection of them.

The defendant kept in its store-house sufficient materials for the construction of the staging required by the workmen in painting the ceilings, and there is no direct evidence that these materials were not suitable for that purpose. There is no evidence that the defendant undertook to furnish the staging in question for the workmen as a completed structure. The company did not assume the responsibility of adapting specific hooks or planks to the construction of a particular staging. On the contrary, it satisfactorily appears that that duty was intrusted to the workmen engaged in painting the ceiling, and assumed by them as within the scope of their employment. The plaintiff's fellow workmen obtained the hooks and the planks from the company's store-house, and erected the staging themselves. There is no suggestion that they were not competent workmen. Under such circumstances, if the plaintiff's fellow workmen failed to exercise due care in the adjustment of the planks to the hooks, and the accident resulted from that cause, the defendant company is not responsible. *Kelley* v. *Norcross*, 121 Mass. 508; *Adasken* v. *Gil-*

bert, 165 Mass. 443; *Dube* v. *Lewiston*, 83 Maine, 211; *Small* v. *The Allington & Curtis Mfg. Co.*, 94 Maine, 551.

There was evidence tending to show that the two-inch planks set edgewise in the hooks filled only about five-eighths of the space inside of the hooks, and that they were not firmly held in an upright position by wedges or otherwise, but allowed to sway back and forth with the swinging movement of the stage. It is obvious that the strong outward pressure which was thus liable to be exerted against the arm of the hook, would easily break an iron rod fully capable of sustaining the same weight if the plank were securely held in a vertical position against the depending rod. If any want of proper care is affirmatively shown by the evidence, it is on the part of the plaintiff's fellow workmen.

It is accordingly the opinion of the court, that upon well settled principles of law, the verdict was manifestly not warranted by the evidence.

Motion sustained. Verdict set aside. New trial granted.

ENOCH F. PENNELL *vs.* ALFRED M. CARD, and others.

Somerset. Opinion April 22, 1902.

Railroads. Land Damages. Bond. Evidence. R. S., c. 51, § 19.

Whether or not the petitioner is the owner of the land described, and the extent of his ownership, are questions of fact to be determined by the commissioners, upon a petition for damages to land taken for railroads. Title to the land constitutes the foundation of the claim for damages.

The personal statement of one of the county commissioners that the "board supposed they were assessing full damages for crossing the land described in the petition," is inadmissible in form and incompetent in substance, and cannot be received as evidence to control or modify the record of their judgment. Nor does the representation contained in the plaintiff's petition, that he was the owner of the land therein described, have any necessary tendency to show that the commissioners awarded full damages to him as sole owner of the lot.

The obligor in a bond given to secure the payment of damages caused by taking land for a railroad cannot defeat an action thereon, after due proceedings and record of the county commissioners, by the introduction of parol evidence tending to show that the obligee was only a part owner of the land so taken.

In the absence of any evidence to the contrary, the commissioners will be presumed, in any collateral inquiry, to have discharged their legal duty of determining the fundamental question of ownership.

Where the damages awarded in such case exceed the penalty of the bond, the plaintiff is entitled to recover the amount of the penalty with interest thereon, as damages for the detention from the date of the breach of the bond.

See *Hunt* v. *Card*, 94 Maine, 386.

Agreed statement. Judgment for plaintiff.

The case appears in the opinion.

J. W. Manson, for plaintiff.

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

The case at bar differs from *Hunt* v. *Card*, 94 Maine, 386, since here there is one provision in the condition of the bond which was not called in question in the Hunt case. The undertaking here is to pay such judgment as should be awarded on account of land owned by Enoch F. Pennell.

The question here involved is, whether this plaintiff, under a bond which provides that the defendants are to pay the damages assessed upon land owned by Enoch F. Pennell, can recover for damages assessed in his favor, but in fact upon land owned partly by Abbie F. Pennell, who is nowhere mentioned in the defendant's undertaking.

The judgment presented is not conclusive on this defendant. Am. & Eng. Encl. of Law, Vol. 21, p. 164, where it is stated that, —"It may be said generally that a judgment against the principal is not conclusive evidence against the sureties, but merely prima facie."

Counsel cited: *Douglass* v. *Howland*, 24 Wend. 35; *Giltinan* v. *Strong*, 64 Pa. St. 242; *Dawes* v. *Shed*, 15 Mass. 6; *Robinson* v. *Hodge*, 117 Mass. 222; *Hayes* v. *Seaver*, 7 Maine, 237, 240; *Sargent* v. *Salmond*, 27 Maine, 539; *Dane* v. *Gilmore*, 51 Maine, 544, 551; *Judge of Probate* v. *Quimby*, 89 Maine, 574; *Judge of Probate* v. *Toothaker*, 83 Maine, 195; *Buffum* v. *Ramsdell*, 55 Maine, 252, 254; *Sweet* v. *Brackley*, 53 Maine, 346; *Bicknell* v.

Trickey, 34 Maine, 273, 281; *Robinson* v. *Bunker*, 38 Maine, 130; *Taggard* v. *Buckmore*, 42 Maine, 77; *Perkins* v. *Pike*, 42 Maine, 141, 149; *Deering* v. *Lord*, 45 Maine, 293; *McCrillis* v. *Wilson*, 34 Maine, 286; *State* v. *Maine Central R. R. Co.*, 66 Maine, 488; *Holmes* v. *Farris*, 63 Maine, 318; *Chapman* v. *Andro. R. R. Co.*, 54 Maine, 160; *Hayford* v. *Co. Com.*, 78 Maine, 153; *Small* v. *Pennell*, 31 Maine, 267, 270; *Starbird* v. *Brown*, 84 Maine, 238.

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

WHITEHOUSE, J. This case is presented to the law court on report. It is an action on a bond dated November 16, 1897, given by the defendants for the purpose of obtaining the plaintiff's consent that the narrow gauge railroad, located by the Wiscasset and Quebec Railroad Company, might be constructed across his land before the damages had been paid or legally estimated. The condition of the bond is as follows:

"Whereas the United States Construction Company is about to construct a narrow gauge railroad leading from Burnham to Pittsfield and crossing the land of said Enoch F. Pennell as indicated by the location of said railroad filed with the register of deeds in the counties of Waldo and Somerset. Now if the said United States Construction Company shall well and truly pay to the said Enoch F. Pennell any and all land damages and costs of court adjudged by the county commissioners of Somerset county to be due said Enoch F. Pennell by reason of the construction of said railroad across the land of said Pennell as aforesaid within ninety days of said adjudication of said county commissioners then this bond shall be void, otherwise to be in full force."

Immediately after the execution and delivery of the bond the Construction Company entered upon the plaintiff's land situated in Pittsfield in the county of Somerset, and partially constructed a narrow gauge railroad within the limits of the location filed by the Wiscasset and Quebec Railroad Company.

At a session of the county commissioners' court for the county of

Somerset held on the first Tuesday of August, 1898, the plaintiff presented a written application for the assessment of the damages sustained by him on account of this taking of his land for railroad purposes, representing in the petition that he was the owner of the land described therein. After due notice and hearing the county commissioners reported that they had "viewed the land taken from the foregoing petitioner" and determined that he was entitled to damages in the sum of $392 and costs taxed at $42.24, and ordered the railroad company to give security for the payment of the same in accordance with the provisions of R. S., c. 51, § 19. The damages thus estimated by the county commissioners have never been paid, nor has any security been furnished as required by their order.

It appears from the statement of facts in the report that since March, 1894, the land described in the plaintiff's petition "always has been and now is owned one undivided half by the plaintiff and one undivided half by Abbie F. Pennell, his wife." It is also admitted that "one of the county commissioners who assessed the damages, the only one living who acted, would testify that the board of county commissioners supposed that they were assessing the full damages for crossing the land described in the petition, and not damages for any undivided part thereof."

Thereupon it is contended in an elaborate argument, in behalf of the defendants, that, inasmuch as their bond stipulates for the payment of a judgment awarded by the county commissioners for damages caused by the construction of a railroad across the land of Enoch F. Pennell alone, the judgment on account of which recovery is here sought, being for all the damages to land owned by Enoch F. and Abbie F. Pennell, in common, is not one which comes within the terms of the bond, and being indivisible that this action is not maintainable for the penalty of the bond or any part of it.

But the report fails to disclose competent and sufficient evidence to establish the defendants' proposition of fact that the judgment of the commissioners included damages for land not owned by the petitioner. The personal statement of one of the county commissioners that the "board supposed they were assessing full damages for crossing the land described in the petition," is manifestly inadmissible in

form and incompetent in substance, and cannot be received as evidence to control or modify the record of their judgment. Nor does the representation contained in the plaintiff's petition, that he was the owner of the land therein described, have any necessary tendency to show that the commissioners awarded full damages to him as sole owner of the lot. It is a matter of common knowledge that such petitions frequently contain erroneous statements respecting the title to the land alleged to have been taken for purposes of a railroad. Whether or not the petitioner is the owner of the land described, and the extent of his ownership, are questions of fact to be determined by the commissioners. Title to the land constitutes the foundation of the claim for damages. *Minot* v. *Cumberland Co. Com.*, 28 Maine, 121.

Section 19 of chapter 51, R. S., provides that "for real estate so taken the owners are entitled to damages to be paid by the corporation and estimated by the county commissioners on written application of either party," etc. In the case at bar the written application was signed by the plaintiff, Enoch F. Pennell. It was not signed by Abbie F. Pennell. The case fails to show that she ever made any written application to have her damages assessed, and therefore fails to show that the county commissioners had any jurisdiction or authority to estimate any damages she may have sustained. *Littlefield* v. *Boston & Maine Railroad*, 65 Maine, 248. In the record of their judgment upon the petition of Enoch F. Pennell, the commissioners "adjudge and determine that the aforesaid petitioner is entitled to damages in the sum of $392." There is no legal evidence in the case that they awarded damages on account of any interest in the land owned by Abbie F. Pennell. In the absence of any evidence to the contrary, they will be presumed, in any collateral inquiry, to have discharged the duty imposed upon them by law to determine the fundamental question of ownership.

The other obstacles interposed by the defendants to the maintenance of this action are effectually removed by the opinion of the court in *Hunt* v. *Card*, 94 Maine, 386.

As the damages awarded exceed the penalty of the bond, the plaintiff is entitled to recover the amount of the penalty with interest

thereon as damages for the detention from the date of the breach of the bond. *Wyman* v. *Robinson*, 73 Maine, 384. The bond in suit was forfeited upon the failure of the obligors to pay the damages awarded by the county commissioners, viz., May 27, 1898.

Judgment for the plaintiff for the amount of the penalty, as debt, with interest thereon, as damages, from May 27, 1898.

Execution to issue for the entire sum.

LORENZO L. SHAW, Petitioner,

vs.

JOHN H. HUMPHREY, Trustee, and another.

Cumberland. Opinion April, 22, 1902.

Probate. Bond. Surety. Appeal.

1. The liability of a surety upon a probate bond is contingent only upon the failure of his principal to pay the amount with which he may stand charged.
2. The surety is not a party so directly interested that he can be considered as "aggrieved" by a decree of the court respecting the settlement of his principal's account.
3. A surety upon such a bond has no right of appeal from a decree of a judge of probate allowing or disallowing the account filed by the principal on the bond, or by the principal's legal representative.
4. The sureties are fully and effectually represented in the probate court by their principal, or his representative; and in signing the bond they, in effect, stipulate that their principal shall abide and perform the decree of the court upon all questions between him and the estate within the court's jurisdiction.

On report. Petition dismissed.

Petition by Lorenzo L. Shaw, the sole surviving surety on the bond of E. Dudley Freeman, trustee under the will of Cyrus F. Sargent, asking that a rehearing be granted upon the appeal of John

H. Humphrey, trustee, from the decree of the probate court for Cumberland county, rendered March 14th, 1899, allowing the final account of E. Dudley Freeman, trustee in said estate, as rendered and settled by Thomas L. Talbot, Admr., in said probate court on Febuary 27th, 1899, upon which a decree was rendered by the supreme court of probate April 27, 1900.

The case appears in the opinion.

J. A. and I. A. Locke, for petitioner.

Geo. E. Bird and W. M. Bradley, for Humphrey.

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

WHITEHOUSE, J. This is a petition to the supreme court of probate for a rehearing upon a probate appeal. It comes to the law court on report.

The petitioner is the surviving surety upon a probate bond given by E. Dudley Freeman as trustee under the last will and testament of Cyrus F. Sargent. After the decease of Mr. Freeman, the defendant, John H. Humphrey, was appointed trustee to fill the vacancy caused by Mr. Freeman's death. Thomas L. Talbot was appointed administrator on the estate of Mr. Freeman, and in that capacity presented to the probate court the final account of Mr. Freeman as trustee under the Sargent will. After due notice and hearing the account was allowed by the judge of probate, including a mortgage from Geo. W. Titcomb of Denver, Colorado, for $3,000 with a commission thereon of $90. Subsequently the defendant Humphrey as trustee, by permission duly obtained, entered in the supreme court of probate an appeal from the decree of the probate court below allowing this account. Due notice of the appeal was given to Mr. Talbot as administrator on the estate of Mr. Freeman, but no notice of it was served on the petitioner, as surety on Mr. Freeman's bond. Mr. Talbot, the administrator, and the defendant Humphrey, subsequently prepared a statement of facts relating to the unfortunate investment made by Mr. Freeman in the Titcomb mortgage, and agreed to submit the appeal to the court upon that statement for such judgment as

law and justice required, reserving to either party the right to except to rulings in matters of law. Thereupon, upon consideration of the facts stated and the documents on file, a decree was entered in the supreme court, reversing the decree appealed from as to the item of $3,000 and commission thereon growing out of the Titcomb mortgage, and disallowing those items, but affirming the decree in all other respects.

The estate of Mr. Freeman was rendered insolvent, and the administrator took no exceptions, nor does it appear that he was ever requested by the petitioner to take any exceptions to the decision of the justice who entered this amended decree disallowing the item of the Titcomb mortgage.

In this application for a rehearing the petitioner represents that he had no notice of the entry of this appeal in the supreme court, that the decree "was obtained by and through the accident, mistake or fraud of the said John H. Humphrey, trustee, and his irregular proceedings in obtaining said decree from the supreme court of probate," that the decree disallowing the item of $3,000 represented by the Titcomb mortgage was erroneous, and that injustice will be done to the petitioner unless that item is allowed in the settlement of Mr. Freeman's account as trustee.

In the opinion of the court it is unnecessray to determine whether such a general allegation that the petitioner is aggrieved by fraud, accident and mistake on the part of the defendant, unaccompanied by any more specific statement of the grounds upon which the charge is based, would justify the consideration of such a petition addressed to the discretion of the court. For there are prior objections which upon the settled law of this state are conclusive against the granting of a rehearing upon a petition such as this now before the court.

The liability of a surety upon such a probate bond is only contingent upon the failure of his principal to pay the amount with which he may stand charged. The surety is not a party so directly interested that he can be considered as "aggrieved" by a decree of the court respecting the settlement of his principal's account. It has accordingly been repeatedly held by this court that a surety upon such a bond has no right of appeal from a decree of a judge

of probate allowing or disallowing the account filed by the principal on the bond, or by the principal's legal representative. *Woodbury* v. *Hammond*, 54 Maine, 332; *Tuxbury's Appeal*, 67 Maine, 267; *Judge of Probate* v. *Quimby*, 89 Maine, 574. In the latter case it is said in the opinion: "The sureties were fully and effectually represented in the probate court by their principal, or, in this case, by his representative, the administrator. They signed the bond for the protection of the estate and of all persons interested in it, against their principal. In signing it they in effect stipulated that their principal should abide and perform the decree of the court upon all questions between him and the estate within the court's jurisdiction. They did not stipulate for any opportunity to object to any proceedings. They intrusted the representation of their principal's rights and interests to the principal himself."

The propositions established by these decisions are necessarily decisive of the principal question presented by the petition now before the court. But it is a satisfaction to observe that a careful examination of the agreed statement of facts in the light of all the circumstances, and of the well known principles of law and equity applicable to the investment of trust funds, fails to disclose any error in the decree of the supreme court of probate disallowing the item of the Titcomb mortgage in controversy.

Petition dismissed with one bill of costs for respondents.

STATE OF MAINE *vs.* MARTIN P. WOLD.

Cumberland. Opinion April 22, 1902.

Intox. Liquors. Nuisance. Search and Seizure. Evidence.

1. Having liquors in possession with intent to sell in violation of law, and maintaining a common nuisance are distinct offenses, and an acquittal of the former is no bar to a conviction on the latter, even upon the same facts.
2. In the trial of an indictment for maintaining a liquor nuisance the evidence in behalf of the state included the seizures made by the officers on three visits to the respondent's premises with search warrants, during the period covered by the indictment. *Held;* that the records of the municipal court, showing that he was discharged in that court on these three search and seizure cases, are not admissible in evidence. His acquittal on the search and seizure was not a bar to a conviction upon the nuisance, and had no legitimate tendency to prove non-possession or absence of intent to sell, in the trial of the nuisance case.
3. The record of a conviction upon a search and seizure process is admissible upon the trial of an indictment to show the intent with which the liquors were kept. But the converse of this proposition by no means follows. The question of the respondent's guilt or innocence upon the charge of maintaining a liquor nuisance must be determined by the jury upon their judgment of the probative force of all the evidence before them at the trial of that case, and not upon the opinion of the municipal judge respecting the proper weight to be given to that portion of the evidence which may have been offered at the hearing of a different case before him.

Exceptions by defendant. Overruled.

This was an indictment found at the May term, 1901, of the superior court for Cumberland county, against the respondent, alleging that he kept and maintained a nuisance at number 55 Middle street in Portland, where he kept an eating house. The case was tried before a jury on the twentieth and twenty-first of May, and the jury returned a verdict of guilty. It appeared from the testimony that the officers had visited respondent's place about fifteen times between January first and the first Tuesday of May, and during that period they had warrants during three of their visits. The evidence presented for the purpose of proving the guilt of the respondent related

principally to the three visits when the officers had a warrant to search. In the municipal court the respondent was discharged in all three search and seizure cases and during the progress of the trial, respondent desired to produce the records of the municipal court in those three search and seizure cases showing his discharge. Upon the objection of the attorney for the state, the presiding justice excluded this evidence and the respondent took exceptions.

R. T. Whitehouse, county attorney, for state.

D. A. Meaher, for defendant.

A search and seizure process and a nuisance indictment are so connected together, and the evidence in one case applies with such force to the other, that where that evidence has been passed on and decided, it should have a bearing in a subsequent case, where the offense is made out by almost entirely the same evidence or an accumulation of search and seizure cases.

It is well known that such evidence as would make out a search and seizure case would be sufficient to prove a nuisance indictment, and it is also apparent that where there is not sufficient evidence to make out a search and seizure case, there is not sufficient evidence to make out an indictment; so that under such circumstances it must appear material to know what a court of record has decided on the facts presented.

The decisions in inferior courts of justice, convictions of magistrates, and, in fact, all other legal and authorized adjudications, are evidence to establish the fact that such an adjudication has taken place and all the legal consequences that may be derived from it. 1 Herman on Estoppel, Ed. of 1886, p. 507.

An indictment requires a series of acts and the duration of time to constitute the offense. *Com.* v. *Robinson*, 126 Mass. 259. So we claim that when the acts are proved to be not illegal by a judgment of the court, the record evidence of such judgment should have been admitted.

In *State* v. *Stanley*, 84 Maine, 555, the court says that the sale of intoxicating liquors on two different occasions in a dwelling-house does not as a matter of law constitute it a common nuisance under R. S., c. 17, § 1. The word "used" in that section implies habitual

action. Evidence of such sales is for the jury to weigh and if it satisfies them beyond a reasonable doubt that the occupant of the dwelling-house was in the habit of thus selling therein, they may thereby find it a nuisance; and in this case the case of *State* v. *Lang*, 63 Maine, 215, is affirmed.

Evidence that the defendant has been convicted of the offense of the illegal selling of intoxicating liquors is admissable at the trial of a complaint for keeping and maintaining a liquor nuisance during a period which includes the date of such sale. *Com.* v. *Bretsford*, 161 Mass. 61.

In a prosecution for maintaining a liquor nuisance, the offense need not be alleged with a continuando, and where a certain day is alleged, evidence as to the character of the place on the day, whether before or after the date alleged, is admissible to show that it was a nuisance on any day within the time limited for the prosecution. *State* v. *Haley*, 52 Vt. 476.

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

WHITEHOUSE, J. This was an indictment for maintaining a liquor nuisance upon which the respondent was tried in the superior court and found guilty by the jury. The evidence in behalf of the state included the seizures made by the officers on three visits to the respondent's premises with search warrants during the period covered by the indictment. The respondent offered the records of the municipal court to show that he was discharged in that court on these three search and seizure cases. This evidence was excluded by the presiding judge, and the case comes to this court on exceptions to that ruling.

The ruling was manifestly correct. The records of respondent's discharge in the municipal court were clearly not admissible upon any recognized principle of evidence. His acquittal on the search and seizure was not a bar to a conviction upon the nuisance, and had no legitimate tendency to prove non-possession or absence of intent to sell, in the trial of the nuisance case.

Having liquors in possession with intent to sell in violation of law and maintaining a common nuisance are distinct offenses, and an acquittal of the former is no bar to a conviction on the latter even upon the same facts. *Com.* v. *McCawley*, 105 Mass. 69; *Morey* v. *Com.* 108 Mass. 433; *Com.* v. *Sullivan*, 150 Mass. 315.

The record of a conviction upon a search and seizure process is admissible upon the trial of an indictment to show the intent with which the liquors were kept. *State* v. *Hall*, 79 Maine, 501. But the converse of this proposition by no means follows. The evidence upon which the discharge was ordered by the municipal judge may have been entirely different from that produced at the trial of the indictment. The question of the respondent's guilt or innocence upon the charge of maintaining a liquor nuisance must be determined by the jury upon their judgment of the probative force of all the evidence before them at the trial of that case, and not upon the opinion of the municipal judge respecting the proper weight to be given to that portion of the evidence which may have been offered at the hearing of a different case before him.

Exceptions overruled. Judgment for the state.

STATE OF MAINE *vs.* COLEMAN CONNOLLY, Applt.

Cumberland. Opinion April 22, 1902.

Intox. Liquors. Search and Seizure. Warrant. Return. Waiver.

1. The insertion, in a warrant to search premises for intoxicating liquors, of a command to search the person of the respondent if the officer shall have reason to believe such liquors are concealed about his person (when no search of the person is made) does not vitiate the warrant.
2. When the respondent in a lawful search and seizure process has submitted to arrest and has pleaded in court to the complaint, his subsequent objections to alleged deficiencies in the return of the officer upon the warrant are made too late, and cannot be considered.

State v. *Chartrand*, 86 Maine, 547, affirmed.

Exceptions by defendant. Overruled.

This was a search and seizure complaint entered at the May term, 1901, of the superior court for Cumberland county on appeal from the municipal court of the city of Portland. During the term a trial was had before a jury, and the respondent was found guilty. He seasonably filed a motion in arrest of judgment:—

1. Because there was no return signed by the officer showing a seizure of any intoxicating liquors on said warrant.

2. Because authority to search the person on said warrant was illegal.

After the filing of the motion in arrest of judgment, the county attorney asked leave that the officer amend his return on the original complaint in the municipal court in accordance with the fact and that a new copy of the complaint, warrant and return as amended be filed in the superior court, which motion the presiding justice allowed over the objection of the respondent's counsel. To the allowance of the amended return the respondent seasonably excepted, and the matter came before this court on the motion in arrest of judgment and on exceptions.

R. T. Whitehouse, county attorney, for state.

After a verdict has been returned, a motion in arrest of judgment,

founded upon want of proper service, is too late. *Com.* v. *Gregory*, 7 Gray, 498; *Com.* v. *Henry*, 7 Cush. 512; *Gilbert* v. *Bank*, 5 Mass. 97; *Brown* v. *Webber*, 6 Cush. 560.

The defect is cured by verdict. R. S., c. 27, § 40; *State* v. *Stevens*, 47 Maine, 360; *State* v. *Plunkett*, 64 Maine, 534; *Spencer* v. *Overton*, 1 Conn. 3, note c.

Return amendable. *Anon.* 1 Pick. 196; *State* v. *Clough*, 49 Maine, 573; *Ring* v. *Nichols*, 91 Maine, 478; *Com.* v. *Parker*, 2 Pick. 549; *Briggs* v. *Hodgdon*, 78 Maine, 514; *Com.* v. *Carney*, 153 Mass. 444.

The order in the warrant to search the person was not acted on and is surplusage. *State* v. *Chartrand*, 86 Maine, 547. Hence it is no ground for discharging respondent found guilty of the offense charged in the complaint, viz: having intoxicating liquors in his possession on the premises in question, with intent of selling them illegally. *State* v. *McCann*, 61 Maine, 116; *State* v. *Plunkett*, 64 Maine, 537, 538; *State* v. *Bennett*, 95 Maine, 197.

D. A. Meaher, for defendant.

Direction to search the person, whether the officer does so or not, renders the entire warrant void. *State* v. *Chartrand*, 86 Maine, 547; *Hussey* v. *Davis*, 58 N. H. 317; *Entick* v. *Carrington*, 19 Howell's State Rep. 1030; *Grumon* v. *Raymond*, 1 Conn. 40, 44; *Lange* v. *Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *McLeod* v. *Campbell*, 26 Nova Scotia, 458; *Com.* v. *Intox. Liquors*, 109 Mass. 371; *Com.* v. *Intox. Liquors*, 115 Mass. 145; *Com.* v. *Intox. Liquors*, 116 Mass. 342.

Provision in warrant for search of person, if officer has reason to believe, etc., is unconstitutional. Bill of Rights, § 5; *Com.* v. *Certain Lottery Tickets*, 5 Cush. 369; *State* v. *O'Neil*, 58 Vt. 140, 162, 56 Am. Rep. 557; *Collins* v. *McLean*, 68 Cal. 284, 288; *State* v. *Grames*, 68 Maine, 418; *State* v. *Therrien*, 86 Maine, 425, 427, 41 Am. St. Rep. 564; *State* v. *Chartrand*, 86 Maine, 547.

Requisites of an officer's return. *State* v. *Grames*, 68 Maine, 418, 421; *Perry* v. *Dover*, 12 Pick. 211; *Wellington* v. *Gale*, 13 Mass. 483; *Swinney* v. *Johnson*, 11 Ark. 534; *State* v. 25 *Packages of Liquor*, 38 Vt. 387, 388.

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

EMERY, J. After a verdict of guilty in this prosecution for the unlawful keeping of intoxicating liquors, the respondent moves for an arrest of judgment upon several grounds.

I. The complaint contained no allegation that intoxicating liquors were concealed by the respondent about his person. The warrant however contained this claim in parenthesis ("or if you shall have reason to believe that the said Connolly has concealed said liquors about his person you are hereby commanded to search him and if said liquors are found upon his person to arrest him.") The officer serving the warrant did not search the respondent, but did search the described premises and found intoxicating liquors, and thereupon arrested him as commanded by another clause in the warrant. The respondent contends that, although the above clause in the warrant was not executed nor in any way made use of, nevertheless its presence in the warrant vitiated the whole warrant and all proceedings under it. The same contention was made, considered and overruled in *State* v. *Chartrand*, 86 Maine, 547. At the request of the respondent we have re-examined the question in the light of his argument and the cases cited by him, but we find no sufficient reason for doubting the correctness of the decision in *State* v. *Chartrand*. That decision is accordingly affirmed.

II. The officer serving the warrant wrote out upon the usual blank on the back of the warrant his return of his doings in searching the described premises, and in finding and seizing the intoxicating liquors described, and also noted his fees for service, including the arrest of the respondent. This particular return he did not then sign as a separate return. He also made upon a separate paper his return in full of the arrest of the respondent, and signed it. This paper he attached to the back of the warrant as his return, and then returned the warrant into the court. This omission of the signature of the officer to that part of his return relating to the seizure of the

liquors is specified in the motion as a sufficient objection to rendering judgment.

We think the objection, if of any validity at any stage of the proceedings, is not valid when first made after verdict. The complaint and warrant were sufficient in substance and form. The arrest itself was legal (intoxicating liquors having been found), for no return of the finding of intoxicating liquors was needed to be made until after the arrest was made and the warrant returnable. *State* v. *Stevens*, 47 Maine, 357. The return of the arrest itself was regular and complete. The respondent yielded to the arrest without objection. He was properly before the court which had jurisdiction of the offense and of the process. He pleaded to the complaint and put himself upon trial. He went to trial and verdict by a jury, without any objection to the acts or omissions of the officer or to his return of his doings. He thereby waived all irregularities in the service of the warrant, or in the return of service. The right to arrest the respondent depended, not upon the officer's return, but upon the fact that intoxicating liquors were found; and that fact was to be proved before the court by competent evidence under oath and not by the officer's return on the warrant. *State* v. *Stevens*, supra. In *Com.* v. *Gregory*, 7 Gray, 498, the respondent after verdict moved in arrest of judgment because the warrant had been served by a disqualified officer. The court held this to be practically a motion to dismiss the case for want of sufficient service of the process, and held that it was made too late. The court said "A motion to dismiss any action for want of due service, must be made before a general appearance in the action. This will certainly apply as strongly in criminal cases as in civil cases. If the party appears and pleads to the complaint or indictment, he is fully before the court and the court has jurisdiction of the case. After a verdict has been returned, it is quite too late to interpose a motion in arrest founded upon the want of proper service of the warrant." If an objection to a defect in the service of the warrant cannot be entertained after verdict, then a fortiori an objection, not to the service, but only to the return of service, cannot be. The court after verdict allowed the officer to supply the omission of his signature on the original warrant, and then allowed a new

copy of the complaint, warrant and return as amended to be filed. To this the respondent excepted, but his exceptions become immaterial upon our holding as above that the omission of the signature, first objected to after verdict, is not cause for arresting judgment.

The foregoing disposes of all the objections to rendering judgment, which were raised or noticed in the respondent's argument.

Exceptions overruled. Judgment for the state.

STATE OF MAINE *vs.* COLEMAN J. WALSH.

Cumberland. Opinion April 22, 1902.

Pleading. Criminal Law. Demurrer.

Upon demurrer to the complaint only in a criminal case, the court cannot go beyond the complaint to consider alleged defects in the warrant or return. If the complaint itself be sufficient in law the demurrer must be overruled.

Exceptions by defendant. Overruled.

Search and seizure process in the superior court for Cumberland county. The defendant filed in that court the following demurrer: —

And now the said respondent comes into court here, and having heard the said complaint read, says that the said complaint and the matters therein contained in manner and form as the same are therein stated and set forth, are not sufficient in law, and that he the said respondent is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient complaint in this behalf, the said respondent prays judgment and that by the court he may be dismissed and discharged from the said premises in the said complaint specified.

Upon joinder by the state, the court overruled the demurrer, and the defendant excepted.

R. T. Whitehouse, county attorney, for state.

There was in fact a return signed by the officer, showing a seizure of intoxicating liquors. The return of the liquors was written in by the officer in due form. The portion of the return relating to the arrest of the respondent was a separate sheet annexed to the return of the liquors upon the back of the warrant. This annexed sheet was duly signed by the officer, and that signature was intended to and did suffice for both the return of the arrest and of the seizure of the liquors in question. *Dwight* v. *Humphreys*, 3 McLean, U. S. 104, and *Litton* v. *Armstead*, 9 Baxt. (Tenn.) 514.

Such defect cannot be reached by a motion in arrest of judgment.

If there had been no return of liquor seized such defect is cured by demurrer. *Com.* v. *Gregory*, 7 Gray, 498. But no such motion was made by the respondent. Instead, he has demurred, and a demurrer is, upon all authorities, a general appearance. *Hale* v. *Continental Life Ins. Co.*, 12 Fed. 359; *Life Ins. Co.* v. *Palmer*, 81 Ill. 88; *Gilbert* v. *Hall*, 115 Ind. 547. Even where the demurrer is for want of jurisdiction over the person. *N. J.* v. *N. Y.* 6 Peters, 323; *Ogdensburg R. R. Co.* v. *R. R. Co.*, 63 N. Y. 176; *Maine Bank* v. *Hervey*, 21 Maine, 38; *Buckfield Branch R. R. Co.* v. *Benson*, 43 Maine, 374; *Vance* v. *Funk*, 3 Ill. 263. Even if the defect in question could be reached by demurrer, the defect is amendable, and the law court will continue the case for amendment. *Com.* v. *Parker*, 2 Pick. 549; *Com.* v. *Carney*, 153 Mass. 444; *Welch* v. *Damon*, 11 Gray, 383; *Baxter* v. *Rice*, 21 Pick. 197.

D. A. Meaher, for defendant.

This case comes before the court on demurrer, so that the main objections to the warrant, as a matter of law, are,

1. Because the warrant orders a search of the person without the support of a complaint on oath or affirmation.

2. Because the return does not show whether the liquors were found on the premises described in the complaint, or on the person who was on the premises.

3. Because the alleged seizure was not signed by the officer and does not state when the seizure was made.

Allowance of amendment. *Johnson* v. *Day*, 17 Pick. 106; *Shepherd* v. *Jackson*, 16 Gray, 600; *State* v. *Hall*, 49 Maine, 412, 415; *Com.* v. *Maloney*, 145 Mass. 205, 211; *State* v. *Gust*, 70 Wis. 631; *Carter* v. *Wyatt*, 43 Wis. 570, 574; *Vail* v. *Rowell*, 59 Vt. 109; *Mosseaux* v. *Brigham*, 19 Vt. 457; *Stratton* v. *Lyons*, 53 Vt. 130; *King* v. *Bates*, 80 Mich. 367, 20 Am. St. Rep. 518; *Noyes* v. *Hillier*, 65 Mich. 656; *People* v. *Chapman*, 62 Mich. 280, 4 Am. St. Rep. 857; *Foster* v. *Alden*, 21 Mich. 507; *Ramsey* v. *Cole*, 10 S. E. Rep. 598; *Vastine* v. *Fury*, 2 S. & R. (Penn.) 426; *Clarke's Case*, 12 Cush. 320; *Sawyer* v. *Harmon*, 136 Mass. 414; *Hale* v. *Finch*, 1 Wash. 517; *Hegler* v. *Henckell*, 27 Cal. 492; *Walker* v. *Com.* 18 Grat. (Va.) 13, 98 Am. Dec. 631; *Hussey* v. *Cole*, 84 Ga. 147, 149; *Thatcher* v. *Miller*, 11 Mass. 413; *Thatcher* v. *Miller*, 13 Mass. 270; *Baxter* v. *Rice*, 21 Pick. 197.

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

EMERY, J. The respondent's argument goes wholly to the warrant and the officer's return upon the warrant.

In *State* v. *Kyer*, 84 Maine, 109, the demurrer was to the complaint and warrant; judgment was prayed for want of sufficient complaint and warrant. The court held that it could not go beyond the demurrer, into any parts of the process or proceedings not demurred to.

In his demurrer in this case the respondent names the complaint only as the object of the demurrer. He prays judgment for want of a sufficient complaint only.

The only question raised, therefore, is the sufficiency of the complaint. The respondent in his argument has not attacked the complaint. No defect in the complaint is pointed out and we see none.

Exceptions overruled.

JAMES W. MESERVE, and another,

vs.

WARREN NASON and SACO RIVER TELEPHONE and TELEGRAPH Co., trustee, and FRANK W. MCKENNEY, claimant.

York. Opinion April 22, 1902.

Trustee Process. Assignment. Consideration. Exceptions. Practice. Costs. R. S., c. 86, §§ 55, par. VI, 79.

1. In a trustee process, one claiming the funds in the hands of the trustee by virtue of a prior assignment from the principal defendant, must prove that such assignment was for a valuable consideration in order to hold such funds against the attaching creditors.
2. As between the plaintiff, trustee and claimant in a trustee process, when the law court sustains exceptions it need not remit the case for a new trial or hearing, but can itself finally dispose of the case and order final judgment.
3. Costs will ordinarily be awarded to the plaintiff against an unsuccessful claimant in a trustee process, when the interposition of the claim has occasioned delay or expense to the plaintiff.

Exceptions by plaintiff. Sustained.

Assumpsit on account annexed.

The principal defendant was defaulted for the amount claimed in the writ and interest.

In this court below the order was, trustee discharged; and plaintiff alleged exceptions.

The trustee's disclosure showed $45.00 due from it to the principal defendant for personal labor performed by him within thirty days next prior to the service of the writ.

J. M. Marshall; J. O. Bradbury and A. E. Haley, for plaintiff.

W. T. Emmons; G. F. and Leroy Haley, for defendant, trustee and claimant.

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

EMERY, J. The party summoned as trustee of the defendant in this trustee process disclosed that at the date of the service of the writ upon him, he had in his hands and possession forty-five dollars due the defendant for his personal labor performed within the thirty days next prior to such service. The alleged trustee also disclosed notice of a claim by assignment of the fund prior to the service of the writ. The claimant of the fund under that assignment was then made a party, and filed his allegations of fact, "so far as respects his title to the goods, effects or credits in question," as provided in R. S., c. 86, § 32. An issue was thereupon formed between the claimant and the plaintiff, and evidence adduced. Upon that evidence and the disclosure of the alleged trustee, the court ruled that the trustee should be discharged. The plaintiff excepted and made the disclosure and "all the testimony presented at the hearing" a part of the case upon his exceptions. Upon this bill of exceptions the law court can review and determine the whole case between the plaintiff and the claimant and the alleged trustee. R. S., c. 86, § 79. *Walcott* v. *Richman*, 94 Maine, 364.

The funds in question originally belonged to the defendant, and were by him "entrusted to and deposited in the possession of" the alleged trustee, and were there remaining when attached by the plaintiff through this trustee process. The burden of proof was, therefore, upon the claimant. He had to show by evidence a prior title to the fund, acquired through a transaction, not only valid in itself, but also valid against attaching creditors of the defendant. A mere voluntary assignment by the defendant to the claimant would not be valid against attaching creditors. A valuable consideration must be shown. *Thompson* v. *Reed*, 77 Maine, 425, 52 Am. Rep. 781; *Haynes* v. *Thompson*, 80 Maine, 125.

The evidence of assignment was a written order signed by the defendant, directing the alleged trustee to pay forty-five dollars to the claimant or his order; but there is no evidence whatever that there was any consideration for the order. It does not even

purport upon its face to have been given for value. For all that appears in evidence it was a mere voluntary order utterly without consideration. In his allegation, or pleadings, the claimant alleged a consideration of goods sold and delivered, but he offered no evidence in support of the allegation and hence has completely failed to establish his claim. *Thompson* v. *Reed* and *Haynes* v. *Thompson*, supra.

The plaintiff, however, cannot hold the entire fund. Twenty dollars of it are exempt from attachment as wages for the defendant's personal labor for a time not exceeding one month next preceding the service of the process. R. S., c. 86, § 55, par. VI; *Quimby* v. *Hewey*, 92 Maine, 129. The alleged trustee can only be charged for the remainder of the fund, viz.: twenty-five dollars, less his legal costs up to and including his disclosure and examination.

The claimant by making his groundless claim has occasioned the plaintiff delay and extra costs of procedure; hence we think it equitable that the plaintiff should recover costs against the claimant from the time of the latter's appearance. *White* v. *Kilgore*, 78 Maine, 323, 57 Am. Rep. 810.

Exceptions sustained. Ruling below reversed. Trustee charged for twenty-five dollars less his legal costs. Plaintiff to recover costs against the claimant since his appearance in the case.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, AND MAINE STEAMSHIP COMPANY AND MAINE CENTRAL RAILROAD COMPANY, Claimants.

Androscoggin. Opinion April 28, 1902.

Intox. Liquors. Interstate Commerce. Const. Law. R. S., c. 27, § 31. Stat. of U. S. Aug. 8, 1890.

Upon a seizure of intoxicating liquors by the sheriff under R. S., c. 27, § 31, it appeared by the shipping receipt given to the consignor by the claimant, the Maine Steamship Co., at the time it received the liquors in New York for shipment, that they were to be transported to Lewiston, in this state, over the Grank Trunk Railway. By mistake, however, the through way-bill made by the claimant, and which accompanied the liquors, directed their transportation to Lewiston over the Maine Central Railroad. They were accordingly shipped there over the latter line, and at the time of their seizure were in the warehouse of the Maine Central Railroad Co., at its station in Lewiston, awaiting the order of the consignee, and some three-quarters of a mile away from the station of the Grand Trunk Railway in that city.

Held; that neither the right of the consignee to refuse to receive the liquors at the Maine Central station, nor the right of the claimant to recall them and, so far as possible, rectify its mistake by shipping them to Lewiston over the Grand Trunk Railway, can affect the question of whether the liquors still retained their character as articles of interstate commerce. Nothing had been done by either the consignee or the claimant looking to the exercise of such a right on the part of either. The status of the liquors is fixed by the facts existing at the time of their seizure, and not by future possibilities.

Held; further, that the liquors having been transported into this state to their place of ultimate destination, designated upon the through way-bill accompanying them, and there remaining for storage to await the orders of the consignee, their transportation as articles of interstate commerce had terminated, and that they had arrived within the state, so as to be subject to the operation and effect of the laws of this state, within the meaning of the Act of Congress of Aug. 8, 1890, known as the "Wilson Act."

Agreed statement on appeal by claimants from the Lewiston municipal court, in a search and seizure process under R. S., c. 27, against certain intoxicating liquors deposited in the freight-house of the Maine Central Railroad Company in Lewiston. Condemnation sustained.

The case appears in the opinion.

W. B. Skelton, county attorney, for state.

W. H. White and S. M. Carter, for Me. Cent. R. R. Co.

J. W. Mitchell, for Me. Steamship Co., claimant.

The contract for shipment of the goods was a lawful contract, one which the Maine Steamship Company might properly make. A refusal to accept the goods for transportation would have rendered the Steamship Company liable in damages. *Bowman* v. *Chicago, etc., R. R. Co.*, 125 U. S. 465; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *Vandercook Company*, 170 U. S. 438.

The liquors in question were not liable to seizure under the statutes of this state until the contract for carriage had been completed by the arrival of the goods at their destination, to wit,—at the Grand Trunk Station in Lewiston. *Rhodes* v. *Iowa*, supra; *Vance* v. *Vandercook Company*, supra; *State* v. *Intoxicating Liquors, and Grand Trunk Ry. Co. of Canada, Claimant*, 94 Maine, 335.

The state's process for their seizure before the contract for shipment had been completed was void. *State* v. *Intoxicating Liquors, Boston & Maine Railroad, Claimant*, 83 Maine, 158.

The contract for shipment had not been completed at the time the goods were seized. Transportation had been interrupted by the goods having been sent by the wrong route.

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

POWERS, J. This case comes to the law court on the following agreed statement of facts and copies of the record and papers therein referred to, and of the joint class rate and commodity tariff between the Maine Steamship Company and Grand Trunk Railway in effect at the time, and duly filed with the Interstate Commerce Commission.

"The three barrels of wine and the two kegs of brandy concerned in the case were shipped from New York, July 14, 1900, by through way-bill over lines of Maine Steamship Company and Maine Central Railroad Company, hereto annexed, having been received there by the Maine Steamship Company, as per shipping receipt, also annexed. They were way-billed by the Maine Central Railroad Company, instead of the Grand Trunk Railway as per shipping receipt, by mistake of Maine Steamship Company. Grand Trunk Railway Company and Maine Steamship Company had through freight rates from New York to Lewiston.

"The keg of alcohol and the two kegs of whiskey were shipped from Boston, Massachusetts, to Lewiston, Maine, via Boston & Maine Railroad and Maine Central Railroad Company prior to July 19, 1900.

"All of said liquors were received at the 'Upper Station,' so-called, being the station designated in the way-bills and one of the stations of the Maine Central Railroad Company in Lewiston, unloaded from the car or cars, containing the same and placed in the railroad company's warehouse before eight o'clock in the forenoon of July 19, 1900, there to await the order of the consignee or consignees. They remained in said warehouse, as aforesaid, until eleven o'clock in the forenoon of the following day, when they were seized by John F. Carrigan, a deputy sheriff of the county of Androscoggin, by virtue of the complaint and warrant thereto annexed, and subsequent proceedings taken, as appears from the papers and records specifically made a part thereof. Said liquors were intended by the consignee for unlawful sale within the state of Maine. The consignee had received no notice of arrival of goods.

"The 'Upper Station,' so-called, of the Maine Central Railroad Company, is situated about three-quarters of a mile from the station of the Grand Trunk Railway.

"It is claimed by the Maine Steamship Company and the Maine Central Railroad Company that the seizure of said liquors was illegal in that it was in violation of the third clause of § VIII, of the first article of the constitution of the United States and the acts of Congress thereunder."

The claim of the Maine Central Railroad Company has been abandoned; and there only remains for consideration the claim of the Maine Steamship Company to the three barrels of wine and two kegs of brandy. The foundation of this claim is that, according to the shipping receipt given by the claimant to the consignor, the liquors were to be shipped to Lewiston over the Grand Trunk Railway, but by mistake they were shipped to Lewiston over the Maine Central Railroad, unloaded from the cars, and placed in the railroad company's warehouse to await the order of the consignee; that therefore the act of transportation had not ceased, and the liquors were still under the protection of the interstate commerce clause of the federal constitution, because the consignee might refuse to receive them at the station of the Maine Central Railroad, or the claimant might see fit to correct its mistake, recall the liquors and ship them again to Lewiston over the Grand Trunk Railway.

We cannot give our assent to such a proposition. Undoubtedly the consignee might refuse to accept the goods at the station of the Maine Central Railroad. In the absence of contract or custom fixing the place of delivery by the carrier, delivery must be made at the carrier's depot at the place of destination, or if by the shipping receipt or bill of lading the goods are to be shipped over a connecting line, the place of delivery is the depot of such connecting line at the place of destination. Undoubtedly, also, the claimant might recall the goods, and so far as possible rectify its mistake by shipping them to Lewiston over the Grand Trunk Railway, in accordance with its contract with the consignor. But neither of these possibilities had ripened into a fact at the time the liquors were seized, and nothing had been done by either the consignee or the claimant looking to the exercise of such a right on the part of either. As well might it be claimed that liquors which at the time of their seizure are intended for unlawful sale in this state are not subject to seizure and condemnation, on the ground that the holder or owner might change his mind, a right which he unquestionably has, and decide to keep them for his own consumption. Their status is fixed by the facts as they existed at the time of their seizure, and not by future possibilities. The liquors were shipped to Lewiston accom-

panied by a through way-bill, which called for their transportation over the Maine Central Railroad. They had been transported to the precise place to which the claimant, who undertook to transport them, directed that they should be transported. The way-bill which accompanied them, and which was made by the claimant, required them to go just where they did go, and no farther. They had been there unloaded, and were in the warehouse awaiting the order of the consignee. The act of transportation had terminated, and they were subject to the operation and effect of the laws of this state. *State* v. *Intox. Liquors*, 95 Maine, 140. As was there said by Chief Justice WISWELL: "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." We know of no decision, however, of that court which holds that liquors which have been transported into the state, to the place of ultimate destination designated upon the through way-bill accompanying them, and there remaining for storage to await the orders of the consignee, are not subject to the operation and effect of the laws of this state, within the meaning of the act of Congress of August 8, 1890, known as the "Wilson Act." In the absence of such a decision we do not feel disposed to adopt a construction of that act which does not commend itself to our judgment, and which, with collusion between the shipper and carrier, would afford practically unlimited opportunities for the successful evasion of the laws of this state.

The claims of the Maine Central Railroad and of the Maine Steamship Company are disallowed.

The liquors are declared forfeited, and are to be disposed of by the sheriff in accordance with the provisions of our statutes.

So ordered.

LESTER A. BRADFORD, Petitioner, *vs.* WILLIS PHILBRICK.

Waldo. Opinion April 28, 1902.

Review. Exceptions.

What facts are proved in a hearing upon a petition for review is solely for the determination of the presiding justice.

When the exceptions state that the presiding justice ruled as a matter of law, that upon the facts proved the petition could not be maintained, and fail to state what facts he found to be proved, there is nothing to show that the ruling is erroneous, or the petitioner aggrieved.

Exceptions must contain within themselves a sufficient statement of the cause to show wherein the excepting party is aggrieved or they will be overruled.

Exceptions by petitioner. Overruled.

Petition for review.

The opinion states the case.

Joseph Williamson, for petitioner.

Where a petitioner for review stated that he intended to have made a defense in a former action, and that he was defaulted by accident, a review was granted. *Judd* v. *Buchanan,* 4 Mass. 579.

The granting of the petition is merely a determination that the petitioner shall not be precluded from making a defense to an action brought against him. *Coffin* v. *Abbott,* 7 Mass. 252.

Counsel cited: *Shurtleff* v. *Thompson,* 63 Maine, 118; *N. E. Mut. Accident Ass'n* v. *Varian,* 151 Mass. 17; *Thayer* v. *Goddard,* 19 Pick. 60; *Pickering* v. *Cassidy,* 93 Maine, 139.

W. P. Thompson, for defendant.

Counsel cited: *Ricker* v. *Joy,* 72 Maine, 106; *Boston* v. *Robbins,* 116 Mass. 313; *Sherman* v. *Ward,* 73 Maine, 29; *Berry* v. *Titus,* 76 Maine, 285; *Smith* v. *Smith,* 93 Maine, 253.

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

POWERS, J. Exceptions to the ruling of the presiding justice denying a petition for the review of two actions.

The exceptions simply state that the presiding justice ruled as a matter of law, that upon the facts proved the petition could not be maintained, and ordered it dismissed. What facts were proved was solely for the determination of the presiding justice, to which exceptions do not lie. *Moody* v. *Larrabee*, 39 Maine, 282. The exceptions fail to show what facts he found to be proved. There is nothing to show upon what facts he based his ruling, nothing to show that it was erroneous, and nothing to show that the petitioner was aggrieved. The petitioner has printed the evidence, but it is not made a part of the exceptions. And if it were, it would not show what facts the presiding justice found to be proved by it. Exceptions must contain within themselves a sufficient statement of the cause to show wherein the excepting party is aggrieved, or they will be overruled. *Allen* v. *Lawrence*, 64 Maine, 175. The petitioner should have incorporated in his exceptions the facts found by the presiding justice, so that it would affirmatively appear that he was aggrieved by the ruling.

Exceptions overruled.

ARTHUR S. LITTLEFIELD, Assignee in Insolvency,

vs.

EPHRAIM GAY.

Knox. Opinion April 29, 1902.

Insolvency. Bankruptcy.

While the bankrupt law of the United States is in force, the insolvent law of the state is suspended as to all persons and cases which are within the purview of the bankrupt law.

This is so as to debtors, owing less than $1000, who cannot be put into bankruptcy by adverse proceedings, but may voluntarily invoke its provisions.

Held; that a petition in insolvency under the statutes of Maine, filed Dec. 4, 1899, is ineffective during the pendency of the U. S. bankrupt law; and the appointment of an assignee under such proceedings is unauthorized and void.

Exceptions by plaintiff. Overruled.

Action by the plaintiff as assignee of F. A. Blackington, of Rockland, insolvent debtor, to recover a preference under the insolvent law of Maine. The petition in insolvency was filed Dec. 4, 1899, by the insolvent's creditors, and the plaintiff was appointed assignee.

The other material facts are stated in the opinion.

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

It is not the right to establish uniform laws on the subject of bankruptcy, but their actual establishment, which is inconsistent with the partial acts of the states. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 196.

By some courts it has been and still is held, that state insolvent laws are not superseded or suspended by the bankrupt law; and that jurisdiction might be exercised under the insolvent law until proceedings had been commenced under the act of Congress. *Damon's Appeal*, 70 Maine, 155; *In re Scholtz*, 106 Fed. Rep. 835.

The state insolvent laws have never been suspended in terms by any national bankruptcy law. The suspension has always been by

implication, by reason of their inconsistency with the provisions of the bankruptcy act. The matter at bar is analogous to the two statutes passed in 1836 and 1838, respectively, in Massachusetts, concerning which the court of that state held, that so far as it affected the same class of persons, the latter statute superseded the former. *Griswold* v. *Pratt*, 9 Met. 22; *Pugh* v. *Russell*, 2 Blackf. 396.

The insolvent law is not suspended as to cases to which it applies, until the bankruptcy law takes effect as to those cases. *Day* v. *Bardwell*, 97 Mass. 254.

The suspension is only partial. *Judd* v. *Ives*, 4 Met. 402; Am. & Eng. Encl. of Law, 2nd Ed. Vol. 16, p. 642, 643; *Palmer* v. *Hixon*, 74 Maine, 447; *Simpson* v. *Savings Bank*, 56 N. H. 475; *Harbough* v. *Costello*, 184 Ill. 113; Black on Bankruptcy, p. 271; Bump on Bankruptcy, 10th Ed. p. 308; *Lothrop* v. *Highland Foundry*, 128 Mass. 122; *In re Worcester*, 102 Fed. Rep. 816; *Eames case*, 8 Fed. Cas. 237.

From the foregoing authorities it would seem, that had the bankrupt law provided that no person could become either a voluntary or an involuntary bankrupt unless he owed debts of at least $1000, the state insolvency law would in no way be affected.

Counsel contended that the mere fact that the debtor may at his option petition himself into bankruptcy, but may not be forced in unless owing $1000 or more, should not alter the rule, or the right of the creditors to institute involuntary proceedings in insolvency under state law. *Boese* v. *King*, 108 U. S. 379. Counsel also cited: *Clarke* v. *Ray*, 1 H. & R. 330; *Shepherdson's Appeal*, 36 Conn. 24.

L. M. Staples, for defendant.

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

STROUT, J. The question here involved is whether the insolvency law of this state is superseded by the bankrupt act of the United States, as to debtors owing more than three hundred dollars and less than one thousand.

The insolvent law of this state is not wholly superseded by the bankrupt act, but when they come in conflict, the latter must prevail.

Damon's Appeal, 70 Maine, 155. So far as the person and subject matter falls within the provisions of the bankrupt act, and is within the jurisdiction of the bankrupt court, the state insolvency law is superseded and cannot be invoked. *First National Bank of Guilford* v. *Ware*, 95 Maine, 395; *Ogden* v. *Saunders*, 12 Wheat. 213; *Ex parte Eames*, 2 Story, 324.

In the case before us Blackington, the insolvent debtor, owing less than one thousand dollars, was petitioned into insolvency in 1899 by his creditors, while the United States bankrupt act was in force. The state insolvency court took jurisdiction, decreed him insolvent and appointed the plaintiff assignee. This action is to set aside a conveyance by Blackington as a preference under the state law.

Under the bankrupt law Blackington could have gone into bankruptcy voluntarily, but could not be forced in by his creditors, under involuntary proceedings. He was asked to go in and refused. It is argued with great ability, that in that condition, the state insolvency law may be invoked. Plausible as the argument is, we do not regard it as sound. At any time after proceedings under the state law, Blackington could have voluntarily invoked the bankrupt law, and thereupon all proceedings under the state law would necessarily cease. The test of jurisdiction under the state law does not rest upon the volition of the debtor. If his person and property are or may be subject to the bankrupt law, then as to him and his possessions the state insolvency law is in abeyance and powerless. Upon any other view, it would be in the power of the debtor at any time to oust the jurisdiction of the state court, after it had been assumed. This would result in great confusion. It may be avoided by holding as we do, that where the person falls within the purview of the bankrupt act, whether by voluntary or involuntary proceedings, the state insolvent law must be silent.

When this case was previously before the court, we said that there might be cases where the insolvency court would have jurisdiction, notwithstanding the bankruptcy act. If such cases can arise, it can only be in instances not within the purview of the bankrupt act, where its provisions cannot be invoked either by the debtor or his creditors. This case does not fall within that rule.

It follows that the insolvency court was without jurisdiction in this case, and the appointment of plaintiff as assignee was unauthorized and void. He therefore has no standing in court.

Exceptions overruled.

SMITH-GREEN COMPANY, and another, in Equity,

vs.

LESLIE M. BIRD.

Kennebec. Opinion May 7, 1902.

Shipping. Master's Interest. R. S. of U. S., § 4250.

The right of a majority in interest of the owners of a vessel to control its management is charged with the duty to retain and exercise it, not only for the benefit of all the owners, but others whose property and lives may be involved; and an agreement to surrender such control permanently, or indefinitely, is inconsistent with the trust which the law implies and imposes. Such a contract is void as against public policy.

On report. Judgment according to decree upon bill.

Bill in equity, heard upon bill, answer and testimony, to recover the proportional part of the plaintiff's earnings of the schooner James W. Bigelow, alleged to be in the hands of the defendant.

The facts are stated in the opinion.

L. C. Cornish, for plaintiffs.

A. M. Spear, for defendant.

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

PEABODY, J. This cause comes before the law court on report. It is a bill in equity brought by the plaintiffs, Smith-Green Company and James W. Bigelow against Leslie M. Bird to recover the proportional part belonging to them of the earnings of the schooner

James W. Bigelow, alleged to be in the hands of the defendant.

Said proportional part, as shown by the account filed by the defendant, is $655.11. The defendant claims to retain this amount in part satisfaction of damages sustained by the breach of the written agreement between him and the plaintiffs, doing business then under the name of Bigelow & Smith.

By this agreement Bigelow & Smith were to "sell the said Bird three-sixteenths of the schooner James W. Bigelow for $6,000, with the understanding it shall be a master's interest; that he shall sail said vessel as long as he desires on half shares." After specifying certain other rights and limitations the contract further provides, "that if said Bigelow & Smith dispose of their interest in said vessel while said Bird is master, it shall be sold subject to this agreement."

It appears that, in accordance with this agreement, the defendant procured the sale of three-sixteenths of the schooner to his friends, retaining a small share, one-thirty-second, himself. These shares were understood by the purchasers to carry with them the beneficial interest granted to the defendant under the terms of the agreement, and, as a consideration for such beneficial interest, the shares were purchased at a price beyond their market value. It further appears that the defendant, although he had sold his interest in the vessel, still claimed and exercised the privileges appertaining to "the master's interest."

The Smith-Green Company, one of the plaintiffs, succeeded to the interest of Smith, he having deceased, which it appears to have held subject to said agreement.

Subsequently the plaintiffs sold their interests in the vessel with no notice to the purchasers, and the vessel was placed under another master.

If this written agreement was a valid contract and was in force at the time of the alienation of the plaintiffs' interest in the vessel, the plaintiffs are liable for such damages as may have been sustained by the defendant by reason of the disposal of their interests in disregard of the agreement; and these damages, to an amount not exceeding $655.11, may be allowed as an equitable set-off to the account due the plaintiffs.

The master's interest is technically recognized in maritime law and in the statutes of the United States, but it does not exist independently of an interest in the vessel, nor against the will of the majority in interest of the owners, unless "there is a valid written agreement subsisting by virtue of which such master would be entitled to possession." When the defendant sold his share in the vessel, and was superseded as master, his sailing rights were extinguished unless preserved by this agreement with the plaintiffs. It had been executed on his part by the purchase of three-sixteenths of the vessel, one-thirty-second being taken in his own name and the rest in the name of friends; and he had paid, or caused to be paid, for the same an amount which included a sum in excess of the value of the shares for "a master's interest," to be held by him with the privileges of sailing the vessel as long as he desired on half shares. It was in terms broken by the plaintiffs by the unconditional sale of their interests as majority owners of the vessel.

The right of a majority in interest of the owners of a vessel to control its management is charged with the duty to retain and exercise it, not only for the benefit of all the owners, but others whose property and lives may be involved; and an agreement to surrender such control permanently or indefinitely is inconsistent with the trust which the law implies and imposes.

In *Rogers* v. *Sheerer*, 77 Maine, 323, VIRGIN, J., says: "There is strong reason and high authority for declaring such a contract void, as against public policy;" he assigns as such reason "the vast authority of a master of a vessel, the important nature of the trust imposed in him, the corresponding duty of exercising the utmost circumspection in his choice and appointment and the great importance that the exercise of this duty shall be by an unfettered judgment," and he cites as such authority Story Part. § 432; Fland. Sh. § 370; Mach. § (2d Ed.) 123; Abb. Sh. (Sto. & Perk. Ed.) 136; *Ward* v. *Ruckman*, 36 N. Y. 26, 30.

In re schooner Eliza B. Emory, 3 F. R. 241, it was held; "The part owner of a vessel is estopped by an attempted sale of the sailing right for which he has received and taken consideration, from joining in an application for the removal, without cause, of the purchaser of

such sailing right." But this case was reversed on appeal, 4 F. R. 342; and it was held, by the appellate court: "A contract for the sale of the sailing right by a part owner of a vessel is not susceptible of specific enforcement either by way of estoppel or by a direct proceeding for that purpose."

This principle is recognized in analogous cases where an agreement of part of the stockholders of a corporation with one purchasing stock that he shall be continuously retained or elected treasurer, is held void, as against public policy. *Guernsey* v. *Cook*, 120 Mass. 501; *Noyes* v. *Marsh*, 123 Mass. 286; *Wilbur* v. *Stoepel*, 82 Mich. 344; *Cone, Executors* v. *Russell*, N. J. Law (3 Dick. 208).

The agreement between the plaintiffs and defendant is therefore not available to the defendant to enforce recovery of damages. It rested in personal confidence only until the plaintiffs saw fit to avoid it, and then the rights of the parties were to be determined according to existing conditions, independent of any contract obligation.

This proceeding in equity is invoked by the plaintiffs. The defendant's answer accounting for the earnings of the vessel shows that the shares of the plaintiffs now in his hands amount to $655.11, which the court will decree to them unless the defendant has equitable claims against them. We think he has no such claim. Curtis in his Rights and Duties of Merchant Seamen, at page 164, quoted in *Ward* v. *Ruckman*, supra, after citing authorities says: "From these evidences of the maritime law it would seem that the owners have the right to remove the master who is a part owner at their own pleasure, paying him for his share of the vessel." But this rule was modified by § 4250 U. S. statutes, and besides he had, before the alleged breach of agreement by the plaintiffs, ceased to be a part owner of the vessel.

He has lost the "master's interest" not alone by fault of the plaintiffs, but by his own act in selling his interest in the vessel and is remediless under the contract which is void as against public policy. It does not appear that he was induced to purchase this interest by the fraudulent representations of the plaintiffs upon which he relied and by which he was misled, or was deceived by any concealment of material facts, and he must be presumed to have known that the

agreement was invalid, and that his possession and control of the vessel could be terminated at the pleasure of the majority in interest. The plaintiffs should therefore recover said sum of $655.11 and interest from the date of accounting, with costs.

Decree accordingly.

LOUISE E. HUNT *vs.* ELIJAH T. BESSEY.

Kennebec. Opinion May 7, 1902.

Bills and Notes. Pledge. R. S., c. 91, §§ 57, 58.

The holder of a valid negotiable promissory note, transferred to him by the payee as collateral security, may transfer it to a third party without consideration for the purpose of collection.

It is no defense to such an action that the maker has paid the note to the payee, while it was still in the hands of the pledgee or his transferee, although he promised to procure its surrender from the holder.

The pledgee of a negotiable promissory note may transfer it to a third person for collection, notwithstanding the provision of R. S., c. 91, §§ 57,58, requiring pledges to be sold at public auction after notice.

On report. Judgment for plaintiff.

Assumpsit on a promissory note in the superior court for Kennebec county.

The case is stated in the opinion.

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

W. C. Philbrook, for defendant.

Besides R. S., c. 91, §§ 57, 58, counsel also cited *Fisher* v. *Bradford,* 7 Maine, 28, and *Waterman* v. *Merrow,* 94 Maine, 237, 242.

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

PEABODY, J. This is an action of assumpsit to recover the amount of a promissory note by the holder against the maker, and is before this court on report. The note is as follows:

"$35. JACKSON, ME. Sept. 18, 1897.

On demand after date, for value received I promise to pay to A. B. Snow, or bearer, the sum of thirty-five dollars, with interest.

E. T. BESSEY."

On the twenty-second day of September, 1897, it came into the possession of the Peoples' National Bank, of Belfast, Maine, as collateral security for a note of six hundred dollars, given on that day by A. B. Snow to the bank. The six hundred dollar note not being paid, this collateral note was transferred by the bank to the plaintiff, without consideration, for the purpose of collection by suit.

The defendant claims in defense:

I. That he paid the note to the payee, A. B. Snow, taking his receipt for the same, which is as follows:

"JACKSON, ME. Dec. 10, 1898.

Received amount due in full for the note of E. T. Bessey.

A. B. SNOW."

Snow at the time informed him that the note was in the bank at Belfast and promised to give it to him; but failed to do so and subsequently absconded. The defendant received notice from the bank requesting payment, and he testifies that he then notified the bank that the note had been paid. This the cashier in his testimony contradicts and exhibits the letter of the defendant relative to the note, as follows:

"BROOKS, Feb. 17, 1899.

Frank R. Wiggin,

Dear Sir:

In regard to the note I shall be in and see you next week. Should have come in this week but have had sickness and so could not come. Do not make any costs on it. I will see it is fixed next week. Respectfully yours,

E. T. BESSEY."

In connection with the alleged payment, the defendant claims that it is available as a defense because the note was not legally transferred to the bank, it being held simply in pledge, and consequently it remained the property of the pledgeor. In support of this contention his counsel cites R. S., c. 91, §§ 57, 58.

But it was a negotiable note, and was transferred by delivery. The bank was the legal holder and its rights could not be affected by the payment to Snow, who neither claimed to act for the bank, nor to have possession or any title to the note; and so far as the rights of the defendant are concerned it matters not whether the bank held the note as absolute owner or as pledgee.

When the alleged payment was made the defendant was informed that the note was in the bank, and there was no pretense that it could be obtained without payment to the holder. The defendant saw fit to trust the payee to obtain and surrender it. This ground of defense is untenable.

II. He claims that the plaintiff has no right of action as she is not the owner of the note; but as it was delivered to the plaintiff to sue for the benefit of the real owner, she may do this in her own name. *Baker* v. *Stinchfield*, 57 Maine, 363; *Ticonic Bank* v. *Bagley*, 68 Maine, 249.

Judgment for plaintiff.

STATE OF MAINE *vs.* FRANK D. GILMAN.

Somerset. Opinion May 7, 1902.

Double Voting. Elections. R. S., c. 1, cl. IV; c. 4, §§ 13, 25, 72. Stat. 1887, c. 91. R. S., 1841, c. 6.

1. Upon an indictment for illegal voting, *held;* that the statutory requirement that a list of voters shall be kept and used at a meeting is directory only, and its omission will not invalidate the proceedings of a town meeting or exonerate a respondent from the penalty of violating the law.
2. If the use of a check list is not essential, its necessity need not be alleged.
3. Double voting, which is an offense at common law, may be committed in the absence of a list of voters, both at a meeting where it is not required, or where its use is improperly omitted.
4. In an indictment for illegal voting, at an annual town meeting for the choice of town officers, it is sufficient if the indictment alleges the meeting is the annual meeting. The words "annual meeting" applied to towns mean the annual meeting required by the statute for choice of town officers.

Exceptions by defendant. Overruled.

Demurrer to an indictment alleging that the defendant at Anson in the county of Somerset on the fifth day of March, 1900, at a meeting for the election of officers of said town of Anson, to wit, at its annual town meeting for the election of the municipal officers of said town, wilfully and unlawfully did cast more than one vote at one balloting, against the peace of the state, and contrary to the form of the statute in such case made and provided.

G. W. Gower, county attorney, for state.

E. N. Merrill, for defendant.

If more than one vote was cast at the meeting, it is not shown by the indictment that it was such a meeting as to make the act a crime. It is not alleged in the indictment that it was a meeting where a check list was necessary. It must be such a meeting in order to make the act charged an offense. It must also be alleged in the indictment. Not only must it be a meeting at which a check list is necessary, but it must be a legal meeting. For if it was not a legal meeting, legally called and organized and the voting for a legal purpose and legally nominated officers, persons eligible to the office for which they were being voted, then there was no crime committed, even though a dozen votes were cast at one balloting. *State* v. *Bailey*, 21 Maine, 62.

The indictment does not show even that there was a legally called meeting; it does not show for whom the alleged ballots were thrown. It does not show that the voting was for a legal and lawful purpose.

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

PEABODY, J. This is an indictment found by the grand jury in Somerset county against the respondent, Frank D. Gilman, for illegal voting.

It alleges that Frank D. Gilman, of Anson, in the county of Somerset and state of Maine, on the fifth day of March, A. D. 1900, at said Anson at a meeting for the election of officers of said town of

Anson, to wit: at its annual town meeting for the election of municipal officers of said town, wilfully and unlawfully did cast more than one vote at one balloting, against the peace of the state and contrary to the form of the statute in such case made and provided.

To this indictment the respondent demurred. The demurrer was overruled by the justice presiding, and the case is before the law court on exceptions.

Three objections are raised to the sufficiency of the indictment.

I. There is no allegation that the balloting was at a meeting where a list of voters is necessary.

The indictment is for a statutory offense defined in § 72, chap. 4, R. S., as amended by chap. 91 of the public laws of 1887, which is as follows:

"Sect. 72. At any meeting for the election of any officer, where a list of voters is necessary, whoever wilfully votes before the presiding officer has had opportunity to find his name on said list, or knowing that it is not on it, or wilfully gives any false answer or statement to the municipal officers of towns, cities, or plantations when they shall be previously preparing such list, or presiding at such meeting, in order that his name or the name of any other person may be entered on such list, or his vote or that of another be received; or casts more than one vote at one balloting; or is disorderly at such meeting, forfeits for each offense not exceeding one hundred dollars, nor less than ten dollars."

The history of this statute shows that in the revision of 1841, four sections of chapter 115 of the statutes of 1821 were condensed into one section. Of these § 16 originally related solely to the offense charged in this indictment. It was as follows:

"Sect. 16. Be it further enacted, that if any person at any meeting for the choice of town officers, shall knowingly give in more than one vote or list, for any officer, or list of officers then voted for at such meeting, he shall forfeit and pay a fine not exceeding one hundred dollars."

The present statute, continued with verbal amendments not affecting this case, through the various revisions, is substantially the consolidated § 63, chap. 6 of the revised statutes of 1841. It defines

several offenses essentially connected with the list of voters, and in respect to these the list constitutes an element thereof; but the two offenses, one being that charged in the indictment, defined in said statute after the word "received" and the semi-colon following, have no logical connection with the voting list.

Double voting, which was an offense at common law, may be committed in the absence of a list of voters, both at a meeting where it is not required, or where its use is improperly omitted.

By § 13, chap. 4, R. S., a list of voters at a town meeting for election of municipal officers is not required unless demanded by one-third of the voters present. But § 25, chap. 4, R. S., at meetings for the choice of governor, senators, representatives and other public officers requiring like qualifications in the electors, directs that the selectmen, or other officers presiding, shall keep and use a check list at the polls during the election of any such officers.

The statutory requirement that a list of voters shall be kept and used at a meeting is directory only, and its omission will not invalidate the proceedings of a town meeting or exonerate the respondent from the penalty of violating the law. If the use of the check list is not essential, its necessity need not be alleged. *State* v. *Bailey*, 21 Maine, 62.

II. The indictment does not allege the name of the person for whom the votes were cast. The offense is in voting more than once at one balloting and not in voting more than once for the same person or persons. The presumption is that the ballots designated the persons and the offices, and they need not be named in the indictment. *State* v. *Welch*, 21 Minn. 22; *State* v. *Minnick*, 15 Iowa, 123; *Steinweir* v. *State*, 5 Sneed, 586.

III. The indictment does not allege that it was a legal meeting. It does not so allege in terms, but it is sufficient if the language necessarily indicates a meeting called and held according to law. The words "annual meeting" applied to towns mean the annual meeting required by law for choice of town officers. R. S., chap. 1, cl. IV.

The allegation in the indictment is that the wilful and unlawful acts of the respondent were "at a meeting for the election of officers of said town of Anson, to wit: at its annual town meeting for the election of municipal officers of said town."

Such meetings are regulated by the laws of the state, and are judicially known to the courts. We think that the designation of such a meeting alleges with sufficient distinctness the statutory meeting of the town for the election of municipal officers. 2 Whart. Prec. 1021; *State* v. *Symonds*, 57 Maine, 148; *State* v. *Boyington*, 56 Maine, 512; *State* v. *Marshall*, 45 N. H. 281, and cases cited; *Com.* v. *Silsbee*, 9 Mass. 416; *State* v. *Minnick*, 15 Iowa, 123, supra.

Exceptions overruled.

Respondent has leave to plead over.

S. N. MAXCY MANUFACTURING CO.

vs.

ALBERT G. BOWIE, and others.

Kennebec. Opinion May 10, 1902.

Bail Bond. Writ. Scire Facias. R. S., c. 85, § 1.

The provision of R. S., c. 85, § 1, requiring the clerk of court to note on the writ that a bail bond taken on mesne process is filed, is directory and not mandatory.

No time for such noting on the writ is fixed by the statute, nor is any penalty imposed for the neglect, nor any provision for any effect upon the bail bond in case of omission.

Exceptions by defendants. Overruled.

Scire facias upon a bail bond. The bond was returned to court with the writ, but the clerk failed to note on the writ of mesne process that it was so filed, as required by R. S., c. 85, § 1, as follows:—"The bond shall be returned with the writ, and the clerk shall note on the writ that a bail bond is so filed."

The justice of the superior court, where the case was tried, ruled that this statute is directory only and that the omission to note the filing on the writ was not fatal to the action, and gave judgment for the plaintiffs. The defendants took exceptions to these rulings.

G. W. Heselton, for plaintiff.

S. S. & F. E. Brown, for defendants.

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

STROUT, J. Scire facias on a bail bond given upon arrest upon writ. The bond appears to have been returned to court with the writ, but the clerk failed to note on the writ that it was so filed, as required by R. S., c. 85, § 1. Defendants claim that this omission is fatal.

This precise question arose in *Ruggles* v. *Berry*, 76 Maine, 265. Of the six justices who sat in that case, three held the omission to be fatal, and the other three dissented. No decision was reached—the case going off upon another point. The question, therefore, presents itself as undecided.

The clerk is an officer of the court. The plaintiff in the original suit had no control over him, and could hardly be required to overlook him and see that he discharged his duty. No time for noting on the writ is fixed by the statute, nor is any penalty imposed for the neglect, nor any provision for any effect upon the bail bond, in case of omission. Although the language of the statute is imperative, such omission of duty by an officer of the court, without fault of the party, may be regarded as directory. It is not perceived that any harm can result to any party by so holding. The bond was in fact returned to court with the writ, and presumably remained on the files of the court. A noting of that fact on the writ, would only afford evidence that fully appears upon inspection of the papers on file. The rule is well stated by LIBBEY, J., in *State* v. *Smith*, 67 Maine, 332:

"In general, when a statute imposes upon a public officer the duty of performing some act relating to the interests of the public, and

fixes a time for the doing of such act, the requirement as to time is to be regarded as directory, and not a limitation of the exercise of the power, unless it contain some negative words, denying the exercise of the power after the time named; or from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the legislature had in contemplation that the act had better not be performed at all, than be performed at any other time than that named." Accordingly, it was there held that the statute which provided that "venires for grand jurors to serve at the Supreme Judicial Court shall be issued forty days at least before the second Monday of September annually," was directory.

We agree with the justice of the superior court, that this provision of the statute is directory and not mandatory, and that the clerk's omission to note on the writ the filing of the bail bond does not defeat this action. *Sykes* v. *Keating*, 118 Mass. 517; *Mutual Life Insurance Co.* v. *Dake*, 87 N. Y. 257.

One other objection is taken by defendants. The original judgment was rendered upon default. On a petition for review the court found that the judgment was for twenty-five dollars and seventy-nine cents too much, and dismissed the petition for review on condition that that amount should be indorsed upon the execution, which was subsequently done. It is not claimed that the judgment was in excess of the ad damnum, as in *Ruggles* v. *Berry*, supra. It was therefore a valid judgment, until reversed. It has not been reversed, but its amount has been reduced by the act of the creditor. The sureties on the bail bond cannot complain.

Exceptions overruled.

JAMES A. PULSIFER, Admr., *vs.* HENRY GREENE.

SAME *vs.* CARLOS HEARD.

Androscoggin. Opinion May 14, 1902.

Stockholders. Double Liability. Foreign Judgment. Limitations. R. S., c. 47, §§ 42, 45, 46. Stat. 1899, c. 68, § 1. Kans. Const. Art. XII, § 2. Kans. Gen. Stats. 1889, 1192, § 32-1200, § 40-1204, § 44-4095, § 18.

The double liability imposed by the constitution and statutes of Kansas upon stockholders in corporations organized under the laws of that state, though statutory in its origin, is contractual in its nature.

As such it is not local but transitory; and a creditor of the corporation, who has obtained a judgment against it in Kansas, may maintain an action in the courts of this state against a stockholder residing here to enforce his liability under such contract.

The stockholder is bound by the contract into which he entered when he accepted his stock; and where by the laws of the state under which the corporation was organized he is liable severally and individually, and not jointly and ratably, he cannot object that his fellow stockholders are not joined with him as defendants, or that it will be difficult for him to enforce contribution from them.

If the same statute of a foreign state which creates the remedy prescribes the time within which an action must be brought, the period of limitation becomes a part of the right itself, and at its expiration the right is extinguished.

If, however, the period of limitation is not prescribed by the same statute which confers the right, but is found in a general statute of limitations of the foreign state, it becomes a law relating to the remedy, and has no extra territorial force.

The statute invoked by the defendant is a part of the general statute of limitations of the state of Kansas. It is not an integral part of the right itself, which goes with it everywhere that the right is sought to be enforced. It applies only when the remedy is sought in Kansas, and cannot follow the right beyond the bounds of that state.

On report. Judgment for plaintiff.

Assumpsit by a creditor of a Kansas corporation to enforce the double liability against a stockholder resident in Maine.

The facts are stated in the opinion.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for plaintiff.

Besides many Kansas cases counsel cited: *Fairfield* v. *Gallatin,* 100 U. S. 47; *Flash* v. *Conn,* 109 U. S. 371; *Jones* v. *Sisson,* 6 Gray, 288; *Penobscot and Kennebec R. R. Co.* v. *Bartlett,* 12 Gray, 244, 71 Am. Dec. 753; *Blackstone* v. *Blackstone,* 13 Gray, 488; *Hutchins* v. *New England Coal Mining Co.,* 4 Allen, 580; *Halsey* v. *McLean,* 12 Allen, 438; *New Haven Horse Nail Co.* v. *Linden Spring Co.,* 142 Mass. 349; *Hancock National Bank* v. *Ellis,* 166 Mass. 414, 55 Am. St. Rep. 414; *Elmendorf* v. *Taylor,* 10 Wheat. 152; *Fourth National Bank* v. *Francklyn,* 120 U. S. 747; *Whitman* v. *Bank of Oxford,* 176 U. S. 559; *Hancock Nat'l Bank* v. *Farnum,* 176 U. S. 640; *Hancock Nat'l Bank* v. *Ellis,* 172 Mass. 39, 70 Am. St. Rep. 232, 42 L. R. A. 396; *Bank of North America* v. *Rindge,* 57 Fed. Rep. 279; *Rhodes* v. *Bank,* 66 Fed. Rep. 512; *McVickar* v. *Jones,* 70 Fed. Rep. 754; *Guerney* v. *Moore,* 131 Mo. 650; *Aldrich* v. *Anchor Co.,* 24 Ore. 32, 41 Am. St. Rep. 831; *Ball Electric Light Co.* v. *Child,* 68 Conn. 522; *American, etc., Co.* v. *Woodworth,* 82 Fed. Rep. 269; *Brown* v. *Trail,* 89 Fed. Rep. 641; *Auer* v. *Lombard,* 72 Fed. Rep. 209; *Bagley* v. *Tyler,* 43 Mo. App. 195; *Kisseberth* v. *Prescott,* 91 Fed., Rep. 611; *Latimer* v. *Bank,* 102 Iowa, 162; *Stoddard* v. *Lum,* 159 N. Y. 265, 70 Am. St. Rep. 541, 45 L. R. A. 551; *Howarth* v. *Angle,* 162 N. Y. 179, 47 L. R. A. 725; *Ward* v. *Joslin,* 100 Fed. Rep. 676; *Thibodeau* v. *Levassuer,* 36 Maine, 362; *Brown* v. *Nourse,* 55 Maine, 230, 92 Am. Dec. 583; *Hobbs* v. *Nat'l Bank of Commerce,* 96 Fed. 396; *Telegraph Co.* v. *Purdy,* 162 U. S. 329; *Scudder* v. *Union Nat'l Bank,* 91 U. S. 406; *Pritchard* v. *Norton,* 106 U. S. 124; *Michigan Ins. Bank* v. *Eldred,* 130 U. S. 693; *Canadian Pacific Railway Co.* v. *Johnston,* 61 Fed. Rep. 738.

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

The strength of the case of *Hancock National Bank* v. *Ellis,* 172 Mass. 39, 70 Am. St. Rep. 232, is somewhat weakened by the fact that the court was divided and all the earlier rules are to the contrary.

At the date of that case the plaintiff's contentions had been denied in *Cushing* v. *Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835, 34 L. R. A. 737, and note; *Tuttle* v. *National Bank*, 161 Ill. 497, 34 L. R. A. 750, and note; *Hancock Nat'l Bank* v. *Farnum*, 20 R. I. 466; *Marshall* v. *Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 34 L. R. A. 757.

The precise questions involved here, raised under the same Kansas statutes, are exhaustively reviewed and decided adversely to the plaintiff by a unanimous court in *Crippen* v. *Laighton*, 69 N. H. 540, 76 Am. St. Rep. 192, 46 L. R. A. 467.

Where a statutory right is created, coupled with a specific remedy to enforce it, such remedy is exclusive and cannot be pursued in a foreign jurisdiction. *Finney* v. *Guy*, 106 Wisconsin, 256, 49 L. R. A. 486.

Where a receiver is appointed to collect from delinquent shareholders the proportionate amounts needed to satisfy the debts of an insolvent corporation, the courts of all states should be opened to him, inasmuch as he will collect the funds equitably and ratably, and finally work out impartial justice among all the stockholders irrespective of their residences; but single stockholders should not in foreign states pursue what is a peculiar and local remedy. *Howarth* v. *Angle*, 162 N. Y. 179, 47 L. R. A. 725.

Stoddard v. *Lum*, 159 N. Y. 265, 70 Am. St. Rep. 541, 45 L. R. A. 551, is a case where collection was being enforced through a general assignee for the benefit of creditors.

While many cases hold to the contrary, it is submitted that the statutes of Kansas under discussion, in attempting to create a liability, at the same time point out a special and peculiar remedy for that liability. No state can legislate upon remedies to be used in a foreign state.

"The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common law action." *Pollard* v. *Bailey*, 20 Wall. 520.

In *Marshall* v. *Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 34 L. R. A. 757, this particular statute was held to provide a remedy so peculiar and complicated that New York could not and would not enforce it.

Liability for unpaid subscriptions is clearly a contract and enforceable everywhere. Statutory liability upon full paid stock is the creature of statute; and if the statute prescribes a remedy the force of the complete statute must end with the boundary line of the state enacting it, and can enter no state not having that form of remedy in like cases.

The important element is the construction of the statute itself. If construed as conferring a right coupled with a peculiar remedy to make it effective, that remedy is exclusive and enforceable only within the jurisdiction of its creation. And it has been so decided in *May* v. *Black*, 77 Wis. 101; *Pollard* v. *Bailey*, 20 Wall. 520; *Fourth Nat'l Bank* v. *Francklyn*, 120 U. S. 747; *Rocky Mountain Nat'l Bank* v. *Bliss*, 89 N. Y. 338; *Christenson* v. *Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *Patterson* v. *Lynde*, 112 Ill. 196; *Huntington* v. *Attrill*, 146 U. S. 657; *New Haven Horse Nail Co.* v. *Linden Spring Co.*, 142 Mass. 349; *Bank of No. America* v. *Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240, 13 L. R. A. 56.

The gist of the cases is well stated in the rule of *Pollard* v. *Bailey*, 20 Wall. 520,—"Where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed."

The recent construction of this statute by the U. S. supreme court is at variance with the rule of *Terry* v. *Little*, 101 U. S. 216, holding that where the statute contemplates in effect a proportionate liability of stockholders the proceedings must be in equity. In the latest decisions of that court the qualifying force of § 1204 as giving a peculiar and special remedy has been overlooked.

Enoch Foster and O. H. Hersey; N. B. Walker, for defendant, in a case brought by same plaintiff against Carlos Heard, and which turned on the same questions, and in which judgment was rendered for the plaintiff.

The plaintiff cannot maintain this action for the reason that the limitation bar of three years applies as provided in Kansas statutes 4095, § 18, since the same is an action upon a liability created by statute.

While the statute of limitations generally is one which has to be applied with reference to the law of the forum, in this particular class of cases there is a distinction between general statutes of limitation and those which are created for and apply to a particular class of cases like this at bar.

"Statutes of limitation in general must be carefully distinguished from special limitations restricting a statutory right, or limitations by express contract." Vol. 13. Am. & Eng. Encl. of Law, 1st Ed. 688.

"Such special limitations extinguish the right rather than affect the remedy. They are therefore as valid everywhere as at the place of the contract, and are not considered to be waived if not pleaded."

Consequently this right which the plaintiff's intestate had of bringing suit against a stockholder to obtain a double liability was not a common law right of action, for at common law no such right existed of suing the stockholder to obtain this double liability which the plaintiff seeks to recover in this action. It was a pure statutory right, created and existing only by virtue of the statutes of Kansas to which we have referred; and upon which the plaintiff himself in this action in his declaration relies, for he claims in that declaration that it was a pure statutory right.

Here then is a special limitation for actions accruing "upon a liability created by statute." But the cause of action, having accrued at the end of one year after the Clyde Banking Company ceased to do business, namely, February 3, 1895, any action against the stockholder must have been brought within three years from that date, else that right has become extinguished as well as the remedy.

The mere fact that the plaintiff's intestate saw fit to proceed against the Clyde Banking Company, and obtain a judgment and execution thereon against that company, could not extend the period of limitations.

"Such a statute is something more than a mere statute of limitations; it constitutes a rule of property." *Pulliam* v. *Pulliam*, 10 Fed. Rep. 76; *State* v. *Crutcher*, 2 Swan (Tenn.) 504.

Counsel cited: *Sleeper* v. *Norris*, 59 Kan. 555; *First Nat'l Bank* v. *King*, 60 Kan. 723; *Hudson* v. *Bishop*, 32 Fed. Rep. 519; *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386; *Carter* v. *Ins. Co.*, 12 Iowa, 287; *Hudson* v. *Bishop*, 35 Fed. Rep. 820; *Taylor* v. *Cranberry Iron & Coal Co.*, 94 No. Car. 525; *Gray* v. *Hartford Ins. Co.*, 1 Blackf. 280; *Finnell* v. *Southern Kansas Railroad*, 33 Fed. Rep. 427; *Boyd* v. *Clark*, 8 Fed. Rep. 849; *Cooper* v. *Lyons*, 9 Lea (Tenn.) 596; *Brunswick Terminal Co.* v. *National Bank*, 99 Fed. Rep. 635, 48 L. R. A. 625.

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

POWERS, J. This is an action of assumpsit brought by a creditor of the Clyde Banking Company, a corporation organized and existing under the laws of the state of Kansas, to enforce the double liability of the defendant, a non-resident stockholder in the corporation.

The case shows the following facts. The administrator of the plaintiff's intestate recovered judgment against the corporation on April 15, 1895, in the district court of Cloud county, Kansas, for $25,523.20 debt, and $10.50 costs. Execution thereon was duly issued, and returned unsatisfied, for the reason that no property could be found whereon to levy it. The judgment is still unsatisfied, and on July 23, 1900, this action was brought against the defendant, who on Jan. 1, 1895, was, and still is the owner of five shares of the capital stock, of the par value of $100 each. No other action has been brought against the defendant, and he has no claim in set-off against the corporation.

Article XII, § 2 of the constitution of the state of Kansas provides as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by

law; but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

And in the general statutes of Kansas of 1889, in force on Jan. 5, 1895, are found the following provisions, later embodied in the revision of 1897, and which are still the law of that state.

"1192, § 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of the stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion such court may order execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"1200, § 40. A corporation is dissolved — first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

"1204, § 44. If any corporation created under this or any general statutes of this state, except railway or charitable or religious corporations, be dissolved leaving debts unpaid, suits may be brought against any person or persons, who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the

collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

"4095, § 18. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First, within five years: An action upon any agreement, contract, or promise in writing.

Second, within three years: An action upon a contract not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty."

The claim of the plaintiff is resisted on three principal grounds: first, that the liability of the defendant is purely statutory, and does not extend beyond the jurisdiction of the state which created it; second, that the remedy given is special, exclusive, and unknown to our laws, and cannot be enforced in this state; third, that the limitation found in the statutes of Kansas does not merely affect the remedy, but has extinguished the substantive right of the creditor.

I. The double liability of the stockholders of the corporation was created for the benefit of its creditors. While it is not an asset of the corporation, adds nothing to its pecuniary resources, and is not available to or enforceable by the corporation itself, it does add to its commercial credit. It is enforceable by its creditors, and persons who contract with and give credit to the corporation may well be presumed to do so upon the faith of the liability of its stockholders. It is elementary that every person who voluntarily becomes a stockholder in a corporation thereby agrees to the terms of its charter. The law which created the defendant's liability was a part of the same system of laws which permitted him and his fellow stockholders to be a corporation. It is to be read into its charter. The two go

together. He cannot with one hand grasp the benefit, and with the other reject the burden. When he voluntarily became a stockholder in the Clyde Banking Company, incorporated under the laws of the state of Kansas, he must be held to have contracted with reference to and have agreed to be bound by the laws of that state, which entered into and formed a part of the constitution of the company. The obligation which he thereby assumed though statutory in its origin was contractual in its nature, and as such not local, but transitory. It goes with him wherever he goes, and is enforceable in any court of competent jurisdiction. This result, which we believe to be consonant with reason and natural justice, is sustained by the weight of authority. *Childs* v. *Cleaves*, 95 Maine, 498; *Whitman* v. *Oxford National Bank*, 176 U. S. 559; *Broadway Nat'l Bank* v. *Baker*, 176 Mass. 294; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. A. 301; *Flash* v. *Conn*, 109 U. S. 371; *Paine* v. *Stewart*, 33 Conn. 516; *Western Nat'l Bank* v. *Lawrence*, 117 Mich. 669; *Bell* v. *Farwell*, 176 Ill. 489, 42 L. R. A. 804; *Ferguson* v. *Sherman*, 116 Cal. 169, 37 L. R. A. 622; *Howell* v. *Manglesdorf*, 33 Kans. 199; Morawetz on Private Corporations, §§ 869, 871, 874.

II. As to the remedy. The construction placed upon a statute by the highest court of the state which enacted it is considered a part of the law itself, and justly entitled to great weight. By paragraph 1192 two remedies are provided for enforcing the liability of the stockholder; one by motion in the original case wherein judgment has been rendered against the corporation; the other by suit by the judgment creditor against the stockholder. *Howell* v. *Manglesdorf*, supra. The liability of each stockholder is several and not joint, and he must be sued separately. *Abbey* v. *Grimes Dry Goods Co.*, 44 Kans. 194; *Howell* v. *Bank*, 52 Kans. 133. The first method is special, and unknown to our laws, and the creditor cannot avail himself of it here. Neither has he attempted to do so. He has proceeded in the precise way pointed out by the latter portion of paragraph 1192. He has alleged and proved a contract, and brings this action upon it. To permit him to maintain it contravenes no

policy of this state, is not contrary to public morals or abstract justice, and injures neither the state nor its citizens. All the parties to the contract are before this court, and as between them complete justice may be done in this form of action. But aside from principles of comity it has been well said that "the right to maintain a suit of this character outside of the jurisdiction of the state by which the corporation was chartered, does not depend upon the comity of the state where the suit is brought, or its willingness to recognize and give effect to the laws of a foreign state; it depends upon the willingness of the courts to enforce a contract validly entered into between the parties in another jurisdiction. A refusal to grant a remedy in a case of this kind would not be a refusal to enforce a foreign law; it would be simply a denial of justice." Morawetz on Private Corporations, § 875.

In this state the liability of stockholders in banks and in trust and banking companies is proportionate and ratable, R. S., c. 47, §§ 42, 45, Pub. Laws 1899, c. 68, § 1, and the remedy is in equity, R. S., c. 47, § 46; *Trust Co.* v. *Loan Co.*, 92 Maine, 444, where the rights of all creditors, and the ratable liability of the stockholders can be determined in one suit. By the law of Kansas, however, which entered into the defendant's contract, he is under a several and not a joint or proportionate liability to the whole amount of his stock, in favor of the judgment creditor of the corporation first suing therefor. By paragraph 1204 the burden of enforcing contribution among the stockholders is put not upon the creditor, but upon the stockholder, and can be made available by him only after he has paid a judgment obtained against him by the creditor of the corporation. It may be difficult for him to enforce the remedy there provided, because his fellow stockholders may reside in many different states, but it is open to all stockholders. The defendant has the same right to enforce contribution as he would have if he resided in Kansas. It is the remedy which he accepted when for purposes of gain he voluntarily accepted his stock, knowing that the law placed upon him, and not upon the creditor, the burden of enforcing contribution among the stockholders. He is simply held to the contract which he made, and by which he agreed with the corporation

creditor to become responsible to him, severally and individually, and not jointly or ratably.

III. It is not claimed that a pure statute of limitations of a foreign state has extraterritorial force, but it is urged that this being "a liability created by statute, other than a forfeiture or penalty," paragraph 4095 operates as a special statutory limitation, and altogether extinguished the right at the expiration of three years from Feb. 4, 1895, when the cause of action accrued. Whether this particular limitation of time is to be regarded as a part of the general statute of limitations must be determined from the language employed, and from the connection in which it is used. "If the same statute that creates the remedy prescribes the time within which the action thereon must be brought, it is generally construed as imposing that period for the prosecution of the remedy as a condition for prosecuting it at all. It becomes a part of the right itself, and is governed by the same law that regulates the right in other respects. But if the period of limitation is not prescribed by the same statute which confers the right, but is found in a general statute, the general principle applies, and it becomes a law relating to the remedy, which will have no extraterritorial force." Minor on Conflict of Laws, § 210. In this case paragraph 1192, which creates the liability of the defendant, prescribes no period within which that liability must be enforced. The statute relied upon by the defendant is a part of the general statute of limitations of the state of Kansas. It applies to all contracts not in writing, and to all liabilities created by statute, other than a forfeiture or penalty. *Broadway Nat. Bank* v. *Baker*, 176 Mass. 294. It is not therefore an integral part of the right itself which goes with it everywhere that the right is sought to be enforced; but it applies only when the remedy is sought in Kansas, and cannot follow the right beyond the bounds of that state. This result is not in conflict with the cases cited by the defendant. In *Cottrell v. Manlove*, 58 Kan. 405, the statute was held a bar to an action in the state of Kansas, and in *The Harrisburg*, 119 U. S. 199, the limitation of the remedy was contained in the same statute which created the liability.

Judgment for plaintiff for $500, and interest from date of writ.

HANNAH E. MORGAN *vs.* ANTONIO C. MCCAUSLAND, ADMR.

Kennebec. Opinion June 19, 1902.

Claim Against Insolvent Estate. Oath. Appeal. Practice. Jurisdiction. R. S., c. 66, §§ 5, 14-16.

Claims presented to commissioners of insolvency on the estates of deceased parties, must be supported by the oath of the claimant, or some person "cognizant thereof," as required by R. S., c. 66, § 5.

In an attempted appeal to this court, sitting as a supreme court of probate, it appeared that the claim presented to commissioners was not the claim offered in proof on trial. *Held;* that the evidence of the latter claim was inadmissible under the pleadings.

It also appeared that the appeal was from a decree of the judge of probate, and not from the decision of the commissioners. There was no decree of the judge of probate to appeal from, and no appeal was taken from the decision of the commissioners.

The appeal was taken to the supreme court of probate, when it should have been to the supreme judicial court on the law side.

From first to last, the proceedings were irregular and not in compliance with law. The true claim was not presented to the commissioners, nor stated in the writ.

Held; that the attempted appeal was ineffectual to confer jurisdiction upon the court.

Exceptions by defendant. Sustained.

Action for money had and received, brought under R. S., c. 66, § 14.

The plea was the general issue with brief statement setting up the general statute of limitations and also that specially applicable to actions against executors and administrators.

There was a verdict for the plaintiff for $1,078.35.

The estate of Sumner B. McCausland, defendant's intestate, was seasonably represented insolvent, and commissioners of insolvency appointed by the probate court of Kennebec county, who gave due notice and held their meeting as required by law.

The claimant seasonably presented her claim to the commissioners in writing, as follows:—

"Sumner B. McCausland, Dr.
To Hannah E. Morgan.

To note dated May 28, 1897,	$800	with interest.
To note dated October 7, 1898,	400	with interest.
For nursing Mrs. Sumner B. McCausland the last two weeks she lived, and services after death in the year 1893,	30	
For making and repairing clothing for Belle McCausland during the year 1894,	20	
For nursing Belle McCausland in her last sickness six weeks night and day in the fall of 1894,	72	
For board and labor on clothing and taking care of Mr. S. B. McCausland for three years and six months from 1894 to June 6, 1898, at $5 a week,	910	
Total,	$2232"	

The claim was supported by the following affidavit filed with it and duly sworn:—

"I, Hannah E. Morgan, by O. B. Clason, her attorney, of Gardiner, in the county of Kennebec, and state of Maine, on oath declare and say that the annexed bill, amounting to the sum of twenty-two hundred and thirty-two dollars, is justly due to Hannah E. Morgan, from the estate of Sumner B. McCausland, late of Farmingdale, in the county of Kennebec, and state of Maine, deceased.

I further declare and say that I hold no security for said claim and that no credit is to be given in set-off except as therein stated, according to my best knowledge and belief.

HANNAH E. MORGAN,
By O. B. Clason, her attorney."

No evidence was offered before the commissioners in support of the claim. No evidence was offered to the commissioners tending to show whether O. B. Clason was a person cognizant of the claim.

The claim was disallowed by the commissioners. Their report was seasonably made to the probate court, and accepted.

The plaintiff seasonably filed in the probate court the following paper, purporting to be a notice of appeal:

"To the Honorable Judge of Probate Court:

Respectfully represents Hannah E. Morgan, that she is interested as creditor and claimant in the estate of Sumner B. McCausland, late of Farmingdale, in said county of Kennebec, deceased, of which said court has now jurisdiction; that she is aggrieved by your Honor's decree made at a probate court held at Augusta, in and for said county of Kennebec, on the fourth Monday of August, A. D., 1891, whereby her claim is disallowed, and hereby appeals therefrom to the supreme judicial court, being the supreme court of probate, to be held at Augusta, within and for the county of Kennebec, on the third Tuesday of October, A. D., 1901, and alleges the following reasons of appeal, to wit, that she was entitled to the full amount of her claim of two thousand, two hundred and thirty-two dollars, and that nothing was allowed her by the said commissioners.

Dated this twenty-sixth day of August, A. D., 1901.

HANNAH E. MORGAN, Claimant. Seal."

With the same paper the plaintiff filed a bond to the judge of probate for the benefit of the estate of Sumner B. McCausland, signed by herself and two sureties, approved by the court, containing the following condition:

"The condition of this obligation is such that whereas the said Hannah E. Morgan, being interested in the estate of Sumner B. McCausland, late of Farmingdale, in said county of Kennebec, deceased, of which estate said court has jurisdiction, did on the twenty-sixth day of August, A. D., 1901, from the order and decree of the judge of probate aforesaid, made and passed at a probate court held at Augusta, within and for said county of Kennebec, aforesaid,

on the twenty-sixth day of August, A. D., 1901, claim an appeal to the supreme court, being the supreme court of probate, to be held at Augusta, within and for the county of Kennebec, aforesaid, on the third Tuesday of October, A. D. 1901.

"Now, therefore, if the above bounden Hannah E. Morgan, shall at the said supreme court prosecute said appeal with effect, and pay all intervening costs and damages and such costs as the supreme court shall tax against her, then this obligation to be void, otherwise to remain in full force."

The plaintiff thereafterwards seasonably brought her action with the following schedule annexed to her writ:

"Plaintiff seeks to recover, for payment of note dated May 28, 1897, eight hundred dollars with interest; note dated October 7, 1898, four hundred dollars with interest; for nursing Mrs. S. B. McCausland two weeks, thirty dollars; for sewing done for Belle McCausland, 1894, twenty dollars; for nursing Belle McCausland, seventy-two dollars; for board and labor on clothing, and taking care of said Mr. S. B. McCausland for three years, six months, from 1894 to June 16, 1898, at five dollars a week, nine hundred and ten dollars."

The cause was submitted to the jury and verdict rendered for the plaintiff in the sum aforesaid under the first two items in the claim, and for the defendant under the remaining items.

The defendant took exception, among other rulings, to the refusal of the presiding justice to rule, that the claim was not legally presented to the commissioners and that the action, therefore, was not maintainable, on the ground that it was incumbent upon plaintiff to show that she had proven before the commissioners, either by allegation in the affidavit or extrinsic evidence, that the person making the affidavit before them was cognizant of the claim.

A. M. Spear, for plaintiff.

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

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

STROUT, J. The claim presented to the commissioners of insolvency was not supported by the affidavit of the claimant, nor that of any person "cognizant thereof." The statute is imperative. Claims "must" be supported by the affidavit of either one or the other. R. S., c. 66, § 5. Clason, who made the affidavit in this case, did not make it as a person himself cognizant of the claim, but only as representing a person who was.

The claim presented to the commissioners contained two items, "To note dated May 28, 1897, $800 with interest; To note dated October 7, 1898, $400 with interest." There were other items not material to notice, as they were disallowed by the jury. This specification of claim clearly implied that the notes were those of defendant's intestate, held by the claimant. No evidence was presented to the commissioners, and they disallowed the claim. On trial after attempted appeal, no notes of defendant's intestate were produced or claimed, but the plaintiff relied upon an alleged agreement of the deceased, which she was allowed to prove, to pay her bills till they were married if she would remain in Farmingdale, and not remove to Boston, and that she acted upon that agreement. The eight hundred dollar note was her own note for a loan negotiated by the deceased, and the proceeds were applied by her to her bills. The four hundred dollar note was also her own note for a loan, of which two hundred and seventy-one dollars was applied to her bills. This claim thus admitted to be proved was not in fact or in substance the claim presented to the commissioners — nor one of which the defendant, as representative of the estate of the deceased, was apprised or could infer from the claim presented to them.

After the commissioners made their report to the probate court, the plaintiff entered an appeal from "the decree" of the probate judge, and not an appeal from the decision of the commissioners, and filed a bond as for an appeal from "the order and decree of the judge of probate." None of these proceedings were in accordance with the statute. R. S., c. 66, § 12, allows an appeal "from the decision of the commissioners." No such appeal was claimed. Upon

the report of the commissioners no decree is required to be made by the judge of probate from which an appeal can be taken. The appeal from the decision of the commissioners is to a common law tribunal, and not to the supreme court of probate, as on appeal from the decree of the judge of probate. *Merrill* v. *Crossman*, 68 Maine, 412.

On appeal from the decree of the commissioners, the statute provides that an action for money had and received shall be brought and the creditor must "annex to his writ a schedule of his claims, stating the nature of them, or file it with the clerk of the court where the writ is returnable, fourteen days before its return day." R. S., c. 66, §§ 14-16. The schedule of claims annexed to this writ, so far as necessary to be considered here, was "for payment of note of May 28, 1897, eight hundred dollars with interest; note dated October 7, 1898, four hundred dollars with interest." Waiving the variance between the claim presented to the commissioners and that annexed to the writ, the claim made by the evidence on trial was in no sense the same or similar to the specification annexed. Nothing in the annexed schedule gave notice to the defendant of the claim actually relied on, but did give notice of another and widely different claim, of which no proof was offered.

From first to last, the proceedings were irregular and not in compliance with law. The true claim was not presented to the commissioners, nor stated in the writ. No appeal was taken from the decision of the commissioners disallowing the claim. The attempted appeal was from a decree never made nor authorized. It was to the supreme court of probate, when it should have been to the common law side of the court.

The evidence of the claim actually made on trial was inadmissible under the pleadings. The attempted appeal was not in accordance with the statute and was ineffectual to confer jurisdiction upon the court.

Exceptions sustained.

MARSHALL S. POLLARD *vs.* CALVIN W. ALLEN.

Cumberland. Opinion June 24, 1902.

Intox. Liquors. Druggist. Presumption. Evidence. Intention. Practice. R. S., c. 27, § 56; c. 28, § 5.

Druggists are authorized to keep "all medicines and poisons authorized by the United States Dispensatory and Pharmacopœia as of recognized medicinal utility." Intoxicating liquors are within this description.

In the absence of evidence of the extent or magnitude of the defendant's business as a druggist, no presumption of an intent to sell in violation of law arises from the quantity of liquors purchased by him. Innocence is presumed till the contrary is proved.

A finding by a justice of the superior court in an action to recover for the sale of intoxicating liquors, that the liquors were not intended for illegal sale in this state, is conclusive, when there is any evidence upon which it can be based. Whether there is any evidence in support of the finding, is a question of law; but whether it is sufficient, is a question of fact.

Held; that the significant circumstance,—that defendant knew what his intention was and could have testified, if true, that he intended to sell the liquors in violation of law, but did not so testify,—is some evidence to sustain the finding. Since he asks to have imputed to him an illegal intention which he declines to avow, and this against the legal presumption of innocence.

It is immaterial whether the seller knew of the intention or not. Our statute forbids collection of a claim for intoxicating liquors sold in another state to an inhabitant of this, if the purchaser intended to sell them in this state contrary to law.

Exceptions by defendant. Overruled.

Assumpsit on account annexed, for a quantity of intoxicating liquors.

The plea was the general issue with a brief statement in effect that plaintiff's demand consisted wholly or in part, at least, of intoxicating liquors sold in violation of section 56, chapter 27 of Revised Statutes of Maine.

The facts appear in the opinion.

Barrett Potter, for plaintiff.

C. P. Mattocks and C. E. Sawyer, for defendant.

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

STROUT, J. The action in this case was for the recovery of the price of intoxicating liquors sold in Boston to the defendant who was a druggist in Brunswick. It was heard by the justice of the superior court without a jury, but with right of exception in matters of law.

The defendant asked a ruling in substance, that the sale of the quantities, within the times stated in the writ was prima facie evidence that the liquors were sold to the defendant for illegal sale in this state. This ruling was rightly refused: R. S., c. 28, § 5, authorizes druggists to keep "all medicines and poisons authorized by the United States Dispensatory and Pharmacopœia as of recognized medicinal utility." Intoxicating liquors are within this description. The law presumes all persons to be innocent of crime or criminal intent until the contrary appears. There is no evidence of the extent or magnitude of defendant's business as a druggist. It may have been large. He may have been putting upon the market in great quantities medicinal preparations, in which alcoholic liquors were ingredients. In the absence of evidence of the requirements of his business as a druggist, no inference of any intent to sell illegally can properly be drawn from the quantities here purchased; especially against the legal presumption of innocence.

Oakes v *Merrifield*, 93 Maine, 297, and kindred cases cited by defendant were all before this court on report, where the court was to find the facts as well as to determine the law. In the *Merrifield* case, the defendant was a hotel keeper, and the purchase was of a large quantity of liquor, much more than could be required for his own use for many years, and the court arrived at the conclusion of fact that the liquors were intended for unlawful sale. Here the justice has found as a fact, that these liquors "were not intended for illegal sale in the state of Maine." This finding of fact is conclusive, if there was any evidence upon which it could be based. Whether there is any evidence in support of the finding, is a question of law. But whether it is sufficient is a question of fact. *Hazen* v. *Jones*, 68 Maine, 343.

The possession of the liquors by the defendant, a druggist, was not unlawful, nor did it of itself justify an inference of an intention to sell them illegally. The defendant knew what his intentions were. He could have testified but did not. If he intended to violate the law by selling, he could have so stated, and defeated the action. Declining to do so is a significant fact from which arises a strong inference that he did not so intend, and could not truthfully testify that he did. He attempts to avoid a moral obligation, by interposing a legal bar to maintain which requires us to impute to him a criminal intent, which he declines to avow, and to do this without evidence and against the legal presumption of innocence. The justice who heard the case was obliged to find that the liquors were intended for illegal sale, or were not. There was no evidence that they were. There was some evidence that they were not. The justice found they were not. This finding cannot be reviewed here. *Brooks* v. *Libby*, 89 Maine, 153. The first ruling excepted to necessarily follows this finding of fact.

The second requested ruling to which exception is taken raised an immaterial question. Our present statute, R. S., c. 27, § 56, forbids collection of a claim for intoxicating liquors sold in another state to an inhabitant of this, if the purchaser intended to sell them in this state contrary to law. It makes no difference whether the seller knew or did not know of such intention. *McGlinchy* v. *Winchell*, 63 Maine, 31; *Meservey* v. *Gray*, 55 Maine, 540.

Exceptions overruled.

JOHN F. PROCTOR *vs.* MAINE CENTRAL RAILROAD CO.

Cumberland. Opinion July 1, 1902.

Deed. Boundary. Flats. Upland. Shore. Bank. Evidence. Ancient Records. Colonial Ordinance, 1641-7,

1. By virtue of the Colonial Ordinance of Massachusetts, 1641-7, the owner of upland adjoining tide-water owns to low water mark, not exceeding one hundred rods from high water mark.
2. Such an owner may separate the flats from the upland, and convey the one and retain the other.
3. Flats pass by a grant of the upland, unless they are excluded by the terms of the grant.
4. In construing a grant, effect is to be given, if possible, to the intention of the parties.
5. Ordinarily the intent which is effective in a grant is the intent expressed in the language of the grant, and such intent is ascertained by giving suitable effect to all the words of the grant, read in the light of the circumstances attending the transaction, the situation of the parties, the state of the country and of the estate granted, such as its condition and occupation.
6. Ancient records of towns and proprietors which tend to throw light upon the intention of the parties to a grant in any of the before mentioned particulars may be admissible and relevant when such intention is in issue.
7. Whether such records so far as they relate to transactions with persons other than the owner of the land in question, or to lots of land which were neither contiguous to, nor in any way connected with the lot whose title is in issue, are admissible to show the intent of the parties with respect to the grant of the latter lot, quære.
8. It being claimed that such records offered in this case do show historically and by reference to the terms of the original grants, by vote and by other proceedings of the town and the proprietors, that in the distribution of upland along Fore river, by the town of Falmouth and the proprietors of Falmouth, the town and the proprietors treated the flats as reserved for common property, and that flats were not conveyed or intended to be conveyed by grants of upland, the court is of opinion that these records do not show any such general intent in 1721, the date of the grant particularly in question,—certainly not as affecting the flats adjacent to the lot described in this grant, nor those in the immediate vicinity, whatever may have been the intent afterwards, and as to other places on Fore river.

9. *Held;* that, by the grant by the inhabitants of Falmouth to Deborah Mills in 1721, of "the first thirty acre lot toward the Round Cove as it is now laid out, with a road to be allowed upon the bank, front thirty rod, and northeast and by east into the woods eight score rod," the adjacent flats did pass to the grantee and that the demandant, who is her successor in title, has shown a better record title than the tenant has to so much of those flats as is embraced by the demanded premises.

10. *Held;* that, by the grant by the inhabitants of Falmouth to James Dueneven in 1729 of a lot with the following boundaries: — "Beginning at a white oak stump adjoyning on James Mills thirty acre lot and thence" by sundry courses "till it comes to the Cove or Marsh and thence round by the bank to the first bounds mentioned," the flats adjacent to the upland described are expressly excluded by the terms of the grant properly construed, and did not pass to the grantee; that the demandant, claiming title under the grant to Dueneven has shown no record title to any of the flats adjacent to the Dueneven lot, and that the tenant in possession, holding under a warrantee deed expressly conveying those flats, has the better record title thereto.

11. The word "bank" in the Dueneven grant, though not strictly appropriate to land adjacent to tidal waters, is to be construed in this connection after the analogy of its use in relation to fresh water streams, meaning, not the shore, but the land adjacent to the shore.

12. In the Dueneven grant, the "bank" was a definite monument, and the phrase "round by the bank" marked the specific boundary of the Dueneven lot on the seaward side.

On report. Remanded to nisi prius.

Real action to recover two parcels of tide lands or flats in Portland.

The plea was the general issue of nul disseizin.

After both parties had introduced their evidence relative to the record title of each to the lots described in demandant's declaration, the case, by agreement of parties, was withdrawn from the jury and reported.

By the terms of the report the court was to decide the question as to which of the parties has the better record title to the demanded lots. If the court should decide that question in favor of the defendant, judgment for defendant to follow; if in favor of demandant, the case to be remanded to nisi prius, to be tried upon the defendant's claim of title by adverse possession. The facts are stated in the opinion.

C. P. Mattocks; *W. K. and A. E. Neal*, for plaintiff.

Counsel argued: That the phrase, "as Fore river runs," or "by Fore river," carries the flats. *Brackett* v. *Persons Unknown*, 53 Maine, 238, 245, 87 Am. Dec. 548; *Pike* v. *Munroe*, 36 Maine 309, 58 Am. Dec. 751; *Winslow* v. *Patten*, 34 Maine, 25.

After a court has given to a statute a construction, title acquired in pursuance of such construction ought not to be disturbed. *Folger* v. *Mitchell*, 3 Pick. 400.

The shore may also pass under the term "ripa" or "bank." Gould on Waters, 2d Ed. c. 1, § 28; *Morrison* v. *First Nat'l Bank*, 88 Maine, 155; *Starr* v. *Child*, 20 Wend. 149; *Child* v. *Starr*, 4 Hill, 369; *In re Belfast Dock*, Ir. Rep. Eq. 128, 139.

The title in the case at bar passed from the inhabitants of Falmouth to the original settlers in 1720 and 1721. Great liberality in construing these old grants is to be exercised in favor of the grantee. *Adams* v. *Frothingham*, 3 Mass. 352, 3 Am. Dec. 151.

Flats are included in a conveyance bounded "by the harbor," *Mayhew* v. *Norton*, 17 Pick. 357, 359, 28 Am. Dec. 300; or "by the sea or salt water," *Green* v. *Chelsea*, 24 Pick. 77; or "by the sea," *Jackson* v. *Boston & Worcester R. R.*, 1 Cush. 575; *Saltonstall* v. *Long Wharf*, 7 Cush. 200; or "by the creek," *Harlow* v. *Fisk*, 12 Cush. 302; or "on the stream," *Lapish* v. *Bangor Bank*, 8 Greenl. 92, 93; or "river," *Moore* v. *Griffin*, 22 Maine, 350; or "bay," *Partridge* v. *Luce*, 36 Maine, 19; or "by the sea or harbor," *Litchfield* v. *Scituate*, 136 Mass. 39; or "to the water," or "to the river," *Babson* v. *Tainter*, 79 Maine, 368.

In *Nickerson* v. *Crawford*, 16 Maine, 245, the boundary was "to and along the margin of the cove," and it was held that the flats were excluded by the use of the word "margin."

In *Rust* v. *Boston Mill Corp.*, 6 Pick. 166, the real boundary was "by a cliff," which excluded the flats.

In a case where ambiguous terms were used, as "on the sea or flats," or "by the sea or beach," the court construed favorably to the grantee, and held that the flats passed. *Saltonstall* v. *Long Wharf*, 7 Cush. 195.

A grant by a town under the colonial ordinance of land next tide-water passes the fee in the flats in front thereof. *Boston* v. *Richardson*, 105 Mass. 351; *Sewall & Day Cordage Co.* v. *Boston Water Power Co.*, 147 Mass. 61.

J. W. Symonds, D. W. Snow and C. S. Cook, for defendant.

Counsel premised their argument with the following historical sketch:

At the close of the French and Indian wars, the town of Falmouth, or Casco, as it was then called, was practically obliterated. The town had been several times destroyed, and its inhabitants had been killed or scattered among the adjoining settlements. Early in the last century a few of the inhabitants returned and took possession of the land, locating as nearly as possible upon the former site of the town. In 1717 these inhabitants petitioned to the Great and General Assembly of the Province of Massachusetts for the appointment of a committee to define the limits of the town and to recommend some form of town government. The petition was granted, and a committee was appointed, which reported in 1718, establishing the boundary lines and it was ordered "that the inhabitants of said town that now are or hereafter shall be, from time to time, invested with the same powers and authorities, to act, manage, direct and order the affairs of said township as other towns are; provided that this order shall in no wise prejudice or infringe any just right or title that any person have to lands there; and that fifty families at least more than now are to be admitted as soon as may be and settle." Taking advantage of this act, the few inhabitants who were then located near or upon the site of the old town met March 10, 1718, and proceeded to organize by the election of officers and the appointment of committees.

So far as real property was concerned, all was confusion; lines were uncertain and rights undetermined, and it was found necessary to take immediate steps to protect the interests of the inhabitants who were then in the town, and to provide for the interests of those who might settle in the future. Among the matters provided for at this time was the division of the common lands in the vicinity, a vote being passed at this first meeting that lots should be laid out

upon the three or four highways which had been determined upon, and that a committee should be appointed for that purpose. Each inhabitant was to have a one acre lot, a three acre lot, a ten acre and thirty acre lot. Later it was voted that if the land should hold out, each inhabitant should receive a sixty and a hundred acre lot. The committee at once proceeded to lay out lots, in accordance with this vote, and from time to time the doings of this or similar committees were ratified and approved by the town. The layings out made by these committees were generally in form of grants from the town. In some instances, however, grants were made by votes of the town or of the proprietors. The language of these old grants is not always clear, and it is somewhat difficult to get at the exact meaning, but it is evident that the intention was to provide a house lot and sufficient land for farming or grazing purposes for each inhabitant, and later on to divide the remaining common lands as fairly as could be. Shortly after the town began to make these grants, the ancient proprietors, as they were called, in other words, those who had occupied the land prior to the destruction of the town by the French and Indians, made claim to portions of the land, and at once a conflict arose between them and the new proprietors, the old asserting title under ancient deeds, and the new claiming under the establishment which they had received from Massachusetts. This conflict continued until some time in 1729, when the difficulties were adjusted, from which time the common lands were controlled and divided by the Falmouth proprietors, as they were called. These proprietors, at meetings called in accordance with statutes in force at this time, authorized the division of the common lands among such inhabitants as proved their right to proprietorship, and continued to lay out lots, until, well into the present century, when all records seem to have ended, although it is evident that some land remained undivided. The title to the land in dispute in this case originates under these old Falmouth grants, and for layings out and method of procedure, reference must be had to such of the old records of the town and proprietors as are now in existence and which have been offered in evidence, and to the copies from these records which make a part of the printed case. Soon after its organization,

the town laid out a highway running from King street (now India), up towards the head of Fore river, ending at the head of what was called the "Round Marsh," now commonly known as the Basin of the Oxford and Cumberland Canal. This Round Marsh adjoins one of the grants under which title is claimed in this suit. At the same time a highway was laid out "beginning at Fish street (now Exchange) and running along the river as the river runs three rods wide upon the bank or upland, until it meets with the way above said at the head of the Round Marsh." The marginal note of this record is, "Road by the water side." This is the road which is referred to in the grants of the thirty acre lots upon the northerly side of Fore river, and the records show that it was intended to run along the top of the bank which on this shore is very abrupt. The language of the various grants along this shore of Fore river indicates that this road or highway was excepted from the grants, and was treated as a boundary in laying out the grants, and it is quite certain that it was intended to be a boundary of one of the grants under which plaintiff claims title. It is not excepted from the other grant under which plaintiff claims title, the reason being that near this point it swung off to meet the road running from King street, to which reference has been made. The records of the town of Falmouth and of the proprietors of Falmouth show an intention to provide first for the necessities of the inhabitants and then to divide the more valuable portions of the common lands among them. After these more pressing needs were attended to, the town and proprietors began to divide the flats adjoining the upland, meanwhile retaining possession of all undivided marshes, and flats, and, through committees appointed for that purpose, cutting the grass, both salt and fresh, and distributing it among the inhabitants. In making these grants of flats, the town and proprietors did not in every instance convey to the parties to whom the former grants of the adjoining upland were made, although this was frequently done; the upland had changed hands in many instances, and in such cases the flats were often granted to the then owners of the upland. It is possible from these records to trace the larger part of the flats along the northerly shore of Fore river with reasonable accu-

racy, taking into consideration the fact that a portion of the records are missing, and that in many instances grants of flats were made bounding upon flats then owned by, or previously granted to, other owners whose grants cannot now be ascertained. The flats along the shores of Fore river were repeatedly granted as flats, sometimes for purposes of building wharves, at other times for no apparent reason other than to give the owner of the upland the right to the flats adjoining his upland. A large number of grants of flats (separate from upland) appear upon these records. The later records of the Falmouth proprietors show a number of votes appointing committees to ascertain what flats, etc., were left in the proprietors, and to provide a method of disposing of the same, either by public or private sale. The records further show that auction sales were held, at which all flats remaining in certain localities were sold for a nominal sum. To those who are familar with the early titles of Portland, it is well known that considerable confusion existed as a result of the conflict between the ancient and new proprietors of Falmouth; that in many instances the disputed lines were never determined, and it can readily be seen that this uncertainty influenced the proprietors in making their grants, as in almost every instance the description ends with the words, "provided the same be free from former grants, etc."

Counsel contended: That the fact that following down the line of title to the land in controversy, no reference is made to flats for more than a hundred years, would not have been, had the owners of the upland considered themselves to be owners of the flats.

It is evident, upon examination of the old records, that it was not the intention in making grants of land to include flats.

The town and the proprietors treated the flats as reserved for common property when making grants of upland; and from time to time conveyed them, without reference to the upland.

Plaintiff has no record title to the flats on Fore river in Portland.

The title to the property in question in this suit originated under two grants from the town of Falmouth; one a thirty acre lot to Deborah Mills, dated January 18, 1721, described as follows:

"Granted to Deborah Mills the first thirty acre lot toward the round cove as it is now laid out, with a road to be allowed upon the bank front thirty rods and northeast by east into the woods eight score rod."

The other a thirteen acre lot to James Dueneven dated October 1st, 1729, described as follows: "Beginning at a white oak stump adjoyning on James Mills thirty acre lot and thence by said lot northeast and be east til it meets with the head of Mr. Thomes' ten acre lot, and thence adjoyning to Thomes' lot til it comes to the cove or marsh, and thence round by the bank to the first bounds mentioned." The grants made by the town of Falmouth are public, and therefore the rule applies that the construction of these grants, if doubtful, must always be against the grantee and in favor of the grantor, the rule in such cases being contrary to that which applies where grants are made by private individuals. Washburn on Real Property, 4th Ed. Vol. 3, 190; *Com.* v. *Roxbury*, 9 Gray, 490; *Martin* v. *Waddell*, 16 Peters, 411.

"Where an ancient location of grant by the proprietors of a township bounded the land granted by way, which way adjoined the sea shore, the Ordinance of 1641 did not pass the flats on the other side of the way to the grantee." *Codman* v. *Winslow*, 10 Mass. 146.

While the Colonial Ordinance of 1641–7 has become by usage a part of the common law of Maine, its application is not to be extended so far as to create a grant where none was intended. *Storer* v. *Freeman*, 6 Mass. 435, 439, 4 Am. Dec. 155.

The James Dueneven grant contains the following: "Thence adjoyning to Thomes lot till it comes to the cove or marsh; and thence round by the bank to the first bounds mentioned."

This description, under the decisions of this state, excludes the flats. *Nickerson* v. *Crawford*, 16 Maine, 245; *Bradford* v. *Cressey*, 45 Maine, 9; *Stone* v. *Augusta*, 46 Maine, 127; *Montgomery* v. *Reed*, 69 Maine, 510; *Brown* v. *Heard*, 85 Maine, 294; *Freeman* v. *Leighton*, 90 Maine, 541; *Rix* v. *Johnson*, 5 N. H. 520, 523, 22 Am. Dec. 472; *Daniels* v. *Cheshire R. R.*, 20 N. H. 85; *Dunlap v. Stetson*, 4 Mason, 349.

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

SAVAGE, J. Writ of entry for the recovery of two parcels of the flats of Fore River in Portland, formerly Falmouth. The plea is the general issue. The question presented to us by the report is, which of the parties has the better record title. If the tenant, then judgment is to be rendered for the tenant; if the demandant, then the case is to be remanded for trial upon the tenant's claim of title by adverse possession.

The decision of this question ultimately depends upon the construction to be given to two grants of land made by the town of Falmouth, one January 18, 1721, to Deborah Mills, and one, October 1, 1729, to James Dueneven. The demandant claims that the demanded flats, being flats in Fore River, an arm of the sea, were included in the grants to Mills and Dueneven, by virtue of the colonial ordinance of 1641–7; and if that be so, it is not controverted that the record title to them has come down to the demandant. On the other hand, if the flats were not included in the grants, the demandant has no title; and the tenant having shown a title under a warranty deed expressly conveying these flats, has a better record title and is entitled to judgment.

It appears that in 1718, under the authority of the Great and General Assembly of the Province of Massachusetts, the inhabitants of Falmouth organized a town government, and proceeded to lay out lots of land by a committee appointed for that purpose, and to distribute those lots. Lots of various sizes were provided for, one acre lots, three acre lots, ten acre lots, thirty acre lots and so forth. It also appears that ten or eleven thirty acre lots were laid out on Fore River, in the vicinity of the demanded premises, from northwest towards southeast, each thirty rods in width on the river, and were allotted or granted to various individuals in 1721. The first of these in time as well as in order from the northwest was granted January 18, 1721, to Deborah Mills, in the following terms: "Granted to Deborah Mills the first thirty acre lot toward the Round Cove as it is now laid out, with a road to be allowed upon

the bank, front thirty rod, and northeast and by east into the woods eight score rod." On October 1, 1729, the inhabitants of Falmouth granted to James Dueneven a lot, with the following boundaries,—"Beginning at a white oak stump adjoining on James Mills thirty acre lot and thence" by sundry courses "till it comes to the Cove or Marsh and thence round by the bank to the first bounds mentioned." This grant represented a ten acre lot and a three acre lot. That the demanded flats lie to the seaward of the upland described in the foregoing grants, and within one hundred rods from high water mark, is not questioned.

The Massachusetts colonial ordinance of 1641–7, though enacted before Maine became a part of that province, has been adopted as a part of the common law of this state. *Barrows* v. *McDermott*, 73 Maine, 441. By this ordinance, "It is declared, that in all creeks, coves, and other places, about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above one hundred rods, and not more wheresoever it ebbs further." By force of this ordinance it is held that the owner of upland adjoining tide-water prima facie owns to low water mark; and does so, in fact, unless the presumption is rebutted by proof to the contrary. *Snow* v. *Mt. Desert Isl. R. E. Co.*, 84 Maine, 14, 30 Am. St. Rep. 331, 17 L. R. A. 280; *Doane* v. *Willcutt*, 5 Gray, 328, 335, 66 Am. Dec. 369. While a grantor may separate the flats from the upland, and convey the one and retain the other, *Storer* v. *Freeman*, 6 Mass. 435, 4 Am. Dec. 155, yet unless flats are excluded by the terms of the grant properly construed, they pass by a grant of the upland.

I. Now to apply these general rules to the grants in question, and of these, first to the Deborah Mills grant. It is suggested that there is nothing upon the face of the grant, nor in the other record proof to show that this particular lot was bounded at all by Fore River. But we think the contrary. The description in the grant itself is "as it is now laid out." But the evidence of how it was "laid out" is lacking. All the monuments are gone, and the records, if any, are probably lost. But we think it sufficiently appears from the records that this was one of a series of thirty acre

lots in this vicinity, on Fore River, all granted in 1721. All the other lots of this series, with one exception, were described as being on Fore River, and that one was granted "as now laid out." Besides, the descriptive language of the grant itself, "front thirty rods," is appropriate to land lying adjacent to the water, and is not appropriate to any other condition shown to have existed at the time of the grant. A lot of land may be said to "front" on water, but not usually to "front" on another piece of land. It may "front" on a road. But in this case there does not appear to have been any existing road. The language to the grant, "road to be allowed upon the bank," indicates rather the reservation of a public right of way for a road then contemplated, than for one then existing. But in whatever condition the road was, it is clear that it was not referred to as a boundary. The Mills lot evidently "fronted" on something, and we think that something was Fore River. It follows, therefore, by the usual rules of construction, that Deborah Mills, by the grant of this lot of upland fronting on tide-water, became also the owner of the adjacent flats to low water mark, not exceeding one hundred rods from high water mark. And her record title has come to the plaintiff.

But the tenant, at the trial, "claimed the right to submit to the inspection of the court the contents of certain early volumes of the records of Falmouth (town and proprietors) and to have the same examined by the court, and by the jury, if any questions of fact were involved, as tending to show historically and by reference to the terms of the original grants, by vote and by other proceedings of the town and the proprietors through the period of the records offered in this and similar instances, that such distribution of upland did not include any grant of flats." And by stipulation, the right claimed is to be accorded to the tenant at this stage of the case, or not, as this court may determine. The records offered are of two kinds, namely, those of the town of Falmouth from 1718 to 1729, and those of proprietors of Falmouth from 1730 to 1826. The claim of the tenant is that these records show that "the town and proprietors treated the flats reserved for common property," and that though "doubts may in some instances arise as to the precise construction of these

early grants, it is clear from the whole course of procedure that flats were generally separated from uplands in making these conveyances, and that flats were not conveyed or intended to be conveyed by grants of upland." And upon this counsel argue that the application of the colonial ordinance of 1641–7 is not to be extended, under such circumstances, so far as to create a grant of flats where none was intended.

Such records as these are undoubtedly admissible as evidence for the purpose of showing such historical facts as are disclosed therein. *Codman* v. *Winslow*, 10 Mass. 146; *Rust* v. *Boston Mill Corporation*, 6 Pick. 158; *Commonwealth* v. *Roxbury*, 9 Gray, 451; *Sumner* v. *Sebec*, 3 Maine, 223; *Goodwin* v. *Jack*, 62 Maine, 414. But to be entitled to consideration, the evidence must not only be admissible, but be relevant. And the question now presented is one of relevancy. We are now construing an ancient grant, a grant which by its terms makes no reference to flats. In construing this grant we are to give effect, if possible, to the intention of the parties, so far as it can be ascertained by legal rules of construction. Ordinarily the intent which is effective in a grant is the intent expressed by the language of the grant. It is the expressed rather than the unexpressed intent. It is ascertained by giving suitable effect to all of the words of the grant, reading them in the light of the circumstances attending the transaction, the situation of the parties, the state of the country, and of the estate granted, such as its condition and occupation. *Treat* v. *Strickland*, 23 Maine, 234; *Adams* v. *Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Commonwealth* v. *Roxbury*, 9 Gray at p. 493. So far, therefore, as these ancient records tend to throw light upon the intent of the parties in any of the above mentioned particulars, they are clearly relevant to the issue. But we think the present proposition goes farther.

We have examined these records so far as our attention has been called to them by counsel. In general it may be stated, that they relate, except so far as they show these particular grants, to transactions with persons other than the owners of these lots, and to lots of land or flats, for the most part, neither contiguous to, nor, so far as we can discover, in any way connected with the lots in question.

The records of the proprietors of Falmouth are all of transactions subsequent to this grant, and are, of course, the records of another proprietary than the original grantor.

We think these records may fairly be regarded as showing, in addition to matter already stated, that in the years from 1721 to 1729 the town of Falmouth granted many other lots of different sizes, some of which were on Fore River, easterly of the lots in question; that the town by vote assumed to regulate the occupancy of the marshes, both salt and fresh, and apportion them to every man "according to his regular stock;" that at different times the town granted to individuals the privilege of building wharves against their own lands; that in very many instances, the town granted flats entirely separate from the upland, both to the owners of the upland and to others. In the majority of instances these grants of flats were "four rods" in width, and sometimes these were described as "across his acre lot." A few of the grants were wider, and one was "against his thirty acre lot." It also appears that controversies arose between parties holding under grants from the town, and other parties holding under grants from proprietors who owned or controlled the land before the organization of the town, the "ancient proprietors," so-called; that these difficulties were adjusted in 1729; and that from that time the common lands of Falmouth were controlled and divided by the "proprietors" instead of by the town. The proprietors' records from 1730 to 1826 show many instances of the grant of flats alone, some of the grant of upland and flats eo nomine, and in one case at least, a grant of land bounded by "the water or sea," followed a year later by a grant of flats adjacent, to the same grantee. Some of the grants of flats were by the acre. Some were with, and some without, reference to the ownership of the upland. These records also show proceedings from time to time for the distribution of "the remainder of the common lots," for ascertaining "what flats remained," and an attempt to sell the remaining flats at public auction.

Upon this showing, the learned counsel for the tenant argue that the very multitude of instances of separate grants of flats indicate a very general, if not practically universal practice of conveying

uplands and flats separately, that the methods pursued show clearly that it was the intention not to include flats in the grants of upland, unless expressly so stated, and that that intention so shown, may be read into this grant to Deborah Mills, which is otherwise silent, in terms, as to any such intention.

But it is necessary only to state this question, not to decide it. Assuming, but not by any means deciding, that the evidence is relevant and admissible for the purpose for which it is offered, we think it is insufficient to show any such general practice as is claimed, certainly not with respect to the flats in question, nor to those in the immediate vicinity. The flats along Fore River are not all of the same width, character or utility, and it might well be argued that because a practice was shown with regard to flats in one quarter, it would not follow that the same practice would be adopted for another quarter. Generally speaking, the size of the flats granted separately seems to indicate that they were adjacent to the small lots granted on Fore River, the one acre or three acre lots, and not to the thirty acre lots. No separate grant is shown of the flats in front of the Mills lot. Nor have we been able to discover, with possibly one exception, where the location is doubtful, the separate grant of any flats in front of any of the other ten thirty acre lots granted in this vicinity on Fore River in 1721. It is true that some of the records have become lost, and that it is now impossible to trace many titles accurately. At the same time, if any of the separate grants of flats did relate to flats in front of these ten lots, a distance of nearly a mile, it is singular that the diligence of counsel has been unable to discover a single case, with certainty.

The boundaries, on the water side of these ten lots, were generally in terms which by the usual rules of construction would include the flats, such as "thirty rods front on the river," "thirty rods up the river," "down the river," "down the river side," and so forth. This fact, with the other fact that there certainly was no attempt on the part of the town or proprietors to grant flats separately in front of the Deborah Mills lot, and apparently no attempt to grant separately any flats in front of the other ten thirty acre lots granted in 1721, rather tend, we think, to show that the town of Falmouth in 1721

did intend to grant flats with upland upon this portion of Fore River, whatever may have been its intention afterwards, and as to other portions of Fore River.

Another matter worthy of consideration is that a way was laid out along the "bank" of Fore River, in 1727, and the language of many of the grants indicates that this way was treated as a boundary in laying them out. If so, the flats in such cases did not pass by grant of the upland. And so far, this would furnish occasion for the subsequent grants of the adjacent flats.

The tenant, therefore, is not aided in showing intent by the evidence it seeks to introduce.

Accordingly, we hold that the plaintiff has the better record title to so much of the demanded premises as is included within the limits of the original grant to Deborah Mills, including flats.

II. The remainder of the demanded premises was included in the flats adjacent to the lot granted to James Dueneven, October 1, 1729. We think the description in this grant did not include the adjacent flats. It is true that the description of the side line as extended "till it comes to the cove," standing alone, would carry the line to low water mark. *Babson* v. *Tainter*, 79 Maine, 368; Gould on Waters, § 195. But it does not stand alone. The line after it "comes to the cove" is then made to proceed "*round by the bank* to the first mentioned bounds." The term "bank" is not strictly appropriate to arms of the sea, tidal waters, but is applicable to non-tidal fresh water rivers. The term "shore" is appropriate to the former, but not to the latter. *Morrison* v. *First Nat'l Bank*, 88 Maine, 155. Whether the word "bank" in a grant like this is to be construed as the same word would be in the case of non-tidal waters may depend upon the context, the other calls in the grant, or the situation of the property. Here we think the analogy of fresh water streams should be followed. The bank is not the shore. The term shore technically means all the ground between ordinary high water mark and low water mark, that is, the flats. "To the shore" is not *over* the shore. "To the shore" and thence "by the shore," unqualified, excludes flats. *Storer* v. *Freeman*, 6 Mass. 435, 439, 4 Am. Dec. 155; *Montgomery* v. *Reed*, 69 Maine, 510. But the expression may be

qualified by other phrases showing an intention to include the flats, as in *Snow* v. *Mt. Desert Island R. E. Co.*, 84 Maine, 14, 30 Am. St. Rep. 331, 17 L. R. A. 280, where the line "beginning at the sea," thence running around the parcel "to the shore, thence to the bounds first mentioned," was held to include the flats. But in the grant under consideration, the seaward line ran not by the "shore," but by the "bank." It appears in this case that there was at the shore end of the lots granted on Fore River a physical formation which was then known and called the "bank" of Fore River. It was somewhat abrupt and precipitous. It extended to the shore. The Cumberland and Oxford canal was afterwards built at the foot of it. The ancient grants show that a road was laid out on the "bank" of Fore River. This "bank" was therefore a monument. It was not the sea. It was not the shore. It was the land adjacent to the shore. The "bank" extended to the margin of the shore, as in case of a fresh water river the bank extends to the margin of the water. There was the definite line. Gould on Waters, § 41; *Stone* v. *Augusta*, 46 Maine, 127. The case of *Bradford* v. *Cressey*, 45 Maine, 9, although relating to non-tidal waters, is in point. The court there said: "If the grantor, however, after giving the line to the river, bounds his land by the bank of the river, or describes his line as running along the bank of the river, or bounds it upon the margin of the river, he shows that he does not consider the whole alveus of the stream a mere mathematical line, so as to carry his grant to the middle of the river." See *Hatch* v. *Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Commonwealth* v. *Roxbury*, 9 Gray, at p. 524.

This construction is aided also by the further consideration that the description of this lot begins at a white oak stump, manifestly a monument on the land at or above high water mark, and the last or seaward course runs "round by the bank *to the first bounds mentioned.*" We think the line was expressly limited to the "bank" and the end of it was fastened to the white oak stump. *Freeman* v. *Leighton*, 90 Maine, 541. We cannot change its position.

The grant to James Dueneven made the "bank," the land by the margin of the shore, the specific boundary on the seaward side, and, we think, excluded the flats, and no person holding under Dueneven

has ever had title to the flats by grant. So far as the question of record title is concerned, the tenant is in possession holding under a warranty deed expressly conveying the flats. But that is a better record title to the flats embraced in the Dueneven grant than anything shown by the demandant. *Blethen* v. *Dwinel*, 34 Maine, 133; *Rand* v. *Skillin*, 63 Maine, 103. The demandant will not be entitled to judgment for the flats adjacent to the Dueneven lot. But as to those in the Deborah Mills grant, the demandant has shown a better record title.

Therefore, in accordance with the stipulation of the parties, the case must be remanded to nisi prius, to be tried upon the tenant's claim of title to the flats on the Deborah Mills lot, by adverse possession.

So remanded.

ISAAC L. SALLEY *vs.* JOHN ROBINSON.

Somerset. Opinion July 2, 1902.

Trespass. License. Water-works. Fixtures. Removal of Plant.

When a structure is placed upon land of another to be used by the builder during the pleasure of the land owner, the ownership of the structure by its builder and his right to remove it when the land owner revokes his license, is recognized and implied.

The same principle applies when a part of the structure or plant is under the ground.

Such plant does not become a part of the realty as a fixture, unless after reasonable notice to remove it, it is suffered to remain; in which case it may be treated as abandoned by the owner.

In 1877, plaintiff's predecessor in title built a dam upon land of the defendant, where there were springs of water, and laid an underground iron pipe through the defendant's land and the public street to his own premises. The water from the spring was forced through the pipe by a hydraulic ram near the dam. At the same time a tee was put in the iron pipe near the defendant's premises, for the purpose of allowing the defendant to take water therefrom, if he chose to do so. The builder of this water plant and his successors in title, including the plaintiff, received water through it from that time until in November 1900. The plaintiff claimed an easement by prescription to take the water in this manner; but the defendant denied

this prescriptive right and claims that the plant was so placed under a license from him to the builder, without consideration, to be so used until the defendant wanted to use the water for other purposes; and that the builder made no different claim than this. The defendant made no use of the tee until Nov., 1900, when without notice to the plaintiff, or request to remove, he cut the pipe, stopped the water, connected the pipe with his own premises, and drew water therefor through the plaintiff's pipe by means of the plaintiff's ram,—thus appropriating to himself the plaintiff's plant to the exclusion of the plaintiff.

Held; that if the defendant had connected with the pipe at the tee, and allowed the water to flow along to the plaintiff, the latter could not complain; but to cut off the plaintiff's supply, and take the whole flow to himself by the agency of the plaintiff's pipe and ram, is an injury for which the defendant is responsible.

Motion for new trial by defendant. Overruled.

Action of trespass vi et armis, for injuries to plaintiff's waterworks situated on defendant's land thus depriving plaintiff's dwelling-house in Skowhegan of its water supply.

The declaration was as follows:

For that John Robinson, on the seventh day of November, A. D. nineteen hundred, at said Skowhegan, with force and arms, dug up, cut, mutilated, plugged and destroyed the iron water pipe of the plaintiff which conveyed and conducted the water to plaintiff's dwelling-house and stable, which said pipe was of great value, to wit, of the value of $500—whereby the plaintiff has been deprived of his supply of water for his said dwelling-house and stable, and hath suffered great loss and damage by reason of said defendant's trespass as aforesaid, to wit, the sum of one thousand dollars, said iron pipe being located and lying along the highway known as Middle street in said Skowhegan.

And for that the said John Robinson at said Skowhegan, on the seventh day of November, A. D. 1900, with force and arms, and with the intent and design to injure the said plaintiff, did then and there break open a certain building belonging to the plaintiff, known as the ram house, and remove the door and lock therefrom, of the value of five dollars and took and carried them away, and converted and disposed of the same to his own use, all of which said acts and trespasses were without the consent of the plaintiff, all of which is

against the peace of our state and contrary to the statute and to the damage of said plaintiff, (as he says) the sum of one thousand dollars.

The plea was the general issue.

The facts appear in the opinion.

E. F. Danforth and S. W. Gould; A. K. Butler, for plaintiff.

E. N. Merrill, for defendant.

Parol license gives no indefeasible power or authority to exercise a continuing privilege on another's land, even when carried into execution and upheld by acts done in pais, in accordance with its terms. *Prince* v. *Case,* 10 Conn. 375, 27 Am. Dec. 675; *Hazelton* v. *Putnam,* 54 Am. Dec. 158; *Hodgkins* v. *Farrington,* 150 Mass. 19, 15 Am. St. 168, 5 L. R. A. 209; *Cook* v. *Stearns,* 11 Mass. 533; *Dark* v. *Johnston,* 55 Pa. St. 164, 93 Am. Dec. 732.

No permanent interest in land by way of easement can be created by parole under the statute of frauds. *Fuhr* v. *Dean,* 26 Mo. 116, 69 Am. Dec. 484; *Pitkin* v. *Long I. R. R. Co.,* 2 Barbour's Chan. 221, 47 Am. Dec. 320; *Lawrence* v. *Springer,* 49 N. J. Eq. 289, 31 Am. St. 702, and note; *Putney* v. *Day,* 6 N. H. 431, 25 Am. Dec. 470; *Mumford* v. *Whitney,* 15 Wend. 380, 30 Am. Dec. 60, and note.

A license is distinguished from an easement in the fact that the latter always implies an interest in the land upon which it is imposed and can only be created by deed. *Clark* v. *Glidden,* 60 Vt. 702.

Occupation of a licensee or other permissive occupant, not claiming title, cannot be adverse to the true owner, and therefore cannot by lapse of time be ripened into a right. *Luce* v. *Carley,* 24 Wend. 451, 35 Am. Dec. 637, and note. Such occupation gives no interest in the land. *Mumford* v. *Whitney,* 15 Wend. 380, 30 Am. Dec. 60; Vol. 13 Am. & Eng. Encl. of Law, p. 514.

It is strictly confined to the original parties; is purely a personal privilege and unless coupled with an interest is not assignable and can operate neither for nor against a third party. One may see fit to grant a privilege to "A," when not to "B." *Howes* v. *Ball,* 7 Barn. and Cress. 481; *Prince* v. *Case,* 10 Conn. 375, 27 Am. Dec. 675; *Emerson* v. *Fisk,* 6 Maine, 200, 19 Am. Dec. 206; *Hill* v. *Cutting,* 113 Mass. 107.

A license is a complete answer and defense to a claim of adverse possession set up by the licensee. *Morse* v. *Williams*, 62 Maine, 445; *Luce* v. *Carley*, 24 Wend. 451, 35 Am. Dec. 637; *Omaha Co.* v. *Tabor*, 13 Col. 41, 16 Am. St. Rep. 185.

The doctrine of the early cases which converted an executed license into an easement is now generally discarded as being "in the teeth of the statute of frauds." And referring to these decisions, Mr. Chitty says concisely, "however a court of equity might, under strong circumstances, interfere against such a party by injunction and decree a conveyance, it is clear that such a doctrine at law is not tenable." 1 Chit. Gen. Pr. 139.

The cases of *Ricker* v. *Kelley*, 1 Maine, 117, 10 Am. Dec. 38, and *Clement* v. *Durgin*, 5 Maine, 9, have now little following, and the case of *Rerick* v. *Kern*, 14 Serg. & Rawle, 267, 16 Am. Dec. 497, which was an action at law for damages in favor of the licensee, are followed in but few states. *Johnson* v. *Skillman*, 29 Minn. 95, 43 Am. Rep. 192.

A parol license to lay and use sewer pipe upon the land of another in the absence of agreement or consideration, may be revoked at the pleasure of the licensor, without notice to the licensee, although he has made expenditures; and a severance of the pipe between the lands of the licensor and the licensee is a revocation of such license. *Pitzman* v. *Boyce*, 111 Mo. 387, 33 Am. St. 536.

In a case where the licensee at considerable expense cut a drain in the licensor's land, by which the water of a spring flowed to his own land, and after enjoying it for some years, the licensor revoked the license and stopped it, the licensee was held to be without remedy. Cases cited in *Pitzman* v. *Boyce*, supra.

See also note to *Johnson* v. *Skillman*, supra; *Morse* v. *Copeland*, 2 Gray, 302, 305.

Parol agreement for the use of the water of a spring on the land of another is a mere license revocable at the pleasure of the person granting it or his heirs or assigns. *Cronkhite* v. *Cronkhite*, 94 N. Y. 323; *Taylor* v. *Gerrish*, 59 N. H. 569.

Counsel also cited: Am. & Eng. Encl. of Law, Vol. 13, 540; *Morse* v. *Williams*, 62 Maine, 445.

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

STROUT, J. In the summer or fall of 1877, Mr. Sayward, a former owner of the premises now owned by the plaintiff, built a dam upon land of the defendant, where there were springs of water, and laid under ground an iron pipe through defendant's land and the public street to his premises. The water from the spring was forced through the pipe by a hydraulic ram located at or near the dam, over which Sayward erected a structure, called the ram house. From that time until the pipe was cut by the defendant, in November, 1900, Sayward and his successors in title, including the plaintiff, received water for domestic use upon the premises now owned by the plaintiff. The plaintiff claimed an easement by prescription to take the water in this manner. This was denied by the defendant, who claimed that the dam, water-pipe and ram were placed there by Sayward by license of defendant, without consideration, to be used by Sayward until the defendant wanted to use the water for something else, and that Sayward never claimed the right to draw water from that spring any longer than defendant saw fit to give it to him. Sayward remained the owner or occupant of the premises supplied with water by this pipe until June 21, 1899. Defendant claimed the right to revoke the license. Under this claim, he cut the pipe and stopped the flow of water to plaintiff, and connected the pipe with his own premises, and received there the whole flow from the spring through the plant built and established by Sayward.

If we assume that the defendant's contention is correct, and that he had the right, at his pleasure, to revoke the license, and stop the flow of water to plaintiff's premises, what were the legal rights of the parties, in relation to the ram and pipe as affected by the act of the defendant? The license to Sayward to lay his pipe and draw water by the same implied an authority to him, in case the defendant revoked the license, to go upon the premises and remove the ram and pipe. A structure placed upon land of another to be used by the builder during the pleasure of the owner of the land, the ownership of the structure by the builder and his right to

remove it when the land owner revokes his license, is recognized and implied. The principle is the same if, as in this case, a part of the plant is under ground. Such plant does not become a part of the realty, as a fixture, unless after reasonable notice to remove it, it is suffered to remain; in which case it may be treated as abandoned by the owner.

Here the defendant, without notice to the plaintiff or request to remove, cut his pipe. While he had the right, upon defendant's contention, to stop the flow of water by any means not destructive to the pipe, he had no right to injure or destroy that. But he did more; he not only cut the plaintiff's pipe, and stopped his water, but he connected the pipe with his own premises, and drew water therefor through the plaintiff's pipe, by means of plaintiff's ram, thus appropriating to himself the plaintiff's plant, to the exclusion of the plaintiff.

When Sayward put down the pipe, he put a tee in it near defendant's premises, for the purpose of allowing defendant to take water therefrom if he chose. This he never did, until he cut the pipe. If he had connected with the pipe at the tee, and allowed the water also to go on to plaintiff, the plaintiff could not complain. But to cut off plaintiff's supply, and take the whole flow to himself, by the agency of plaintiff's pipe and ram, was an injury for which the defendant is responsible.

It is expressly conceded by the learned counsel for the defense, that if there is any liability of defendant, the damages are not excessive.

Motion overruled.

EDWIN C. SWIFT, and another, vs. JOHN H. WINCHESTER.

Penobscot. Opinion July 2, 1902.

Insolvency. Discharge. Foreign Creditor. Concealed Identity.

A discharge in insolvency is void as against non-resident creditors who have not made themselves voluntary and consenting parties to the proceeding, by proving their claims, accepting dividends, or otherwise.

The effect of a discharge in insolvency depends upon the authority of the court which granted it, and not upon the conduct of the parties.

The true ground upon which such a discharge is void as against non-resident creditors is that the insolvency court has no jurisdiction over them.

Though the debt in suit was contracted with the plaintiffs, while doing business in this state under a name and style which did not disclose their identity, nor their residence, and by which the defendant was led to believe that he was dealing with a resident concern, the defendant's discharge in insolvency is not a bar.

Agreed statement. Judgment for plaintiff. Assumpsit for beef and packing-house products sold and delivered between September, 1891, and October, 1892.

The plaintiffs were doing business in Bangor under the style of the Bangor Beef Co.

The facts are stated in the opinion.

B. C. Additon and D. W. Nason, for plaintiffs.

D. D. Stewart, for defendant.

The case at bar falls directly within the principles established by this court in *French* v. *Robinson,* 86 Maine, 142, 41 Am. St. Rep. 533, and has the support of every reason upon which those principles are based.

The plaintiffs were seeking some supposed advantage from their conduct and the concealment of their identity; "they should suffer any disadvantages as well."

All the facts were artfully concealed from the defendant. But the plaintiffs well knew that defendant, dealing with an undisclosed agent, had the right to treat him as the principal, and could main-

tain any suit against him for any defect in the goods sold, and could set off any debts he might have against such agent.

"One who acts as the agent of an undisclosed principal, may be treated as principal by the party with whom he deals." *Nolan* v. *Clark*, 91 Maine, 38; *Welch* v. *Goodwin*, 123 Mass. 71, 77, 25 Am. Rep. 24; *Osborn* v. *U. S. Bank*, 9 Wheat. 843.

Had the agent disclosed his principal and defendant thereupon refused to purchase the goods, the parties could then have made a binding agreement, that, if later made necessary by stress of proper circumstances, defendant might have the benefits of the insolvent laws of Maine. And by such an agreement plaintiffs would be "submitting himself and his claim" to the jurisdiction of the Maine court within the doctrine of *Pullen* v. *Hillman*, 84 Maine, 129, 130, 30 Am. St. Rep. 340.

Counsel also cited: *Woodbridge* v. *Allen*, 12 Met. 470, 473; *Blanchard* v. *Russell*, 13 Mass. 1, 8, 7 Am. Dec. 106; *May* v. *Breed*, 7 Cush. 15, 38, 54 Am. Dec. 700.

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

SAVAGE, J. The plaintiffs, who are non-residents, bring this action to recover the price of meats sold to the defendant in Bangor. In defense, the defendant sets up a discharge from his debts under the insolvent laws of this state.

It is a well settled and familiar rule of law, which needs only to be stated, that a discharge in insolvency is void as against non-resident creditors who have not made themselves voluntary and consenting parties to the proceeding, by proving their claims, accepting dividends, or otherwise. *Felch* v. *Bugbee*, 48 Maine, 9, 77 Am. Dec. 203; *Hills* v. *Carlton*, 74 Maine, 156; *Pullen* v. *Hillman*, 84 Maine, 129, 30 Am. St. Rep. 340; *Silverman* v. *Lessor*, 88 Maine, 599; *Baldwin* v. *Hale*, 1 Wall. 233. It is admitted that the plaintiffs in this case did not in any manner participate in the insolvency proceedings of the defendant.

But it appears that the plaintiffs at the time the meats in question

were sold were doing business in Bangor, under the name of the Bangor Beef Co.; that their general manager was a citizen of Bangor; that the sign upon the plaintiffs' store was "Bangor Beef Co.;" that all of the transactions of the plaintiffs were done solely under that name; and that their individual names nowhere appeared. It is admitted that until the commencement of this suit the defendant had no knowledge that the plaintiffs had any interest in, or connection with, the store of the "Bangor Beef Co.," or the property in it, but supposed that he was trading with an incorporated company.

Upon these facts the learned counsel for the defendant urges that the manner in which the plaintiffs conducted their business was fraudulent as to the defendant, that it was a suppression of the truth, and that thereby the defendant was falsely entrapped into trading with them. It is claimed that had the defendant known the truth he would or might have refused to trade with the plaintiffs, incurring debts which would not be barred by a discharge in insolvency, and that by means of the alleged fraudulent conduct of the plaintiffs he has been put into a false position and thereby injured. And it is argued that the plaintiffs, having thus induced the defendant to believe that he was trading with a citizen of the state, should be treated as such citizens are, and that their claim should be barred by his discharge in insolvency.

We do not, however, think the defendant's premises are sound in fact. The plaintiffs had a right to do business under the name of the Bangor Beef Co. if they chose to do so, and the case does not show that they in any manner transcended their legal rights. But were it otherwise, the result claimed by the learned counsel would not follow.

The effect of a decree of discharge in insolvency, in this respect, depends upon the authority of the court which granted it, and not upon the conduct of the parties. As was said by the court in *Pullen* v. *Hillman*, supra, the question "is one of jurisdiction." The cases in the supreme court of the United States seem to establish the doctrine that the true ground upon which such a discharge is void as against non-resident creditors is that the insolvency court has no jurisdiction over them. In *Gilman* v. *Lockwood*, 4 Wall. 409, it is

said: — "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because such laws have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction of the cause." In *Denny* v. *Bennett*, 128 U. S. 491, Miller, J., said: — "Whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to relieve him from the obligation of a contract which he owes to a resident of another state, who is not personally subject to the jurisdiction of the court." See also, *Hammond Beef and Provision Co.* v. *Best*, 91 Maine, 431, 42 L. R. A. 528; *Murphy* v. *Manning*, 134 Mass. 488; *Murray* v. *Roberts*, 150 Mass. 353, 15 Am. St. Rep. 209, 6 L. R. A. 346, and note; *Cook* v. *Moffat*, 5 Howard, 309. If a non-resident creditor voluntarily participates in the insolvency proceedings of his debtor, he subjects himself to the jurisdiction of the court and is bound by its decrees. But if he stands aloof, he remains independent of the jurisdiction of the court, and his right of action upon a contract with his debtor is not thereby impaired, no matter what his conduct may have been. These plaintiffs resided beyond the jurisdiction of the insolvency court which decreed a discharge to the defendant. There was no power in that court to reach them. It had no jurisdiction over them. Its decree could not deprive them of their right of action. Hence the discharge of the defendant in insolvency is not a defense to this action.

The case of *French* v. *Robinson*, 86 Maine, 142, 41 Am. St. Rep. 533, cited and relied upon by the defendant is not like the one at bar. There the non-resident owners of a note assigned it to a citizen of this state, for a nominal consideration, in order that he might sue upon it in his own name in this state. The assignee recovered judgment, and in a suit on that judgment, a plea of discharge in insolvency was interposed. The court held that the plaintiff was the legal owner of the judgment, while the original assignors were equitable owners only, and that because the legal owner was a resident of the state the discharge was a defense. It was declared that "the insolvency court deals with the legal owners of

demands ordinarily." The doctrine of the opinion in that case is not applicable in this one. There the legal creditor was a resident, here the creditors were non-residents. There the legal creditor was subject to the jurisdiction of the insolvency court, here the creditors were not. The defense fails. The amount of the debt sued has been fixed by the stipulation of the parties.

Judgment for plaintiffs for $197.24 and interest from the date of the writ.

CHARLES A. BRADFORD vs. ELIZABETH HAWKINS.

Waldo. Opinion July 2, 1902.

Fence Viewers. Election. Appointment. R. S., c. 22, § 6; c. 3, §§ 12, 13, 14, 25. Stat. 1897, c. 280.

Under the statutes of this state, as they existed in 1898, the selectmen of a town were not authorized to act as fence viewers.

The office of fence viewer, since the act of 1897, chap. 280, must either be filled by election at the annual town meeting, or by appointment by the selectmen.

Agreed statement. Judgment for defendant.

Special action on the case for double the cost of defendant's portion of a line fence.

The facts appear in the opinion.

Jos. Williamson, for plaintiff.

W. P. Thompson, for defendant.

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

WISWELL, C. J. This is an action brought under the provisions of R. S., c. 22, § 6, to recover double the cost of building the portion of a partition fence that was assigned by persons acting as fence

viewers to be built by the defendant. The selectmen of the town acted as fence viewers in the proceedings upon which this suit is based, and the question presented is, whether under the law as it existed at that time, during the year 1898, and the admitted facts, the selectmen of the town had authority to act in that capacity.

Revised Statutes, c. 3, § 12, provides for the election of various town officers, including two or more fence viewers, at the annual town meeting in March. Section 13, prior to the amendment later referred to, provided for the election of certain officers, not including fence viewers, by ballot, and for the election of "the other said officers by ballot or other method agreed upon by vote of the town." Section 25, contains this provision: "If a town neglects to choose fence viewers at its annual meeting or the persons chosen fail to qualify, the selectmen shall act in that capacity." By chap. 280, public laws of 1897, § 13, above referred to, was amended so as to read as follows: "Moderator, town clerk, selectmen, assessors, and overseers of the poor, treasurer, auditor, school committee, and town agent shall be elected by ballot, and the other said officers by ballot or to be appointed by the selectmen."

At the annual town meeting in the town of Knox, in March, 1898, there was no election of fence viewers by ballot, but three persons were chosen to that office by hand vote, such method not having first been agreed upon by vote of the town. These persons so chosen were sworn, and upon one occasion prior to the commencement of proceedings in this matter acted in that capacity.

On June 28, 1898, the complaint, which was the commencement of the proceedings relied upon by the plaintiff in this suit, was made to the selectmen as fence viewers, and on that day two of the three selectmen, although one of them was not sworn as a fence viewer until the next day, gave the notice required by statute and commenced to act as fence viewers in this matter. The other selectman took no part in the proceedings. On Aug. 10, 1898, two of the selectmen appointed as fence viewers the same persons that were informally chosen to that office at the March meeting. The proceedings upon which this action is based were not commenced until subsequent to that date.

The plaintiff's claim is, that because there was no election of fence viewers by ballot, no other method having been agreed upon by vote, there was no election at all, and that consequently in accordance with the provisions of § 25 already referred to, the selectmen were authorized to act in that capacity. Such was undoubtedly the plain provision of the statute in case of the neglect to elect such officers at the annual town meeting, or the failure upon their part to qualify. But the effect of chap. 280, public laws of 1897, was to make it mandatory upon the selectmen to appoint certain officers, including fence viewers, if they were not elected by ballot at the annual town meeting.

Prior to this amendment the selectmen had the power to make appointments for the purpose of filling vacancies caused by the failure of the town to elect at the annual town meeting any officer not required to be elected by ballot. R. S., c. 3, § 14. The only purpose of the act of 1897, was to make the duty of the selectmen to fill such vacancies by appointment. This act is inconsistent with and repugnant to the section which provides that in the event of a failure to elect fence viewers, the selectmen should act as such, and, in accordance with the well established rule, this later act must be held to have repealed by implication that section of the revised statutes. *Smith* v. *Sullivan*, 71 Maine, 150.

It follows that the selectmen would not be authorized to act as fence viewers in any event; that this office must either be filled by election at the annual town meeting or by appointment by the selectmen. This action consequently cannot be maintained. In accordance with the stipulation of the report, the entry will be,

Plaintiff nonsuit.

MIMA F. KIMBALL, by Pro Ami, vs. LILLIAN P. PAGE.

Penobscot. Announced April 8, 1902. Opinion July 15, 1902.

Pleading. Slander.

In a declaration for slander, the plaintiff alleged in the first count in the writ that "Mima stole the pin." In her testimony the plaintiff said the language was "Mima stole the buckle." A variance was claimed. *Held;* that in actions for slander, the law requires strict proof of the words as alleged; any material variance being fatal.

But in this writ there was a second count, which averred that defendant charged the plaintiff with the crime of larceny, in which the specific words spoken were not stated. *Held;* that a declaration in this form is good.

Under this count any language which charged larceny would sustain it. Whether the language was "Mima stole the pin" or "Mima stole the buckle," was immaterial, as in either form larceny was charged. As applied to this count, the instruction excepted to, that "it would be sufficient compliance if in this case the allegation was, Mima stole the pin, and the proof was, Mima stole; those two words being sufficient to impute to another the commission of this crime of larceny," is correct.

The verdict was general, and can be sustained upon the second count, and the defendant has not been harmed.

Motions and exceptions by defendant. Overruled.

Case for slander. The slander was in the words: "Mima stole the pin," "Mima must have stolen the pin." The second count charged the plaintiff "with the crime of larceny."

H. H. Patten, for plaintiff.

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

Counsel cited, on the exceptions: *Whiting* v. *Smith,* 13 Pick. 364, 371; *Cratty* v. *Morrisey,* 40 Ill. 477; *Payson* v. *Macomber,* 3 Allen, 69; *Chapin* v. *White,* 102 Mass. 139; *Sanford* v. *Gaddis,* 15 Ill. 229; *Walters* v. *Mace,* 2 B. & Ald. 756, 1 Chitty's Rep. 507, 18 E. C. L. 149; *Gardner* v. *Self,* 15 Mo. 480; *Bundy* v. *Hart,* 46 Mo. 460; 2 Am. Rep. 525; *Ratcliff* v. *Shubely,* Cro. Eliz. 224; Greenleaf on Evidence, 14th Ed. Vol. 2, § 414; *Estes* v. *Estes,* 75 Maine, 478, 481.

On the general motion: *Stacy* v. *Portland Pub. Co.*, 68 Maine, 279; *Gilmore* v. *Mathews*, 67 Maine, 517; *Estes* v. *Estes*, supra.

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

STROUT, J. A careful examination of the evidence fails to satisfy us that the verdict is clearly wrong. The testimony was contradictory. The jury saw the witnesses, and was in a better situation to determine the facts, than we can be from a printed report. The motion to set aside the verdict as against evidence cannot be sustained.

There is also a motion to set the verdict aside, upon the ground of newly-discovered evidence. This relates to alleged conversations between the plaintiff and defendant, after the trial, in which it is claimed that plaintiff said substantially that her testimony at the trial was untrue. The witnesses called upon this motion disagree as to important facts—one or more of them saying that plaintiff said at the interview with defendant that her testimony was true, others testifying to same conversation, state the contrary. The defendant says she did not send for plaintiff—a witness called by her, says she did. There is an air of suspicion attached to this testimony as to the interview between the defendant, a mature woman, and the plaintiff, an inexperienced girl. It seems improbable that plaintiff, after the trial and a verdict in her favor, would voluntarily tell the defendant that her testimony at the trial was untrue, in its material points. Strong evidence is required to satisfy the mind that such statements were made. Without fully reviewing this evidence, in view of its improbability, the difference of statement of the various witnesses, the condition, age, and relation of the parties, we are not impressed with the belief that this evidence, if offered on trial, would or ought to change the result. This motion cannot be sustained.

Upon the exceptions, the first count in the declaration charges the slander to be, "Mima stole the pin,"—"Mima must have stolen that pin." In her direct examination plaintiff stated that defendant's language was, "Mima stole the pin." On cross-examination, she said the language was, "Mima stole the buckle." Other witnesses for plaintiff say the language was, "Mima stole the pin." Defend-

ant claimed a variance between the allegation and proof. The presiding justice instructed the jury that "the allegation must equal or exceed the proof",—"the words must be the same, but they need not be all the words that are alleged." "It would be sufficient compliance if in this case the allegation was, Mima stole the pin, and the proof was, Mima stole: those two words only being sufficient to impute to another the commission of this crime of larceny; that would be sufficient even if the further qualifying words were not used." To this ruling exception is taken.

It is the general rule in actions for slander, where the words spoken are set out in the declaration, that they must be proved strictly as alleged. In the early cases in this country and in England, the slightest variation in the words proved from those alleged, was held to be fatal. But this rule has been somewhat modified, and it is now held that "material words, those which are essential to the charge made, must be proved as alleged, and cannot be supplied by equivalent words, as words in one language by a translation into another. But in relation to unimportant, connecting or descriptive words, some latitude is allowed." "But even now the form of expression cannot be varied so far as to substitute the second person for the third, as you for he, or the reverse. *Whiting* v. *Smith*, 13 Pick. 364. In *Chapin* v. *White*, 102 Mass. 139, it is said that "if the pleader adds any allegation which narrows and limits that which is essential, it becomes descriptive, and must be proved as alleged. It identifies the slander." In this count, the charge is that of stealing a pin. That charge was not sustained by proof of a charge of stealing any other article. Defendant could not justify by proving the larceny of anything else. Although the charge of stealing would imply a criminal offense, it is not the identical offense which this count alleges that was charged by the defendant. The instruction that it was sufficient to prove that defendant said the plaintiff stole, was erroneous, as applied to the first count. *Estes* v. *Estes*, 75 Maine, 478.

But the second count alleges that defendant charged the plaintiff "with the crime of larceny," without setting forth the language of

the slander. This general declaration for slander charging a crime, is good. If the defendant desired, under it, she could call for a specification of the language, but this was not done. This form of declaring was sustained before the separation of Maine from Massachusetts in *Nye* v. *Otis*, 8 Mass. 122, and has been upheld by this court in *True* v. *Plumley*, 36 Maine, 466; *Burbank* v. *Horn*, 39 Maine, 233; *Small* v. *Clewley*, 60 Maine, 262.

Under this count evidence that defendant charged plaintiff with the theft of a buckle, or of a pin, would be sufficient to sustain the averment. As applied to this count, the instruction that it was sufficient to prove that defendant said Mima stole, is unobjectionable. Stealing is larceny. To charge that plaintiff stole, is to make a charge of larceny, and it is immaterial what article was charged to have been stolen. The slander could be justified by proof of the stealing of anything.

The verdict was general, and can be sustained upon the second count. Applied to that, the instruction was correct, and the defendant has not been harmed.

Motions and exceptions overruled.

DANIEL COTE *vs.* CITY OF BIDDEFORD.

York. Opinion July 15, 1902.

Office—Abandonment of. City Marshal. Removal. Biddeford Police Board. New Trial. Spec. Laws 1893, c. 625.

A verdict in plaintiff's favor for the salary of an office, in the absence of contractual relation, cannot be upheld, when, from the circumstances and plaintiff's conduct, it appears that he had abandoned and relinquished the office and its emoluments, to the extent of acquiescing in his removal and failing, for years, to make any pretense to be longer its incumbent or entitled to the salary, although not admitting the legality of his removal.

Nearly seven years after his attempted removal from the office of city marshal of Biddeford, by the police board of that city, and nearly a year after the filing of his voluntary petition in bankruptcy, in which he made no mention of any claim against the city,—the plaintiff, claiming that the action of the board to remove him was ineffectual, brought suit to recover the salary for the period subsequent to filing the petition.

The following facts appeared:

From the time that notice was given to plaintiff of his removal, he never performed, nor attempted to perform any duties of the office.

He engaged in other occupations during all the years intervening between the attempted removal and the commencement of suit.

He never made any claim or demand for compensation, thus allowing the earlier part of his claim to be barred by the statute of limitations.

He made no objection or protest to a performance of the duties of the office or the drawing of the salary by the person appointed as his successor.

He never commenced legal proceedings of any kind, except this suit, to either test the title to the office or the action of the board.

Held; that it was the duty of plaintiff to seek to be reinstated in his office by formal demand, and, if necessary, by appropriate legal proceedings; and, not having done so, under the circumstances, he cannot maintain an action for the salary.

See *Andrews* v. *Biddeford*, 94 Maine, 68.

Motion by defendant. New trial granted.

Assumpsit for the salary of the office of city marshal of Biddeford, from January 24, 1899, the day after plaintiff filed a voluntary petition in bankruptcy, to the date of the writ, being 422 days at $2 per day.

The plea was the general issue with the following brief statement:

"If the plaintiff ever had a valid cause of action as he alleges, it has long since been lost by his abandonment of the office upon which his alleged claim is founded."

The facts appear in the opinion.

Enoch Foster; G. F. and Leroy Haley; R. B. Seidel, for plaintiff.

Among other things counsel argued: "When a question of fact is expressly submitted to a jury on conflicting evidence, their verdict, in the absence of prejudice shown, will not be set aside, if it is founded on evidence in its support, though the preponderance is against it." *Gregor* v. *Cady,* 82 Maine, 131.

N. and H. B. Cleaves, and C. S. Perry; Frank W. Hovey, city solicitor; *B. F. Cleaves, H. T. Waterhouse and G. L. Emery,* for defendant.

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

WISWELL, C. J. On March 27, 1893, the plaintiff was duly elected city marshal of the city of Biddeford for the municipal years of 1893 and 1894, by the city council of that city, and upon the same day he qualified by taking the oath of office. On the next day an act of the legislature providing for the establishment of a board of police of the city of Biddeford, chap. 625, special laws of 1893, went into effect. This police board was given authority by the act, "to appoint, establish and organize the police force of said city, including the marshal and deputy marshal, and to remove the same for cause and make all the needful rules and regulations for its government, control and efficiency." It was provided by the act that the members of the police force in office when the members of the board of police were first appointed, should continue to hold their offices until removed by the board.

This police board organized just prior to July 1, 1893, and upon that day entered upon the performance of the duties for which it was established. One of its first acts was to attempt to remove the

plaintiff from the office of city marshal and to elect one Charles B. Harmon as his successor in that office without making any charges against the plaintiff, or assigning any cause for his removal or giving him any notice of their proposed action. Two days later, on July 3, the board gave notice to the plaintiff of his removal and of the election of his successor.

Nearly seven years later, on March 22, 1900, the plaintiff, claiming that the action of the police board in attempting to remove him from office was ineffectual, and that he had continued to hold the office of city marshal from the time of his election in 1893 up to the date of his writ in 1900, commenced this action to recover the salary of the office from January 24, 1899, to the date of his writ. The reason why the account sued did not commence back of the date named, being undoubtedly, that on January 23, 1899, the plaintiff filed his voluntary petition in bankruptcy. At nisi prius the trial resulted in a verdict for the plaintiff for the amount claimed, and the case comes here upon the defendant's motion for a new trial.

It is undoubtedly true that the action of the police board in attempting to remove the plaintiff and to elect a successor in the office was unauthorized and void. The plaintiff had been elected to the office just prior to the time when the act creating the board of police went into effect and he could only be removed for cause. *Andrews* v. *Police Board of Biddeford*, 94 Maine, 68. But it does not by any means follow, from the fact that the plaintiff was city marshal in 1893, and that the attempt to remove him from that office on July 1, of that year, was ineffectual, that he continued to hold the office for the period embraced in his account sued, and during all the intervening years.

In fact, notwithstanding the verdict of the jury in his favor, we are entirely satisfied from all of the circumstances of the case, and especially from the plaintiff's conduct for years prior to the commencement of the account sued, that long before that time he had voluntarily relinquished and abandoned the office and all claims to its emoluments; that although he did not admit the legality of his removal or the power of the board to make a removal in that way, he for years before the commencement of the account sued had

acquiesced in the result of the action of the police board, and had made no pretense to be longer an incumbent of the office or entitled to the salary attached thereto.

It would not be profitable to here make an analysis of the testimony or to refer at any considerable length to the facts which force us to this conclusion. It is sufficient to refer to the following as some of the salient features of the case. From the time that notice was given to the plaintiff of his removal from office, he never performed nor attempted to perform any of the duties of the office. He engaged in other occupations during all of the years that intervened between the attempted removal and the commencement of this suit. He never made any claim or demand for compensation, thus allowing the earlier part of his claim therefor to be barred by the statute of limitations. He made no objection or protest to a performance of the duties of office by the person appointed as his successor nor to his regularly drawing the salary attached to the office. When, on January 23, 1899, he filed his petition in bankruptcy, he did not include in the schedule of his assets any indebtedness due him from the city of Biddeford, although, if the position now taken by him is true, the city at that time was indebted to him for salary to an amount of over $3000, too large a sum to be inadvertently omitted; the attempted explanation of this omission is unsatisfactory.

But stronger than all of these circumstances is the fact, we think, that from July, 1893, until the commencement of this action on March 23, 1900, he never commenced any legal proceedings of any kind to test the title to his office or the legality of the action of the police board. It is true that at first he thought of commencing proceedings for the purpose of ascertaining his rights and employed counsel with this purpose in view, but such proceedings were never commenced, and within a comparatively short time all idea of commencing them was abandoned.

A portion of the language of the opinion of the court in the case of *Phillips* v. *Boston*, 150 Mass. 491, very similar to this, is so applicable that we quote therefrom: "If, having it in his power to reinstate himself, or be reinstated by proper proceedings, in an office from which he has been wrongfully but actually removed,

and he makes no effort to that end, but submits for a long term of years to the removal, the inference is inevitable that he waives his right thereto during that period." Again: "If his removal was unlawful, it was in his power to bring up the proceedings of the board by petition for certiorari, by which its action could have been quashed and the petitioner afterwards restored by a mandamus to his public office. It was his duty to initiate this promptly, and not to wait, and seek, after ten years of apparent acquiesence, to maintain that during all this time he was of right entitled to a public office in which he made no effort to be reinstated, and the duties of which he did not attempt to perform. It was especially the duty of the plaintiff to seek to be reinstated in his office by formal demand, and, if necessary, by appropriate legal proceedings, in view of the peculiar relation in which he stood to the defendant, of which he now seeks to avail himself." The court going on to explain that the plaintiff, as the plaintiff in this case, had no contractual relation with the defendant city, but was a state officer appointed to preserve its peace and to execute its laws as well as the ordinances of the city.

It is impossible for us to believe that this plaintiff, who for nearly seven years remained in apparent acquiesence with the result of the action of the police board, who saw another perform the duties of the office and regularly draw its salary, without objection or protest on his part, who made no demand during all of this time for the salary attached to his office of $2 per day, until the earlier portion of it even became barred by the statute of limitations, who omitted an indebtedness of over $3000, if his position is true, from his bankruptcy schedule, and who never commenced legal proceedings of any kind during all of these years, claimed during all of this period to be an incumbent of the office and to be entitled to its emoluments. Upon the other hand, we are forced to the conclusion that the position now taken by him is the result of an afterthought, attributable, perhaps, to the announcement, on February 17, 1900, one month about before the commencement of this suit, of the decision in the case of *Andrews* v. *Police Board of Bidde-*

ford, supra, where a similar action of that police board was held by this court to have been illegal.

In coming to this conclusion we do not forget the fact that the case has already been submitted to a jury and that the trial resulted in a verdict in the plaintiff's favor; nor do we fail to give the plaintiff the full benefit of that verdict in the consideration of the question as to whether or not a new trial should be granted. But the conclusion reached by us seems so inevitable and irresistible that we are satisfied that the verdict was wrong and should be set aside.

Motion sustained. New trial granted.

STATE OF MAINE *vs.* MAURICE J. QUINN.

Franklin. Opinion July 15, 1902.

Trial Justice,—Residence of. Criminal Appeal. R. S., c. 83, § 1; c. 132, § 15. Stat. 1860, c. 164.

The appointment of a resident of one county to act as a trial justice for another county is authorized by the statute of this state.

The defendant was adjudged guilty upon a liquor search and seizure warrant on March 11, 1901, by a magistrate in Franklin county, before whom he was arraigned, and thereupon he took an appeal to the September term of the supreme judicial court for that county; but the next term of that court and the one to which he should have taken his appeal, as required by R. S., c. 132, § 15, was the June term.

Held; that it was the duty of the defendant, if he desired to appeal from the judgment of the magistrate, to appeal to the proper court and the proper term of court; and having failed to do so, his attempted appeal was a nullity, and the judgment of the magistrate below stands against him unreversed and unaffected by his ineffectual attempt to appeal therefrom.

Agreed statement. Judgment for the state.

Appeal to this court below from a judgment of guilty rendered by a trial justice, on a search and seizure complaint and warrant, in March, 1901.

Before proceeding to trial respondent seasonably filed a motion to dismiss.

The justice who issued the warrant and heard the case was R. C. Boothby, then and ever since a resident of East Livermore, in the county of Androscoggin. He was appointed and commissioned a trial justice for the county of Franklin in August, 1894, for the term of seven years.

A municipal court for the town of East Livermore was established by act of the legislature made and passed March 10, 1899, and said R. C. Boothby was thereafter duly appointed and commissioned judge of said court, and at time of issuing the warrant in this case was the duly qualified judge of said municipal court.

H. S. Wing, county attorney, for state.

E. O. Greenleaf and B. Emery Pratt, for defendant.

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

WISWELL, C. J. The defendant was arrested upon a liquor search and seizure warrant. When taken before the magistrate for arraignment and trial he pleaded not guilty and waived an examination. Thereupon he was adjudged guilty and took an appeal therefrom to the September term of the supreme judicial court for Franklin county.

In the appellate court he claimed that the court should not take cognizance of his appeal or of the offense charged against him, but that he should be discharged for the reasons stated below. The case comes to the law court upon an agreed statement of facts, in which it is stipulated that this court shall render such decision as the case requires.

The first objection made by the defendant is, that the original complaint was made to and the warrant issued by a resident of Androscoggin county, who was acting as a trial justice for Franklin county, and that the appointment of a resident of one county to act as trial justice within and for another county was void; that consequently the person acting as trial justice in this case had no authority to receive the complaint, or to issue the warrant or to act as a trial justice for Franklin county.

A trial justice is a creature of statute. The office was first created in this state by the legislature of 1860, chap. 164, public laws of 1860. There was nothing in that act which required that trial justices should be residents of the county for which they were appointed. In fact, the language of the statute, we think, clearly shows that no such qualification was intended. It provided for the appointment of suitable persons "to be trial justices in the county for which they are respectively appointed." There has been no subsequent change of the statute in that respect. Revised Statutes, c. 83, § 1, is as follows: "Trial justices shall be appointed and commissioned by the governor, with the advice and consent of council, to act within the county for which they are appointed, and shall hold their offices for seven years from the date of their commissions." So that the appointment of a resident of Androscoggin county to act as a trial justice for Franklin county was authorized by the statute.

The defendant was adjudged guilty by the magistrate on March 11, 1901. He took an appeal therefrom to the September term of the supreme judicial court in Franklin county, but the next term of the supreme judicial court in Franklin county was the June term, and the statute, R. S., c. 132, § 15, requires any person aggrieved at the sentence of a magistrate, if he desires to appeal therefrom, to appeal to the next term of the supreme judicial or superior court in the same county. The June term of the court in Franklin county was one to which a criminal appeal may by statute be taken. *Welch* v. *Sheriff of Franklin county*, 95 Maine, 451.

The defendant claims that on account of this irregularity the appeal is void, and he should be discharged. The appeal is undoubtedly void. It is not properly before the appellate court. But it was the duty of the defendant, if he desired to appeal from the judgment of the magistrate, to appeal to the proper court, and the proper term of court, and having failed to do so his attempted appeal was a nullity, and the judgment of the magistrate in the original proceeding stands against him unreversed and unaffected by his ineffectual attempt to appeal therefrom.

Appeal dismissed.

ARTHUR S. LITTLEFIELD *vs.* H. MARCELLUS PRINCE.

Knox. Opinion July 15, 1902.

Deed. Record. Tax-Sale. Non-Resident Owner. R. S., c. 73, § 8. Stat. 1895. c. 70, § 5.

In a real action, the defendant relied upon a sale of the premises for the non-payment of taxes assessed thereon; and the plaintiff upon a conveyance from the former owners, non-residents against whom the tax was assessed.

The sale for non-payment of taxes was made on the first Monday of Dec. 1896. The collector's deed was not received for record until Oct. 22, 1900. The plaintiff obtained his deed and had it recorded nearly a month prior to the time that the defendant's deed was recorded.

It appearing that the defendant's deed was not recorded within thirteen months after the day of sale, (R. S., c. 73, § 8) and the plaintiff having no knowledge of the prior sale of the property for non-payment of taxes, or the unrecorded deed to the defendant, *held;* that the plaintiff has the better title and is entitled to judgment.

On report. Judgment for plaintiff.

Writ of entry for the recovery of a parcel of land on Chestnut street in Camden.

The plea was the general issue. The case is stated in the opinion.

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

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

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

WISWELL, C. J. Real action. The defendant relies upon a sale for the non-payment of taxes; the plaintiff upon a conveyance from the former owners, against whom the tax was assessed.

The plaintiff in argument attacks the sufficiency of every step in the proceedings relied upon by the defendant to make out his title, from the assessment of the tax to the time of recording the collec-

tor's deed. Of the many objections raised to the defendant's title, it is necessary to consider only one sufficient objection.

The sale for non-payment of taxes was made upon the first Monday in December, 1896. The real estate was taxed and sold as the property of a non-resident owner. The collector's deed was not received for record in the proper registry of deeds until Oct. 22, 1900. The conveyance from the former owners, against whom the tax was assessed, to the plaintiff, was made August 24, 1900, and was recorded Sept. 24, 1900.

The general provision of the statute in relation to the record of deeds, is: "No conveyance of an estate in fee simple, fee tail, or for life, or lease for more than seven years, is effectual against any person, except the grantor, his heirs, and devisees and persons having actual notice thereof, unless the deed is recorded as herein provided." R. S., c. 73, § 8. But in the case of a sale of real estate of a non-resident owner for the non-payment of taxes it is provided by statute: "If the deed of land of a non-resident owner is recorded within thirteen months after the day of sale, no intervening attachment or conveyance shall affect the title." Chapter 70, § 5, public laws of 1895.

In this case, the tax collector's deed was not recorded within thirteen months after the day of sale. Long after the expiration of that period of thirteen months, the plaintiff obtained his deed and had it recorded nearly a month prior to the time that the defendant's deed was recorded. The case does not disclose that the plaintiff had any knowledge of the prior sale of the property for non-payment of taxes, or of the unrecorded deed to the defendant. His title is consequently the better, and he is entitled to judgment.

Judgment for plaintiff.

CITY OF PORTLAND *vs.* CITY OF AUBURN.

Cumberland. Opinion July 15, 1902.

Pauper. Settlement—Loss of. Residence without the State. R. S., c. 24, § 3. Stat. 1893, c. 269.

Since the statute of 1893, c. 269, amendatory of R. S., c. 24, § 3, a pauper, who had derived a settlement in Auburn, through her husband, loses her settlement there, when her husband has lived five consecutive years beyond the limits of the state, without receiving pauper supplies from any source within the state.

It makes no difference that this residence of the husband beyond the limits of the state commenced before the enactment of the statute of 1893.

The validity of the statute and the power of the legislature to change the statutory provisions, in relation to pauper settlements and the liability of towns for the relief of paupers, are beyond question.

Agreed statement. Judgment for defendant.

Action of assumpsit for pauper supplies.

The case is stated in the opinion.

C. A. Strout, city solicitor, for plaintiff.

N. W. Harris, city solicitor, for defendant.

SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, POWERS, SPEAR, JJ.

WISWELL, C. J. Action of assumpsit to recover for supplies furnished a pauper. The case comes to the law court upon an agreed statement, from which the following facts appear: The pauper is a married woman, the wife of one Charles F. Emerson, having been married to him during the year 1889; at the time of such marriage Emerson had his pauper settlement in the defendant city; they lived together in that city for about one year after their marriage; at the expiration of that time Emerson abandoned his wife, left the state of Maine, and has since lived beyond the limits of the state, without receiving pauper supplies from any source within the state. The pauper, after her abandonment by her husband, continued to reside in the defendant city until the year 1896,

when she moved to the plaintiff city, and on Jan. 12, 1900, fell into distress in that city, and commenced to receive the pauper supplies sued for in this action.

The only question raised by the parties is, whether, under the statutes of this state, the pauper continued to have her settlement in the defendant city up to the time that she fell into distress and received the pauper supplies sued for. By chap. 269, public laws of 1893, the following provision was added to § 3 of c. 24 of the revised statutes: "And whenever a person having a pauper settlement in any town in this state shall hereafter live for five consecutive years beyond the limits of this state without receiving pauper supplies from any source within this state, he and those who derive their settlement from him lose their settlement in such town."

This amendment is exactly applicable to the admitted facts of this case. The pauper, by her marriage to Emerson in 1889, acquired the settlement of her husband; that settlement was then in Auburn. But the husband, for more than five consecutive years after the amendment of 1893 went into effect, and before this cause of action accrued, lived beyond the limits of this state without receiving pauper supplies from any source within the state. Thereby, in accordance with the express provision of this amendment, "he and those who derive their settlement from him" lost their settlement in the defendant city. The pauper was one who derived her settlement in Auburn from her husband, and she lost her settlement there when her husband had lived for five consecutive years, after the act of 1893 went into effect, beyond the limits of this state.

It matters not that the pauper's husband moved out of the state several years before the time that this amendment went into effect provided that after that time he continued to live out of the state the necessary length of time, without receiving pauper supplies from any source within the state.

Of the validity of the act and the power of the legislature to change the statutory provisions in relation to pauper settlements and the liability of towns for the relief of paupers, there is no question.

The entry will therefore be,

Judgment for defendant.

JAMES A. PARSONS

vs.

LEWISTON, BRUNSWICK AND BATH STREET RAILWAY.

Androscoggin. Opinion July 15, 1902.

New Trial. Newly-Discovered Evidence. Cumulative Evidence. Discretion of Court. R. S., c. 89, § 4.

In granting a new trial upon motion based on newly-discovered evidence, the true doctrine is, that the newly-discovered testimony must be of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused.

It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict; there must be a probability that the verdict would be different upon a new trial. But it is not necessary that the additional testimony should be such as to require a different verdict.

If it were true that such new evidence must be of such a character as to require a different verdict upon a new trial, as stated in *Linscott* v. *Orient Ins. Co.*, 88 Maine, 497, and *State* v. *Stain*, 82 Maine, 472, then it would follow as a logical sequence that none but a different verdict would be allowed by the court to stand.

The rule stated in those two cases is too strict. It would deprive a party of the privilege of having his evidence passed upon by a jury, whose peculiar province it is to decide controverted issues of fact, even in cases where the court is of opinion that the new evidence would probably change the result, or that injustice would be likely to be done if a new trial was not granted.

It is not an absolute and unqualified rule that a new trial will not be granted under any circumstances upon newly-discovered cumulative evidence.

When the newly-discovered evidence is additional to some already in the case in support of the same proposition, the probability that such new evidence would change the result is generally very much lessened, so that much more evidence, or evidence of much more value, will generally be required when such evidence is cumulative; but if such newly-discovered testimony, although merely cumulative, is of such a character as to make

it seem probable to the court that, notwithstanding the same question has already been passed upon by the jury, a different result would be reached upon another trial with the new evidence, then such new trial should be granted.

The provisions of the statute, R. S., c. 89, § 4, applicable to petitions for review, that "newly-discovered cumulative evidence is admissible and shall have the same effect as other newly-discovered evidence" should have some effect upon the value of such testimony upon motions for a new trial; otherwise, a party who had lost a verdict would have greater rights upon a petition for review after judgment than upon a motion for a new trial before.

While it is important to have general rules in regard to granting new trials upon this ground, which may be known to the profession and by which the court will be governed so far as practicable, each case differs so materially from every other, that the decision of the question as to whether or not a new trial should be granted in any particular case must necessarily depend to a very large extent, but of course within the limits of such general rules, upon the sound discretion of the court, which will always be actuated by a desire, upon the one hand, to put an end to litigation when the parties have fairly had their day in court, and, upon the other hand, to prevent the likelihood of any injustice being done.

Linscott v. *Orient Ins. Co.*, 88 Maine, 497; and *State* v. *Stain*, 82 Maine, 472, criticised.

Motions by plaintiff. New trial granted.

Case for personal injuries to plaintiff, whose horse became frightened at defendant's rotary snow plow.

There was a general motion for a new trial which was not urged in argument; also a motion on the ground of newly-discovered evidence.

The facts are stated in the opinion.

E. M. Briggs, for plaintiff.

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

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

WISWELL, C. J. While the plaintiff was driving a horse attached to a long covered vehicle on runners across the bridge between the cities of Lewiston and Auburn, in the direction of Auburn, he met the defendant's rotary snow-plow coming towards him from Auburn; his horse became frightened at the appearance of the snow-plow and

the noise caused by it to such an extent as to become unmanageable; finally, the horse bolted towards one side of the bridge, and, after striking that side, started diagonally across the bridge to the other side, the plaintiff in the meantime was thrown out, dragged some distance and sustained severe injuries.

The plaintiff, claiming that the accident was attributable to the negligence of the defendant's employees in the management of the snow-plow, brought this suit to recover the damages sustained by him. The trial resulted in a verdict for the defendant and the plaintiff brings the case here upon two motions for a new trial, one, because the verdict was against the weight of the evidence, the other upon the ground of newly-discovered evidence. The plaintiff's counsel admits in argument that the jury was authorized in finding a verdict for the defendant upon the evidence introduced at the trial, so that it only becomes necessary to consider the second motion and the newly-discovered testimony presented under it, in connection with the case as submitted to the jury.

The contention of the plaintiff at the trial was that his horse showed signs of fright when about one hundred feet distant from the snow-plow as the two were slowly approaching each other; that the fact that his horse was greatly frightened and was becoming unmanageable was so apparent that it should have been seen, and in fact was seen, by the motor-man a sufficient length of time before the horse bolted, for him to have stopped his plow and allow the plaintiff to drive past; that by doing so the accident would have been avoided, but that he failed to stop the snow-plow and that this failure was the proximate cause of the accident resulting in the injury to the plaintiff. The defendant's answer to this proposition is, and was at the trial, that the motor-man did stop his plow as soon as the horse showed any signs of fright. Defendant's counsel in their brief say, "coincident in point of time with the first appearance of real fright on the part of the horse, the motor-man shut off the current, applied the brake, and stopped the plow."

Upon this issue, the plaintiff testified that the snow-plow did not stop until after the accident, and one witness called by him, whose means of observation on account of his distance from the scene of

the accident were not particularly good, to some extent substantiated the plaintiff, stating it as his impression that the snow-plow did not stop. Upon the other hand, four witnesses called by the defense, all of whom were on the snow-plow at the time, and in the employ of the defendant corporation, and three of whom were still in its employ at the time of the trial, all testified in substance that the motor-man stopped his plow as soon as the horse appeared to be frightened. A jury certainly would be authorized to find that it was negligence upon the part of those managing the rotary snow-plow, such as this one was described and shown by the photographs to be, to continue its movement along the track, in such a situation as this, when an approaching horse displayed signs of great fright and of becoming unmanageable. But, upon the other hand, the jury was authorized to find from the testimony in the case that the motor-man seasonably stopped his plow, and did all that he could do to prevent the accident. So that the important issue of fact at the trial was, as to whether or not the plow was seasonably stopped, in view of the situation.

Since the trial the plaintiff has discovered three additional witnesses who saw the accident and who will testify, with varying degrees of positiveness, that the snow-plow did not stop until after the accident. These witnesses are entirely disinterested, they had no acquaintance with the plaintiff, their opportunities for seeing what happened were good. The testimony of these three witnesses is newly-discovered within the well established rule in this state, its discovery subsequent to the trial was accidental; and the failure of the plaintiff or his counsel to be earlier aware of its existence cannot be attributed to any negligence upon their part, because diligence upon their part would not have been likely to have put them in possession of it.

The question then is, whether the court, in the exercise of its sound discretion, but within the rules which have been adopted relative to granting new trials upon this ground, should grant a new trial in this case. But first, inasmuch as there may be some confusion as to what the true doctrine is governing the court in the exercise of its discretion in cases of this kind, growing out of the language

used in two decisions of this court, it may be well to carefully state it.

The true doctrine is, that before the court will grant a new trial upon this ground, the newly-discovered testimony must be of such character, weight and value, considered in connection with the evidence already in the case, that it seems to the court probable that on a new trial, with the additional evidence, the result would be changed; or it must be made to appear to the court that injustice is likely to be done if the new trial is refused. It is not sufficient that there may be a possibility or chance of a different result, or that a jury might be induced to give a different verdict; there must be a probability that the verdict would be different upon a new trial. But it is not necessary that the additional testimony should be such as to *require* a different verdict.

The correct doctrine has been so repeatedly stated by this court, that we quote the language used in numerous earlier decisions relative to the character of the newly-discovered evidence necessary and sufficient to justify the court in granting a new trial upon this ground. "A new trial to permit newly-discovered testimony to be introduced should only be granted . . . . when there is reason to believe that the verdict would have been different if it had been before the jury." *Handly* v. *Call*, 30 Maine, 10. "Unless the court should think it probable the new evidence would alter the verdict." *Snowman* v. *Wardwell*, 32 Maine, 275. "A review will never be granted to let in additional testimony, when such testimony would not be likely to change the result." *Todd* v. *Chipman*, 62 Maine, 189. "Nor unless there be reason to believe that it would change the result." *Trask* v. *Unity*, 74 Maine, 208. In *Linscott* v. *Orient Insurance Co.*, 88 Maine, 497, 51 Am. St. Rep. 435, the court stated the rule, citing various earlier cases, in these words: "It has long been the settled doctrine of this court that a new trial will not be granted on the ground of newly-discovered evidence, unless it seems to the court probable that it might alter the verdict." In *Stackpole* v. *Perkins*, 85 Maine, 298, nothing is said in the opinion in regard to the new evidence being of such a character as to require a different verdict. The court does say in that case:

"If believed (the newly-discovered witness) his testimony must substantially destroy the evidence of a witness at the trial, whose testimony may have been considered of controlling weight." A new trial was granted in this case, although the effect of the newly-discovered testimony was stated by the court to depend upon the weight given to it by the jury.

It is true that in *Linscott* v. *Orient Insurance Company*, supra, where the correct doctrine of this state was very distinctly stated as above quoted, and in accordance with the previous authorities, the court, at the conclusion of the opinion said that the question was, "whether the legitimate effect of such evidence would *require* a different verdict." The case of *State* v. *Stain*, 82 Maine, 472, was cited in support of this doctrine. But we do not find the rule so stated in any case, other than in these two, in this state. If it were true that such new evidence must be of such a character as to *require* a different verdict upon a new trial, then it would follow as a logical sequence that none but a different verdict would be allowed by the court to stand. The rule thus stated in these two cases is too strict, it would deprive a party of the privilege of having his new evidence passed upon by a jury, whose peculiar province it is to decide controverted issues of fact, even in cases where the court is of opinion that the new evidence would probably change the result, or that injustice would be likely to be done if a new trial was not granted.

In this case we can not say that the new evidence, in connection with the former evidence, would require a different verdict. After this evidence is submitted it then becomes a question for the jury to pass upon. But it does seem probable to the court that the verdict will be different when the case is submitted anew with the additional evidence.

It is true that this evidence is cumulative, but it is not an absolute and unqualified rule that a new trial will not be granted under any circumstances upon newly-discovered cumulative testimony. *Snowman* v. *Wardwell*, 32 Maine, 275. When the newly-discovered evidence is additional to some already in the case in support of the same proposition, the probability that such new evidence would change the result is generally very much lessened, so that much more evi-

dence, or evidence of much more value, will generally be required when such evidence is cumulative; but if the newly-discovered testimony, although merely cumulative, is of such a character as to make it seem probable to the court that, notwithstanding the same question has already been passed upon by the jury, a different result would be reached upon another trial with the new evidence, then such new trial should be granted.

The provision of the statute, R. S., c. 89, § 4, applicable to petitions for review, that "newly-discovered cumulative evidence is admissible and shall have the same effect as other newly-discovered evidence," should have some effect upon the value of such testimony upon a motion for a new trial; otherwise, a party who had lost a verdict would have greater rights upon a petition for review after judgment than upon a motion for new trial before.

And after all, while it is important to have general rules in regard to the granting of new trials upon this ground, which may be known to the profession, and by which the court will be governed so far as practicable, each case differs so materially from every other, that the decision of the question as to whether or not a new trial should be granted in any particular case must necessarily depend, to a very large extent, but of course within the limits of such general rules, upon the sound discretion of the court, which will always be actuated by a desire, upon the one hand, to put an end to litigation when the parties have fairly had their day in court, and, upon the other, to prevent the likelihood of any injustice being done.

In the exercise of this discretion, and within the rules as above laid down, the court is of the opinion that this plaintiff should have the opportunity to again submit his case, with the additional testimony, to the determination of a jury.

New trial granted.

PHILIP S. LADD *vs.* AUGUSTA SAVINGS BANK.

Kennebec. Opinion July 15, 1902.

Savings Bank. By-Laws. Lost Book. Impostor. Payment by Check. Forged Order. Evidence. Contracts.

If a comparison by the officers of a savings bank of the signature of the person falsely presenting a deposit book with the genuine one of the depositor on file would be sufficient to prevent fraudulent imposition, then payment to an impostor without such comparison, and without requiring any proof of the identity of the person demanding payment, other than the possession of the bank-book, is no defense to an action by a depositor against the bank to recover his deposit.

A by-law governing the relations of a savings bank with its depositors which states as the reason for its existence that "the officers of the institution may be unable to identify every depositor, transacting business at the bank," is not applicable to cases where the officers would be able to protect the interests of the depositor with the exercise of reasonable diligence.

The adoption of rules, regulations and conditions which affect the contractual relations between a savings bank and its depositors may be shown by their long use, with the knowledge and approval of the trustees, as well as by record of a formal vote.

The signature of a depositor thereto, is not the only way to show his agreement to be bound by the rules and regulations of a savings bank. The agreement may be evidenced by his conduct.

The negligence of a depositor in a savings bank in losing his book does not excuse the officers of the bank from the exercise of reasonable care in taking precautions to prevent payment to an impostor. This is true, notwithstanding the existence of a by-law in effect requiring immediate notice to the bank by the depositor of the loss of his book.

Payment by a savings bank to an impostor in the form of a check on a commercial or national bank payable to the order of the real depositor, does not exempt the savings bank from liability to the true owner of the deposit.

As to forged orders, *held;* that, under a by-law providing in effect that money be withdrawn by the depositor or by any other person duly authorized to receive it, the officers of the bank must decide upon the genuineness of the authority presented at their peril.

On report. Judgment for plaintiff.

Assumpsit for the amount of a savings bank deposit.

The facts are fully stated in the opinion.

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

L. C. Cornish and N. L. Bassett, for defendant.

Counsel cited, among other cases: *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; *Kimins* v. *Five Cent Savings Bank*, 141 Mass. 33, 55 Am. Rep. 441; *Sullivan* v. *Lewiston Savings Inst.* 56 Maine, 507, 96 Am. Dec. 500; *Hayden* v. *Brooklyn Savings Bank*, 15 Ab. Pr. N. S. 297; *Appleby* v. *Erie Co. Savings Bank*, 62 N. Y. 12, 16; *Allen* v. *Williamsburg Savings Bank*, 69 N. Y. 314, 318; *Schoenwald* v. *Metropolitan Bank*, 57 N. Y. 418; *Gifford* v. *Rutland Savings Bank*, 63 Vt. 108, 11 L. R. A. 794; *Brown* v. *Merrimac River Savings Bank*, 67 N. H. 549, 68 Am. St. Rep. 700; *Geitelsohn* v. *Citizens' Savings Bank*, 17 Misc. Rep. (N. Y.) 574; *Kummel Germania Savings Bank*, 127 N. Y. 488, 13 L. R. A. 786; *Allen* v. *Williamsburg Savings Bank*, 69 N. Y. 317; *Hager* v. *Buffalo Savings Bank*, 64 N. Y. St. Rep. 25; *Tobin Manhattan Savings Institution*, 6 Misc. Rep. 110; *Saling* v. *German Savings Bank*, 28 N. Y. St. Rep. 975; *Gearns* v. *Bowery Savings Bank*, 135 N. Y. 557; *Eaves* v. *Peoples' Savings Bank*, 27 Conn. 229, 71 Am. Dec. 59; *Goldrick v. Bristol Savings Bank*, 123 Mass. 320.

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

WISWELL, C. J. Between July 7, 1884, and Jan. 3, 1893, the plaintiff made numerous deposits in the defendant Savings Bank, which aggregated on Aug. 1, 1900, with the dividends credited by the bank up to that time, the sum of $2,947.17. Of this amount he withdrew $850. No part of the balance has ever been repaid by the bank to him or upon his genuine order. But on June 10, 1895, the bank paid to a person, who falsely personated the plaintiff and presented his bank-book, the sum of $1,250, and it subsequently paid on two occasions, upon what purported to be the orders of the plaintiff, but which are now admitted to have been forgeries, the

sums of $620, and $227.17, the plaintiff's bank book being presented upon each of these occasions.

In this action the plaintiff seeks to recover the amount of his deposit less the amount withdrawn by him. It is, of course, conceded that the bank, which had received upon deposit the plaintiff's money to be repaid to him or to some person duly authorized by him to receive it, and which has not paid the same to him or upon his order, is liable, unless by virtue of some stipulation in the contract between the bank and the depositor, the payments thus made, under the circumstances of the case, constitute a defense.

So that it first becomes necessary to inquire whether or not there was any stipulation in the contract between this depositor and the bank that would change the general rule as to the latter's liability. When this account was opened by a deposit on July 7, 1884, a bank-book was made out in the plaintiff's name with the first deposit entered to his credit, and the book was sent to, and received by him, he not being personally present upon that occasion. This individual bank-book, sent to the depositor, contained several pages of printed rules and regulations in relation to the management of the bank, making of deposits, the withdrawal of funds and in regard to other matters, among which were the following:

DEPOSIT BOOKS.

"All deposits are entered in the Books of the corporation, and a Bank-Book given to each depositor, in which every deposit made and every sum withdrawn will be entered. This book will be the voucher and the evidence of the depositor's property in the institution, and of the same validity as a note of hand. Applications for withdrawal of funds, whether in person or by order, must always be accompanied by the Deposit Book.

In case of the loss of a deposit book, notice of such loss should be immediately given at the Bank. As the officers of the institution may be unable to identify every depositor transacting business at the Bank, the Institution will not be responsible for loss sustained, when the depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part, on presentment."

SIGNATURE OF RULES.

"On making the first deposit, the depositor will be required to subscribe his name to the rules, regulations and by-laws of the Institution, and thereby agree to be bound by them."

This plaintiff never signed any agreement to be bound by the rules, regulations and by-laws of the institution. When the first deposit was made in this account he was not personally present, and was never required to sign any such agreement. Prior to the commencement of this account the plaintiff had had deposits in this bank which were entirely withdrawn prior to July 7, 1884, and when the first account was commenced by a deposit in 1874, he then not being personally present, his name was subscribed by the treasurer at that time to a book known as a "Depositors' Book" which contained a provision to the effect that the depositors who signed this book agreed "to accede to and abide by the rules, regulations and by-laws which are now in force or may be hereafter made for the management of said bank." But it is not claimed that this act of the treasurer in signing the plaintiff's name to this book, being neither authorized nor ratified by the plaintiff, had any binding force upon him.

One method certainly of obtaining and showing the depositor's agreement to be bound by the rules and regulations of the bank was to have him sign a contract to that effect, but this was not the only way. If a depositor in a savings bank receives from the bank a bank-book containing rules, regulations and conditions which affect his contractual relations with the bank and its liability to him, clearly printed therein, and reads them so that he knows of their existence, and continues to leave his deposit in the bank and to make additional deposits and to hold the bank book as his voucher, he must be presumed to have agreed to be bound by them, so that they will become a part of his contract with the bank. *Gifford* v. *Rutland Savings Bank*, 63 Vt. 108, 25 Am. St. Rep. 744, 11 L. R. A. 794; *Heath* v. *Portsmouth Savings Bank*, 46 N. H. 78, 88 Am. Dec. 194. Various other cases to this effect might be cited. This plaintiff had read these rules and regulations, and was consequently bound by them.

But it is claimed that this principle is not applicable in the present case, and that this plaintiff is not so bound, because no record has been introduced showing that these rules and conditions printed in the depositor's bank-book were formally adopted by a vote of the trustees of the institution. We do not think that this is necessary. These rules regulating the methods of business, and constituting conditions in the contracts between the bank and its depositors, when in any way assented to by them, had long been in use and had been printed in the bank-book given to depositors, at least since the year 1883, and for how much longer time is unknown. For all this period of time they had been known to the trustees and recognized by them as the rules and regulations of the bank, and they were printed in the bank-books with their approval. Whenever changes were made in these rules, it was with the knowledge and approval of the trustees. We think that the adoption of such rules and regulations as these, may be shown by their long use with the knowledge and approval of the trustees, as well as by the record of a former vote.

The plaintiff being bound, then, by these rules and regulations, which, by his implied assent became a part of his contract with the bank, it becomes necessary to inquire as to what extent the bank's liability to him was thereby limited, with reference to the two classes of payments, that to a person who falsely personated the plaintiff, and those upon the forged orders, the effect of the rule, as we shall later see, being different in the two cases. First, as to its effect with reference to the payment of $1,250, to the person who claimed to be the depositor.

The rule itself contains language which shows the reason and necessity for its existence, and at the same time contains a limitation upon its effect and meaning. The reason given is because, "the officers of the institution may be unable to identify every depositor transacting business at the bank," and this shows that the rule is only applicable to cases where the officers of the institution are unable, by the exercise of reasonable diligence, to identify the depositor, or to perceive the want of identity between the depositor and the person presenting the book for payment. In other words,

this provision does not relieve the officers of the bank from the exercise of such care as would be reasonable, under all the circumstances of the case, in order to protect the interests of the depositor and to prevent loss to him by reason of a payment made to a person not entitled to it. That this is the true construction of this provision has frequently been decided by the courts, where by-laws precisely or substantially similar to the one in this case have been construed. *Sullivan* v. *Lewiston Institution of Savings*, 56 Maine, 507, 96 Am. Dec. 500; *Gifford* v. *Rutland Savings Bank*, supra; *Brown* v. *Merrimac River Savings Bank*, 67 N. H. 549, 68 Am. St. Rep. 700; *Kummel Germania Savings Bank*, 127 N. Y. 488, 13 L. R. A. 786. And, in fact, the counsel for the defendant very frankly concedes that this is the true construction of the regulation.

We next come to a consideration of the question as to whether or not in making this payment the officers of the institution exercised reasonable care to prevent mistake and consequent loss. This issue of fact is submitted by the parties to the determination of this court, as the case comes here upon a report of the evidence with a stipulation that the court shall render such judgment as the law and evidence require. Upon this question numerous decided cases are called to our attention upon the one hand and the other, but authorities upon this question of fact are necessarily of little value, as each case must be decided upon the facts and circumstances peculiar to it.

The bank, as we have seen, did not have the plaintiff's signature upon its depositors' book, nor upon any book, so that it could be permanently preserved, and easily and speedily referred to for the purpose of comparison. While one object of this depositors' book was to obtain the written assent of the depositor to the rules and by-laws of the bank, it would also serve as a signature book for reference and comparison. The bank at that time did not use the card system for the preservation and arrangement of signatures, so that the signatures of depositors, and also certain facts peculiarly within the personal knowledge of the depositor, might be preserved and so arranged as to be at once accessible. Nor was the plaintiff's signature in any way so preserved and filed that it could be referred to when wanted. The bank had in its possession the genuine signature

of the plaintiff on an order for the payment of money given in 1892, but this was not preserved for reference and comparison, and the treasurer, at the time of making this payment, did not know of its existence. The case disclosed nothing as to what was said and done, or what inquiries were made, when the person who falsely personated the depositor presented the plaintiff's book at the bank and requested a payment thereon, except that the treasurer testified that he presumed that he inquired if the person was Phillip S. Ladd, as it was his custom to make such inquiry. The payment of this sum of $1,250, was made by check drawn on the First National Bank of Augusta. The plaintiff's bank-book had been taken from his possession without his knowledge, but the fact was unknown to him at that time, and of course the bank had received no notice that it had been lost or stolen. At the time of this payment the Augusta Savings Bank had over six million dollars of deposits, and about twelve thousand different depositors.

We do not think that, under these circumstances, the officers of the defendant bank exercised reasonable care in taking such precautions as would be likely to prevent a mistake of this kind and in making the payment of this sum of money to a person not entitled to it. The only proof of identity required was the possession of the plaintiff's bank-book, but this is something so easily lost, and the possession of it may be so easily obtained by a person not entitled to it, that a bank of the size of this one, where only a small proportion of its depositors could be personally known to the officers of the institution, should take some further precaution to prevent mistake and loss. One that suggests itself as simple and inexpensive, but as quite effectual, owing to the well known peculiarities and characteristics of every person's handwriting, is to preserve in some convenient place for reference a signature of the depositor, when the depositor can write; and to obtain from any person unknown to the officers who claims to be a depositor, his signature for comparison with the genuine one on file in the bank.

In our opinion, the officers of this bank, with its large deposits and numerous depositors, were negligent in not having some such means at hand to aid in the identification of its depositors and to

prevent false impersonations by swindlers. It is no answer that the first deposit was sent by mail or by messenger, because it is perfectly easy to obtain by mail the signature of all depositors who can write, even if they do not come personally to the bank. And if, for any reason, this cannot be done, then other proof of identity should be required beside the possession of the book, even if the depositor is put to some inconvenience thereby. But in this case the bank had in its possession the genuine signature of the plaintiff. It would have been a very easy matter to have so attached that order to some book, or so filed it, that it could be readily referred to whenever a person not known to the officers of the bank claimed to be a depositor and demanded a payment upon his account.

Reliance is had by the counsel for the defense upon the case of *Sullivan* v. *Lewiston Institution of Savings*, supra, where it was decided, that, "if the disbursing officer, using reasonable care and diligence, but lacking present means of identifying the depositor, pay bona fide on presentation of the book by one apparently in the lawful possession of it as the owner thereof, the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim or make known its loss before it is presented for payment." But in that case the depositor could not write his name, he subscribed the by-laws and regulations by making his mark, the bank therefore could not have had this means of testing the identity of the person demanding payment. The circumstances of the two cases differ in other important respects.

Again, it would not necessarily follow that the methods of doing business and the means adopted for the prevention of mistakes of this kind in the year 1868, the time of the mistaken payment in the case cited, which might then have been reasonably careful and prudent, would be so, more than a quarter of a century later, when by the use of such improved methods of doing business and devices for saving time and preventing mistakes, as have been generally adopted and found beneficial in financial institutions, the loss could have been prevented.

What we decide is, that officers of a savings bank of the magnitude of this one, who in the year 1895 made a payment of as large

a sum as $1,250, to a person unknown to them, who claimed to be a depositor, and who presented the bank-book of such depositor, without having in their possession in some convenient place for ready reference and comparison the signature of that depositor, if he could write, and without obtaining the signature of the person presenting the book for such comparison, and without requiring any proof of the identity of the person demanding payment, other than the possession of the bank-book, had not adopted reasonably safe methods of doing business, and did not exercise reasonable care to prevent making a payment to a person not entitled to it. And if a comparison of the signature of the person falsely presenting the book with the genuine one of the depositor on file would have been sufficient to have prevented the fraudulent imposition, then such payment is no defense to an action by the depositor against the bank.

In this case a comparison of the forged signature of Philip S. Ladd upon the back of the check given by the Savings Bank, with the genuine one in the possession of the bank at that time, would have been sufficient, in our opinion, to have aroused the very serious suspicions of the treasurer and would have consequently prevented the payment to the impostor. The payment of this sum by the Savings Bank by giving its check upon a commercial bank does not alter the situation as between the Savings Bank and the depositor, whatever may be, or at any time may have been, the rights of the two banks as between themselves. It was merely an attempt to shift onto the commercial bank the responsibility of passing upon the identity of the payee. We therefore decide that this payment was not made under such circumstances as to relieve the bank from its liability to the plaintiff.

Next, as to the effect of this same regulation, if any, upon the liability of the bank for the amounts paid by the bank upon what purported to be the orders of the plaintiff, but which were in fact forgeries. One of the by-laws printed in the bank-books given to depositors contains this provision in relation to the withdrawal of funds: "Money deposited, may be withdrawn in whole or in part, by the depositor, or by any other person duly authorized, at any time, without notice, when there are funds on hand unappropriated."

So that the contract of the bank was to pay to the depositor in person or to some person duly authorized by the depositor to receive it, and in either case upon presentation of the bank-book. We have already seen that by virtue of this regulation, which we have been considering, the bank is not liable for loss, if the book is lost or stolen, and without notice thereof to the bank, its officers pay a person who falsely personates the depositor, and who presents the book, provided that in making such payment and in having at hand some suitable means for testing the identity of the person so presenting the book, they exercise reasonable care.

But this regulation is limited by its own language to cases where the officers are unable to identify the depositor. It does not purport to apply to the case of a payment made to a person who does not pretend to be the depositor, but who does claim to be duly authorized by the depositor to receive the payment. And there was no other by-law which does affect the question of the bank's liability as to such a payment.

It may be true, that there is as much necessity for some provision in the contract limiting the liability of the bank in the latter case as in the former. The only answer is, that being none the bank made these payments upon its peril as to the genuineness of the orders.

That such a regulation as this does not apply to the case of a payment made to a person who presents apparent authority from the depositor to receive it, but which is in fact a forgery, has always been the decision of the courts whenever the question has arisen, so far as we are aware, and no authority to the contrary has been called to our attention. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; *Levy* v. *Franklin Savings Bank*, 117 Mass. 448; *Kimins* v. *Boston Five Cents Savings Bank*, 141 Mass. 33, 55 Am. Rep. 441; *Smith* v. *Brooklyn Savings Bank*, 101 N. Y. 58, 54 Am. Rep. 653.

The question as to whether or not the plaintiff was negligent in not discovering the loss of his book, and notifying the bank thereof before any or all of these payments were made, is not material upon either branch of the case. Even if he was negligent in this respect, his negligence did not excuse the bank officers from the exercise of reasonable care in the adoption of suitable means of preventing such

a mistake, and in making a payment to a person pretending to be the depositor. As to the payments of the second class, we have already seen, that under such a by-law as the one we have considered, the officers of the bank can only make payments to a person duly authorized to receive them by the depositor, and that they must decide upon the genuineness of the authority presented, at their peril. *Brown* v. *Merrimac River Savings Bank*, 67 N. H. 549, 68 Am. St. Rep. 700.

The plaintiff is accordingly entitled to recover the aggregate of these three payments, made to persons unauthorized to receive them, $2,097.17, together with interest to be computed in accordance with the stipulation of the parties in the case.

Judgment for plaintiff.

PHILIP S. LADD *vs.* ANDROSCOGGIN COUNTY SAVINGS BANK.

Kennebec. Opinion July 15, 1902.

Savings Bank Deposit. Lost Book. Notice. Negligence. Forged Order. By-Laws. Contracts.

The contract between a savings bank and its depositors, in the absence of any by-law or regulation limiting the bank's liability, is the ordinary one of debtor and creditor.

Where payments are made by the officers of a savings bank on orders purporting to be signed by a depositor, but in fact forgeries, accompanied by the deposit book, of the loss of which the bank has not been notified, no question of negligence, either of the depositor or the bank, is involved in a suit by the depositor to recover his money, in the absence of any regulation requiring notice of the loss of the book.

On report. Judgment for plaintiff.

Assumpsit to recover a savings bank deposit, the amount of which had been previously paid by the officers of the defendant bank to the American Express Co., acting innocently for a forger who had fraudulently obtained possession of plaintiff's deposit book.

The only provisions of the bank's by-laws having any bearing upon the case were as follows:—

"WITHDRAWAL OF FUNDS.

Money deposited may be withdrawn, in whole or in part, by the depositor, or by any other person duly authorized, at any time without notice, when there are funds on hand unappropriated. As a rule, however, no payment above five hundred dollars will be made in the months of May or November, without previous legal notice from the depositor; and the Treasurer *may*, if the interests of the Bank demand it, at any time require depositors to give the notice provided by the law of the State and the By-Laws of the Bank. When depositors cannot appear at the Bank in person, to withdraw their deposits, they will be paid on their written order, properly witnessed, a form of which is given in this book.

The order must always be accompanied by the Deposit Book.

DEPOSIT BOOKS.

All deposits are entered in the Books of the corporation, and a Bank-Book given to each depositor, in which every deposit made and every sum withdrawn will be entered. This book will be the voucher and the evidence of the depositor's property in the institution, and of the same validity as a note of hand. Applications for withdrawal of funds, whether in person or by order, must always be accompanied by the Deposit Book."

When the plaintiff's deposit was made he employed a messenger for that purpose, to whom the bank officers delivered the deposit book containing the regulations.

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

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

While it is true that ordinarily the drawee of an order must satisfy himself of the genuineness of the signature of the drawer, we have in this case the element of the production of the book which is made the evidence of the property. Its production warrants the bank in assuming that the possessor is the depositor and the possession by the drawee of an order gives currency to the order, there being no suspicious circumstances connected with the transaction.

The book was carried back to the plaintiff containing the regulations printed therein, which he says he read, and he allowed his money to stay there. He was bound by these regulations as a part of his contract. *Gifford* v. *Rutland Savings Bank*, 63 Vt. 108, 11 L. R. A. 794; *Heath* v. *Portsmouth Savings Bank*, 46 N. H. 78, 88 Am. Dec. 194; *Wall* v. *Provident Savings Inst.*, 3 Allen, 96, 6 Allen, 320; *Reinstein* v. *Watts*, 84 Maine, 139.

These regulations specified that the book should be the evidence of his property in the bank, and they also require the production of the book for any payment to the depositor or on his order.

The plaintiff's own carelessness or stupidity made possible the state of facts which actually exist. He kept these books in a trunk, locked, it is true, but with the key in easy access of any one familiar with his habits and surroundings. The inmates of the house knew he had these books. For years there was probably no hour of the day when a person who had this knowledge and could gain access to the house, could not have taken the key from Ladd's room, or from his clothing in the closet, opened the trunk and taken the books. As a matter of fact it would appear that a brother of the mistress of the house did do it, not once but several times and probably, from his connection with the family, was able to get the check cashed by Mr. Benjamin, the cashier of the village bank, whom Ladd says he had known for years.

The first order was presented on December 2, 1895, but Ladd did not discover the loss of the book until August 4, 1901. It may be said that the book was probably replaced and was actually in the trunk until August, 1900, when it was removed a second time. This may be true, but Ladd doesn't know whether it is or not. Had he taken the trouble to look at his book for once during all the years which elapsed between December 2, 1895, and September 1, 1900, he would have discovered either the loss of the book or the payment of the first order, and thereby have prevented the thief from obtaining the second payment. Had he sent the book to the bank, for the addition of dividends and comparison of the deposit at any time during these years, as common prudence dictated that he should, the same result would have been reached.

It would be difficult to find a case where the rule, that when one of two innocent parties must bear a loss it shall be the one by whose carelessness it was made possible, could be more equitably applied.

"Where a loss which must be borne by one of two parties alike innocent of the forgery, can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded." *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33; *Danvers Bank* v. *Salem Bank*, 151 Mass. 280, 21 Am. St. Rep. 450; *First National Bank of Crawfordsville* v. *First National Bank of Lafayette*, 4 Ind. App. 355, 51 Am. St. Rep. 221.

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

WISWELL, C. J. This case differs from the preceding one of *Ladd* v. *Augusta Savings Bank*, in that this bank had no by-law or regulation limiting its liability in case a depositor's bank-book is lost or stolen, and the bank, without notice of such loss, makes a payment to a person who falsely personates the depositor and presents the book.

Even such a by-law, as was considered in the case referred to, does not apply when the mistaken payment is made to a person, who does not pretend to be the depositor, but who falsely claims to have authority from the depositor to receive the payment, as was decided in that case.

In this case the amount to the credit of the plaintiff in the defendant savings bank, on November 1, 1895, including the dividends credited by the bank up to and including that date, was the sum of $825.56. He has never withdrawn any portion of this deposit. But upon two occasions, December 2, 1895, and September 1, 1900, the bank made payments of $321, and $585.55, respectively upon orders purporting to be signed by the plaintiff, but both of which were in fact forgeries. In each case the plaintiff's bank-book which had been fraudulently taken from his possession, was presented, and the amount paid entered therein to the debit of

the account. The bank had received no notice of the loss of the plaintiff's bank-book prior to making these payments, and its loss was not discovered by the plaintiff until after the last payment.

The liability of the bank rests entirely upon contract. No question of negligence, either of the plaintiff or of the bank officials, is involved. The contract in this case was the ordinary one of debtor and creditor, modified in some respects, unimportant in the decision of this case, by the bank's by-laws and regulations.

A by-law in relation to the withdrawal of funds contained this provision: "Money deposited may be withdrawn, in whole or in part, by the depositor, or by any other person duly authorized at any time without notice, when there are funds on hand unappropriated."

It follows that the defendant, which had received the plaintiff's money on deposit, under a contract to repay it, together with its portion of accumulated profits, to the plaintiff, or to some one duly authorized by him to receive it, and which has not repaid any portion of the deposit, either to the plaintiff or to any one authorized by the plaintiff to receive it, is liable in this action brought to recover the amount due.

The plaintiff is entitled to judgment for $1024.03, together with interest thereon to be computed in accordance with the stipulation of the parties from November 1, 1901.

Judgment for plaintiff.

OLIVER E. COPELAND *vs.* JAMES H. H. HEWETT, and others.

Knox. Opinion August 12, 1902.

Building Contract. Committee. Principal and Agent. Specialty. Parol Modification. Waiver. Oral Substituted Agreement. R. S., c. 73, § 15.

1. A written contract was signed by the defendants, with the words "Building Committee of the M. E. Church of Thomaston" after their names; it contained an express promise on their part to pay, without any statement in the contract itself that such promise was made for or in behalf of another, and no authority to bind another was shown.

Held; that it was the personal contract of the defendants.

2. Where a contract provides that neither party thereto shall have any claim for alterations or additions unless first particularly described in writing, and the valuation agreed upon, committed to writing, and signed by the parties before such alterations or additions are made, it is competent for either party to waive this provision intended for his benefit; and it is for the jury to determine from the evidence whether it in fact has been waived.

3. However evidenced, a contract remains in force until it is superseded by a later one inconsistent with it, and no longer; and one who has agreed that he will only contract in writing in a certain way does not preclude himself from making a parol bargain to change it.

4. The refusal to give a requested instruction, in itself a correct statement of the law, but which has already in substance been given in the charge of the presiding justice, affords no ground for exception.

5. To sustain exceptions it is not sufficient that an instruction may have been erroneous. The exceptions must contain within themselves sufficient to show that the excepting party was thereby prejudiced.

Exceptions by defendant. Overruled.

Assumpsit on account annexed to recover $803.13 for the balance due on a building contract under seal, with parol modifications.

Following defendants' signatures to the contract were the words, —"Building Committee of M. E. Church of Thomaston;" and they contended that they executed the contract with the plaintiff as agent and as a committee of the church and not as principals.

The plea was the general issue. Plaintiff had a verdict for $770.92.

The case is stated in the opinion.

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

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

SITTING: WISWELL, C. J., WHITEHOUSE, SAVAGE, POWERS, PEABODY, SPEAR, J J.

POWERS, J. This is an action of assumpsit upon an account annexed for an alleged balance due upon a special contract to repair and make additions to a church building, and for extra work and materials.

The defendants contend that the contract was the contract of the Methodist Episcopal Church of Thomaston, and except to the ruling of the presiding justice that it was their personal contract. The principles of the common laws as modified by R. S., c. 73, § 15, applicable to this question have been fully settled by this court, and require no further discussion here. *Sturdivant* v. *Hull,* 59 Maine, 172, 8 Am. Rep. 409; *Mellen* v. *Moore,* 68 Maine, 390, 28 Am. Rep. 77; *Simpson* v. *Garland,* 72 Maine, 40, 39 Am. Rep. 297; *Rendell* v. *Harriman,* 75 Maine, 497, 46 Am. Rep. 421; *McClure* v. *Livermore,* 78 Maine, 390. The contract purports to be made between the plaintiff and the building committee of the Methodist Episcopal Church of Thomaston, and is signed and sealed by the defendants with the words "Building Committee of M. E. Church of Thomaston," following their signatures. The intention of the parties is to be gathered from the whole instrument. It is not executed by the defendants in the name of their alleged principal, nor in their own names for such principal. If it was their intention to bind another, they have entirely omitted in the deed itself to use any apt words indicating such an intention. On the contrary, the Building Committee, "the said party of the second part, for themselves and their successors, do hereby agree to pay unto the said party of the first part, the sum of thirty-eight hundred dollars." If they were acting as agents their successors would not mean their principal. It must mean those who succeeded them in their office, who voluntarily took their places and assumed their obligations.

The use of these words cannot control or modify the express obligation into which they entered and the promise which they made "for themselves." Moreover, it nowhere appears that they had authority to bind another, an essential element in determining the intention of the parties. An intention to bind the defendants clearly appears upon the face of the contract; its mode of execution was such they may be bound, and it necessarily follows that it is their personal contract.

Defendants' second exception is to the admission of the testimony of certain witnesses, introduced by the plaintiff to prove an implied contract on the part of the defendants to pay for an item of extra work charged in the account annexed. So far as this exception is based upon that provision of the contract that no claim shall be had for alterations and additions, unless first particularly described in writing and the valuation thereof agreed upon, it is considered later on. Aside from that, it cannot be doubted that this testimony was competent; whether it was sufficient was for the jury to determine, and is not before us on exceptions.

The defendants requested the following instruction: "In order for the plaintiff to recover of these defendants the sums charged for extra work and materials he claims to have done and furnished, he must prove by a preponderance of evidence that the defendants employed the plaintiffs to do such work and furnish the materials for them, and not for the church or society, and that the defendants agreed to pay for the same, but the agreement to pay may result from the acts and understanding of the parties without express words."

This request was declined, but the instruction had already in substance been given in the charge. The jury were instructed that "the defendants having contracted personally for the building and repairing, whatever changes or additions might have been directed by them and performed by the plaintiff in connection with the work originally contracted for, it is for you to determine whether or not it was the understanding of both parties that as to those, the same liability to pay should exist as did exist under the original written contract. And if you find that those were ordered personally by the defendants

in the same manner as the contract was made, then for anything you find under the principles of law which I have and shall give you that the plaintiff is entitled to recover, you would be justified in finding against the defendants." This required the jury to find affirmatively that the extra work and materials were ordered personally by the defendants in the same manner as the contract was made, that is, in their own behalf, and furnished by the plaintiff with the understanding of both parties that, as to these items, the same liability should exist as did exist under the written contract in which the defendants had personally bound themselves to pay. It was as favorable a statement of the law as the defendants were entitled to. If one, having employed another to do a certain piece of work at a given price, personally order and direct additions to or changes in that work which involve extra labor, materials, and expense, the law implies a promise on his part to make compensation therefor. And the fact that by the instruction the jury were further required to find that it was the understanding of both parties that the defendants were to be liable for the additions and changes, the same as for the work originally contracted for, certainly imposed no additional burden upon the defendants.

The contract provided that neither party should have any claim for alterations or additions unless first particularly described in writing and the valuation agreed upon, committed to writing and signed by the parties, before such alterations or additions were made. The presiding justice declined to instruct the jury that no recovery could be had for alterations and additions in fact agreed upon by the parties unless the above provision of the contract was complied with, and instructed them that this provision was legal and binding, but it was competent for the parties notwithstanding this to agree verbally, the plaintiff to do a piece of work connected with the church, yet not called for by the contract or specifications, and the defendants to pay for it; that either of the parties might waive this provision intended for his benefit, and that it was for the jury to determine from the evidence in the case whether such a waiver was or was not made. Parties have a right to contract in any way they see fit, orally, by simple contract, or by specialty. When the statute of frauds is

not involved, the one form is as binding as the other; and however evidenced the contract remains in force until it is superseded by a later one inconsistent with it, and no longer. It does not stand with reason that parties can by contract preclude themselves from contracting in any particular way, that such a contract once entered into becomes an iron bond which the will of the parties is impotent to annul or modify. "One who has agreed that he will only contract by writing in a certain way does not preclude himself from making a parol bargain to change it; and there is no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing." *The Westchester Fire Insurance Co.* v. *Earle*, 33 Mich. 143; *Chesapeake & Ohio Canal Co.* v. *Ray*, 101 U. S. 522; *Bartlett* v. *Stanchfield*, 148 Mass, 394, 2 L. R. A. 625. It is true that by the strict rule of the common law a contract under seal could not be modified or waived before breach by parol agreement, but the tendency of the decisions in the United States has been to apply the same rule to sealed instruments as to simple contracts. Vol. 28, page 539, Am. & Eng. Encl. of Law, 1st Ed., and cases there cited. And in any event the agreement claimed by the plaintiff was fully executed and therefore valid. *Haynes* v. *Fuller*, 40 Maine, 162.

Finally, the defendants except to certain portions of the judge's charge, but this exception is not accompanied by any statement of fact or any evidence whatsoever. There is no agreement that the recitals in the charge are to be taken as evidence. There is nothing to show that the instructions excepted to are prejudicial to the defendants. It is not sufficient that as abstract principles of law they may have been erroneous. The exceptions must contain enough to show that the excepting party was thereby prejudiced.

On all the defendants' contentions the entry must be,

Exceptions overruled.

JOSEPH B. PEAKS *vs.* MELVIN D. HUTCHINSON.

Piscataquis. Opinion August 29, 1902.

Fixtures. Deed. Husband and Wife. R. S., c. 61; c. 103, §§ 7-9. Stat. 1866, c. 52.

A building does not become a part of the realty when erected on another's land under an agreement that it shall be the personal property of the builder.

Husband and wife may make such contracts with each other, under the statute of 1866, c. 52, (R. S., c. 61) which provides that: "The contract of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole."

A building erected by one on the land of another under an agreement that it shall remain the personal property of the builder does not pass by a conveyance of the land to a bona fide purchaser without notice, although from its character, purpose and mode of use it appears to be a part of the realty.

On report. Judgment for defendant.

Forcible entry and detainer to obtain possession of a certain stable situated on a portion of village lot No. 40 in Dover, Piscataquis county.

It appeared that the stable in question was built by the defendant on the land above described, which was then owned by his wife, under an agreement that when erected it should be his.

The case is stated in the opinion.

J. B. Peaks, for plaintiff.

Henry Hudson and Frank E. Guernsey, for defendant.

SITTING: WHITEHOUSE, STROUT, SAVAGE, POWERS, PEABODY, SPEAR, JJ.

WHITEHOUSE, J. This is a process of forcible entry and detainer commenced by the plaintiff against the defendant as a disseizor, to obtain possession of "a certain stable" situated on land therein described and alleged to be a part of the realty. The defendant pleads the general issue and for a brief statement of his defense says that the stable in question was erected by him with his own means

upon the lot described in the plaintiff's declaration, with the knowledge and consent of his wife, Susie M. Hutchinson, who had title to the lot, with the dwelling-house thereon, before her marriage. The plaintiff claims title by virtue of a conveyance from Susie M. Hutchinson of the real estate on which the stable is standing. The case comes to this court on report.

It appears from the facts admitted that Susie M. Hutchinson, the wife of the defendant, commenced a libel for divorce against him on the 30th day of September, 1898; that the plaintiff acted as her attorney in the prosecution of the libel, and continued to act as her attorney until October 3, 1899, when she gave him a deed of the land described in this complaint, "with all the buildings situated on said lot;" and the following day the plaintiff commenced this process of forcible entry and detainer.

It appears from the uncontroverted testimony of the defendant that in 1892, when he and his wife were occupying the house on the lot in question, it was agreed between them that he should build a stable on the lot at his own expense and that the stable should be and remain his property. In pursuance of this agreement, the defendant erected the stable in question, thirty-two feet long and twenty-eight feet wide, paying for all the labor and materials with his own money. The stable was supported by twenty-four granite posts set in the ground, and was situated about twenty-five feet from the house. The next year after the erection of the stable, a shed was constructed to fill the space between the stable and the ell of the house, but without joining the sills. A serviceable connection was thus made between the shed and stable.

Upon these facts the plaintiff contends, in the first place, that the agreement between the defendant and his wife with respect to the stable was not a contract which a married woman had authority to make; but he further contends that if this contract is held to be a valid one as between the parties, he was an innocent purchaser of the real estate for value, without notice of any agreement that the stable should remain personal property, and that in any event it passed to him as a part of the real estate under his deed of October 3, 1899.

In support of his first proposition the plaintiff cites *Doak* v. *Wiswell*, 38 Maine, 569, in which it was held that a married woman was not competent to restrict or enlarge the rights of her husband over her property or to contract with him in reference to it; that the husband's interest in the real estate of his wife was acquired by operation of law and not by contract, and that her consent to the erection of buildings on her land by her husband was of no effect. But an examination of the facts upon which that decision rests clearly shows that it is not an authority in the present case. In that case the parties were married in 1831, and the buildings in question were erected by the husband on the land of his wife in 1839, long prior to the passage of the most important legislative enactments in this state enlarging the rights of married women.

In *Blake* v. *Blake*, 64 Maine, 177, the parties were married in 1869, and the building there in question was erected by the husband on the land of his wife in the year 1870. Between 1839 and 1870, there had been twelve different enactments of the legislature, including the broad and comprehensive one of 1866, all designed to enlarge a married woman's powers respecting the preservation and protection of her separate property and personal rights. The act of 1866 (c. 52) was as follows: "The contracts of any married woman made for any lawful purpose, shall be valid and binding and may be enforced in the same manner as if she were sole." The provisions of all these enactments appear in a condensed form in chapter 61 of the revised statutes.

It was accordingly held in that case that a man who had built an addition to the stable and made valuable improvements on the house, standing on the land of his wife, under her promise to pay for them, was entitled, after a dissolution of the marriage by divorce, to recover for such improvements and expenditures. Quoting the first four sections of chapter 61 of the revised statutes of 1871, the court say in the opinion: "If the wife can convey to her husband, she may be bound by the covenants of her deed. If the husband is liable for the rent of his wife's estate to her, she is none the less bound to the faithful performance of the covenants contained in such lease. . . .

"The result is that the wife, having the general and unrestricted

power of making any and all contracts in relation to her estate, its sale, lease, improvement, with the further right to make contracts for any lawful purpose, may contract with whomsoever she may choose. She may contract with her husband equally as with any one else." See also *Wentworth* v. *Wentworth*, 69 Maine, 247.

It is true that in *Haggett* v. *Hurley*, 91 Maine, 542, 41 L. R. A. 362, it was held that the disabilities of the wife have not been so far removed by our enabling statutes as to empower her to form a business partnership with her husband and thereby subject her separate estate to debts contracted by the partnership. Among the reasons assigned in the opinion for this conclusion is the fact that in the revision of the statutes (c. 61, § 4, R. S., 1871 and 1883) a married woman is made liable only for debts contracted "in her own name." It is suggested that these words, which do not appear in the original act of 1866, seem to limit her power to contract to such contracts as she may make "in her own name," and not in a partnership name. But referring to *Blake* v. *Blake* and *Wentworth* v. *Wentworth*, supra, the court add: "We make no decision here inconsistent with those decisions or opinions. We do not decide that a wife may not make a valid contract with her husband, nor that she may not join with her husband in contracts with other parties, nor that she may not become a surety for her husband, nor that she may not make contracts through him as her agent. All these might be contracts "in her own name."

So also in *Pinkham* v. *Pinkham*, 95 Maine, 71, it was held that a wife cannot bar her right and interest by descent in her husband's real estate by a release to him during coverture. But the legislature had previously specified the methods by which dower might be barred (R. S., c. 61, § 6; c. 103, §§ 7, 8 and 9); and it was considered that such important provisions of existing law, designed expressly for the protection of the rights of the wife in the estate of her husband, ought not to be declared abrogated or superseded by subsequent enactments, without a more definite expression of the legislative purpose.

An agreement by the wife that a stable erected on her land by her husband, with his money, shall remain his property, is readily distinguishable from those in the cases last cited, and is not open to

the objections which there prevailed. Our enabling statutes during the last sixty years were obviously intended to confer upon a married woman important rights and powers not previously enjoyed, and it is not the province or the duty of the court to nullify these statutes and defeat the obvious purpose of them by excluding from the operation of their general terms each particular contract that may arise, on the ground that it is not within the intendment of any of the acts. If a married woman is empowered to convey, lease and manage her real estate, to make any and all contracts "in her own name for any lawful purpose," and "may contract with her husband equally as with any one else," there seems to be no substantial reason why the agreement in question, which had the effect to confer upon her property a benefit without a burden, does not easily fall within the manifest purpose as well as the comprehensive language of the statutes. It is difficult to conceive of any contract which a married woman could more appropriately be deemed authorized to make, respecting the management of her real estate. It is accordingly the opinion of the court that the plaintiff's grantor was empowered to make the agreement in question with her husband that the stable should remain his property.

But the plaintiff still insists that as a bona fide purchaser of the real estate without notice of the defendant's claim to the stable, he ought not to be affected by it even if it is held valid as between the original parties.

The case discloses no evidence respecting the consideration of the conveyance to the plaintiff except that imported by the seal and the recital in the deed that it was "in consideration of $1,000 paid" by the plaintiff. It has been seen that the plaintiff was acting as attorney for his grantor at the time of this conveyance to him, and commenced this process the next day after he received the deed. The defendant contends that the court would be authorized to infer from these circumstances that, as the wife could not maintain an action against her husband in her own name, the conveyance was made to the plaintiff, her attorney, for the sole purpose of instituting this process, and that he must have had notice of the controversy in regard to the stable.

If it be assumed, however, that the plaintiff was a bona fide purchaser for value without notice, his contention that the stable passed to him as a part of the realty is not supported by the rule of law which has hitherto prevailed in this state in this class of cases. *Russell* v. *Richards*, 10 Maine, 429, 25 Am. Dec. 254; *Hilborne* v. *Brown*, 12 Maine, 162, and *Tapley* v. *Smith*, 18 Maine, 12, established the principle that a building erected by one man on the land of another, by his permission, remains the personal property of him who erects it and does not pass by a conveyance of the land to a third person, although from its character, purpose and mode of use it appears to be a part of the realty, and the conveyance is to a bona fide purchaser without notice. These decisions have never been overruled in this state, although it must be admitted that they have been somewhat discredited by the comments of our own court in more recent decisions, and the rule established by them is undoubtedly contrary to the great weight of authority relating to this question. In *Fifield* v. *Me. Cent. R. R. Co.*, 62 Maine, 77, the court say: "The case of *Russell* v. *Richards*, 10 Maine, 429, 25 Am. Dec. 254, and subsequent cases, establish the doctrine here that bona fide purchasers, who even without notice acquire title to land, are not entitled to claim such structures as a house, store or mill standing on the land at the time of purchase, if such buildings were at such time the property of a third person, although from their situation upon the land they had the appearance of being a part of the realty. The case of *Russell* v. *Richards*, does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decisions is rather opposed to it. See enumeration of cases compared in the extensive notes to the case of *Elwes* v. *Mawe*, 2 Smith's Lead. Cas., 99." (9th ed., p. 1423.)

Again in *Dustin* v. *Crosby*, 75 Maine, 75, the court say: "*Russell* v. *Richards*, 1 Fairf. 429 (10 Maine) is not an opposing authority. That case was decided upon the ground of estoppel, and even that case has been a good deal criticised by other courts. Certainly its doctrine is not to be extended."

With respect to the effect of such an agreement as against third persons, the Am. & Eng. Ency. of Law says: "The weight of

authority is to the effect that a subsequent purchaser or mortgagee of the land without notice of the agreement is not affected thereby. But in Alabama, Maine and New York the rule appears to be otherwise, and a subsequent purchaser or mortgagee cannot claim the chattels, though ignorant of the agreement by which they were to retain their personal character." Vol. 13, page 628, title "Fixtures." And the numerous authorities there cited appear to warrant the statements in the text. See also *Fuller-Warren Company* v. *Harter*, 110 Wis. 80, and elaborate note in 84 Am. St. Rep. 867.

In view of the general policy of our law to constitute the registry of deeds the true source of information respecting titles to real estate, it may seem that the Maine rule has no stronger support in equity than in authority, since under its operation an innocent purchaser of land may find incumbrances upon it against which no ordinary care or vigilance on his part would afford any safeguard or protection. But if it be deemed more reasonable and just that such an agreement should not be effectual against any person except the original parties thereto and those having actual notice thereof, unless it is in writing and recorded in the registry of deeds, the legislature can appropriately so declare.

Judgment for the defendant.

EASTERN MANUFACTURING COMPANY

vs.

CAMDEN LUMBER COMPANY.

Knox. Opinion September 8, 1902.

Trover. Pleading. Description of property.

"One thousand logs, spruce, pine and hemlock, all duly branded with the private marks of said plaintiff, of the value of one thousand dollars," is a sufficiently particular description in a declaration in trover.

Exceptions by plaintiff. Sustained.

Trover for logs.

Defendant demurred specially to the declaration "because . . . the property mentioned is not described with sufficient particularity."

The presiding justice sustained the demurrer and plaintiff alleged exceptions.

The opinion states the case.

Reuel Robinson, for plaintiff.

J. H. Montgomery, for defendant.

The declaration does not state the number of spruce, or the number of hemlock logs.

The values of the different kinds of logs are not stated. The value of all the logs is lumped at one thousand dollars.

The declaration states the logs are branded with the private marks of the plaintiff, implying that there are many marks of plaintiff.

It is a well known fact that spruce, pine and hemlock logs, each have a different value. The declaration leaves the quantity and value of the different articles entirely uncertain. They may be nearly all spruce. They may be nearly all pine.

Counsel cited *Edgerly* v. *Emerson*, 23 N. H. 555.

SITTING: WISWELL, C. J., SAVAGE, POWERS, PEABODY, SPEAR, JJ.

SAVAGE, J. Trover. The declaration described the property converted as "one thousand logs, spruce, pine and hemlock, all duly branded with the private marks of said plaintiff, of the value of one thousand dollars." The defendant has demurred specially, and claims that the property is not described with sufficient particularity. We think otherwise.

In trover, the property converted should be described with reasonable certainty, in order that the jury may know what is meant, and the defendant protected against another suit for the same cause of action. But a very general description is sufficient. The particularity required in detinue or replevin is unnecessary, for in those actions the things themselves are recoverable, while in trover only damages can be recovered. *Stinchfield* v. *Twaddle*, 81 Maine, 273; *Edgerly* v. *Emerson*, 23 N. H. 555; *Colebrook* v. *Merrill*, 46 N. H. 160; 26 Am. & Eng. Ency. of Law (1st Ed.) p. 805.

It can hardly be doubted that the description "one thousand logs," without qualification, would be sufficiently certain, in trover. The addition of the words, "spruce, pine and hemlock" does not make the description less certain. In reality these words make it more certain, for they limit the logs to spruce, pine and hemlock, and exclude all others. Upon trial the plaintiff would be limited to proof of logs of the kinds described. *Ewell* v. *Gillis*, 14 Maine, 72. The presiding justice at nisi prius should have overruled the demurrer.

Exceptions sustained. Demurrer overruled.

JOSIAH B. MAYO, and others, In Equity,

vs.

DOVER & FOXCROFT VILLAGE FIRE COMPANY, and others.

Piscataquis. Opinion September 9, 1902.

Ultra Vires Contract. Village Corporation. Water-Works. Subsequent Legislative Ratification. Taxation. Spec. Laws, 1863, c. 262; 1887, c. 31; 1887, c. 260; Maine Const., Art. IX, § 8.

The legislature may grant to any public corporation, whether its municipal powers and purposes be general or limited, power to construct, or to purchase, and maintain a system of water-works for the purpose of furnishing water for its municipal purposes and for use by its inhabitants for domestic and sanitary purposes.

On November 27, 1886, the Dover and Foxcroft Village Fire Company, a public corporation created by an act of the legislature approved March 20, 1863, (chap. 262, special laws 1863) with certain powers and for certain limited municipal purposes, entered into a written contract with the Dover and Foxcroft Water Company for a hydrant service for protection against fire. The contract also contained a provision giving the village corporation the right at its option to purchase, within the limited time stated in the contract, all of the property and all of the corporate rights and privileges of the Water Company at a price to be agreed upon by the parties, or, in case of the failure of the parties to agree, at a price to be determined by three disinterested appraisers to be appointed by the chief justice of the supreme judicial court.

The legislature of 1887 passed an act (chap. 260, special laws of 1887) entitled: "An Act to amend the charter of the Dover and Foxcroft Village Fire Company," by the first section of which, all of the proceedings of the village corporation at the meetings when the latter considered and finally voted to make this contract, were "ratified, confirmed and made valid." By the second section, the village corporation was authorized "to raise money for an annual supply of water for fire and other municipal purposes, and for an annual rental of hydrants, in addition to the purposes now authorized, to be levied and assessed in the manner provided by its charter and by this act." By the third section the contract above referred to between the village corporation and the Water Company under date of November 27, 1886, was "ratified, confirmed and made valid", and the village corporation was "authorized to raise such sums of money from time to time as may be necessary for the purposes thereof."

In a bill in equity against the village corporation brought by certain of its taxpayers, asking for an injunction to restrain it from proceeding further under this contract to purchase the property of the Water Company, and to have the price thereof determined as provided by the contract, *held;* that although the contract when made was ultra vires, it became valid by reason of the subsequent legislative authority and the acquiescence in the contract after such authority; that it was the plain intention of the legislature, in the passage of this act, to give plenary authority, by way of ratification, to the village corporation to make this contract, including the important provision relating to the purchase of the water company's property, and that it must be assumed that the legislature, when it passed this act, the main purpose of which was to ratify this contract, had knowledge of what the contract was and of this particular clause in question.

Subsequent ratification by the legislature, under such circumstances as are here involved, is equivalent to previous authority. It is a permission to the municipal corporation to enter into the contract if they do not choose to reconsider their former action, and none the less valid because it is known to the legislature what the proposed contract was.

Municipal corporations can, not only exercise such powers as are granted by their charters, or by general law, either expressly or by implication, but also such as are incidental to the powers expressly granted and such as are essential to the objects and purposes of the corporation.

Where a water-works system is purchased in good faith by a municipal corporation for the main and primary purpose of supplying water for its own municipal wants, and for domestic use by its inhabitants, under legislative authority, such legislation and the action of the municipal corporation under it in making the purchase, and in raising money by taxation therefor, are not in violation of that clause of the state constitution which requires equal taxation, because of the fact that incidentally the purchasing municipality may be compelled to assume the obligation of the original water company to provide water for some individual takers who reside outside of its territorial limits.

If the village corporation, as purchaser of this property of the Water Company, should be obliged to furnish water for a few takers who reside outside the limits of the corporation, it must be assumed that it will receive a reasonable compensation therefor, so that the taxation of property within the village corporation will not be increased in the slightest degree by such purchase. But, in any event, this is merely incidental and subsidiary to the main and primary object of furnishing water for its lawful public purposes under legislative authority.

Held; that the acts of the legislature of 1887, were sufficient to ratify and make valid the contract between the village corporation and the water company; that the act amending the charter of the Dover and Foxcroft Village Fire Company gave to that corporation, by express grant or by necessary implication, the authority to carry out that contract by a pur-

chase of the water-works system, and, subsequent to such purchase, to maintain and operate the same; and that this legislation was not in violation of the provisions of our state constitution.

On report. Bill dismissed.

Bill in equity by twelve tax-payers of the Dover and Foxcroft Village Fire Company to enjoin the purchase by it of the water-works of the Dover and Foxcroft Water Company, and to restrain the creation of any debt or assessment of any tax by the village corporation on account of the purchase price.

The cause was heard upon bill, answer and replication, and after the evidence was taken out was reported to the law court.

The facts are stated in the opinion.

O. D. Baker; *J. B. Peaks*, for plaintiffs.

The grounds relied on for injunction are two:

1. That the purchase proposed would be ultra vires as to the Fire Company. That if the purchase were effected, the charter powers of the Fire Company would not permit it to legally exercise the rights, or be compelled to perform the duties, of the Water Company purchased.

2. That even if the charter of the Fire Company were adequate, the Fire Company could not, under the constitution, acquire or exercise the full franchises of the Water Company, since it would involve the raising of money by direct taxation upon property within the taxing district, to pay for public benefits shared in common by persons and property outside that district, while the outside property thus benefited was itself exempt from taxation.

1. The general powers conferred on the Fire Company, either by its original charter or by the amendment of 1887, are not broad enough to permit it legally to perform the duties or to enjoy the privileges imposed and conferred on the Dover and Foxcroft Water Company under its charter of 1887, and any attempt by the Fire Company so to do would be ultra vires; and all steps, by contract, reserved option or otherwise, taken towards that end, would be equally ultra vires and therefore legally enjoinable at request of tax-payers in said fire district.

A municipal corporation has no general power to incur expense for water-works unless such power is conferred by statute in express terms, or by necessary intendment. See Vol. 20 Am. & Eng. Ency. of Law, 1st Ed., title Water-Works, pp. 1, 2. Vol. 15 Am. & Eng. Ency. of Law, 1st Ed., title Municipal Corporations, pp. 1115, 1117, and cases cited.

Legislative sanction to sale or lease of franchises is not to be implied, but must be clearly expressed in the charter or act. *Stewart* v. *Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 513; *Stockton* v. *Central R. R. Co. of N. J.*, 50 N. J. Equity, 52, 24 Atlantic Rep. 969.

As an illustration of how strictly the charter power of a municipal corporation as to distributing water is construed, see *Quincy* v. *Boston*, 148 Mass. 389, where it is held that an act authorizing a city to distribute water "throughout said city" does not embrace the right to carry water to Long Island in Boston harbor, although the Island at the passage of the act was a part of the city, the decision being based on the general ground that where the legislature intended to grant a power to cross the harbor it was likely to do so in express and unequivocal terms, and in the absence of such terms such could not be implied.

As an illustration of the extent to which courts are bound to go to prevent the execution of contracts which are ultra vires, see *Ziegler* v. *Chapin*, 126 N. Y. 342, in which case it was held that where goods are bought by a corporation with intent to use them for a purpose ultra vires, and such unlawful use is stipulated for in the agreement to purchase, the contract is so far void that the vendor cannot recover for goods thus bought. See also Vol. 27, Am. & Eng. Ency. of Law, 1st Ed., title Ultra Vires, p. 389, and cases cited. See *Franklin* v. *Lewiston Savings Institution*, 68 Maine, 43.

Counsel discussed the powers and charters of the two corporations and the provisions of the contract.

2. The deeper and equally fatal objection to the exercise by the Fire Company of the option reserved in the contract is, that for the legislature to authorize the acquisition of the property by the Fire Company is beyond the constitutional power.

If the purchase is made at all, whether by agreement or appraisal, payment must be made in such way only as the charter permits, viz., by direct property tax levied and collected in the same way as town taxes; that is, by direct assessment upon property within the fire district.

Such a tax would be illegal, because it would be laid on a limited territory to pay for public benefits common to a larger territory, from which the property so benefited lying outside the territory taxed would be exempt.

Such taxation would be in violation of the provisions of the Constitution of Maine, Art. IX, § 8, because unequal.

The territory embraced within the charter of the Water Company and actually operated in by it is not confined to the limits of the fire district, but embraces the entire territory of the two towns of Dover and Foxcroft, of which the fire district forms but a part.

Each inhabitant of the fire district is a tax-payer, and each one must be taxed, not in proportion to the benefits received as a private taker of water, but in proportion to his general property within the fire district. The money for this huge cash payment cannot be raised as the charters alone permit, either "annually," or "from time to time," but must be assessed in a single year, and paid in one lump sum; so that the tax must be levied on the entire taxable property in the fire district in a single year, amounting to one-twelfth of all the property which every inhabitant in the district owns.

Counsel cited: Cooley on Const. Lim., 4th Ed., *494, *495; *Hammett* v. *Philadelphia*, 65 Pa. St. 146; *McCormick* v. *Patchin*, 53 Mo. 33; *Dyar* v. *Farmington Village Corporation*, 70 Maine, 515.

Furthermore, if it should be said that an option reserved under a contract may be exercised either before or after appraisal, and that it does not follow, if an appraisal is had, that the company will elect to purchase, the answer is, if it does elect to purchase, it cannot legally pay the purchase price or tax the petitioners for that purpose, and hence even the preliminary steps in furtherance of that unlawful end must be enjoined.

If it does not finally elect to purchase, the incurring of the large expense necessary to the procurement and completion of a futile

appraisal would still be unlawful, and for the reasons above given must equally be enjoined under the constitution and at common law.

H. M. Heath; F. E. Guernsey; C. W. Hayes, for defendants.

SITTING: WISWELL, C. J., WHITEHOUSE, SAVAGE, POWERS, PEABODY, SPEAR, JJ.

WISWELL, C. J. The Dover and Foxcroft Village Fire Company is a public corporation consisting of portions of the territory of the adjoining towns of Dover and Foxcroft, and the inhabitants thereon, created by an act of the legislature approved March 20, 1863, (chap. 262, special laws 1863) with certain powers and for certain limited municipal purposes, which are stated as follows in the original act of incorporation: "Said corporation is hereby invested with power at any legal meeting called for the purpose, to raise money for the purchase, repair and preservation of one or more fire-engines, hose and apparatus for extinguishment of fire, for the procuring of water, and for the organizing and maintaining within the limits of said territory an efficient fire department."

The act of incorporation contained provisions in relation to the officers of the corporation; the manner in which money raised by the corporation for its authorized purposes should be assessed upon the property within the territory; authorizing the corporation to borrow not exceeding the sum of two thousand dollars for its purposes, and in relation to a variety of other matters not necessary to be here considered.

On November 27, 1886, a written contract was entered into between this corporation and the Dover and Foxcroft Water Company, wherein the water company agreed to furnish, set and maintain a certain number of hydrants, and additional hydrants as they might be required, and to furnish through such hydrants a constant and sufficient supply of water for protection against fire, for which the village corporation agreed to pay an annual rental. The contract contained numerous and detailed provisions as to the location, size and character of the dam, standpipe, pumps and pipe lines, and in general as to the construction and efficiency of the system of waterworks to be built by the water company.

The contract also contained this clause: "Item Eighteenth. At any time after ten years, and before fifteen years, from the time payments begin under this contract the said Fire Company shall have the right and privilege of purchasing of said water company all the buildings, reservoirs, fixtures, apparatus and property of said water company, with all its corporate rights and privileges at such a price as may be agreed on; and in case of disagreement between the parties the price shall be determined by three disinterested appraisers appointed by the chief justice of the supreme judicial court, none of whom shall be residents of Piscataquis county. When thus chosen and assembled such appraisers shall have power to determine finally and conclusively the amount which said Fire Company shall pay for the rights, property and franchise of said water company. The option of said purchase may be exercised by the said Fire Company either before or after such appraisal, if after, then within six months therefrom."

This contract was executed upon the part of the village corporation by its assessors who were authorized to do so by a vote of the inhabitants at a meeting duly called for the purpose and held at Mayo's Hall in the town of Dover on November 18, and by adjournment, on November 27, 1886. At the first meeting a committee was appointed "to negotiate a contract for a fire service of thirty hydrants, at an annual rental, with some party, and report the same at an adjourned meeting." At the adjourned meeting the committee in their report submitted a draft of this contract with the water company, which was first discussed item by item, spread upon the records of the village corporation; and it was then voted "that the assessors of the Dover and Foxcroft Village Fire Company be hereby instructed and authorized in the name of the said Fire Company and in its behalf, to execute the contract this day reported by the committee on water-works, and this day spread upon the records, whenever the same shall be executed on its part by the Dover and Foxcroft Water Company."

The Dover and Foxcroft Water Company, the other party to this contract, had shortly before its execution been organized under the general laws of this state relating to the organization of corporations.

But in the following winter an act of the legislature (chap. 31, special laws 1887) was passed giving it certain powers. A portion of § 12 of this act is as follows:

"The existing contract between the said Water Company and the said Dover and Foxcroft Village Fire Company of date of November twenty-seven, in the year of our Lord one thousand eight hundred and eighty-six, is hereby confirmed and made legal and valid."

And the same legislature passed an act (chap. 260, special laws of 1887) entitled "An Act to amend the charter of the Dover and Foxcroft Village Fire Company, the first three sections of which are as follows:

"Sect. 1. The proceeding of the incorporation and organization of the Dover and Foxcroft Village Fire Company are hereby confirmed and made valid; and all the proceedings of said corporation in calling, holding and acting in a meeting of said corporation, held in Mayo's Hall in Dover, on the eighteenth day of November, in the year of our Lord one thousand eight hundred and eighty-six, and by adjournment thereof on the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and eighty-six, and all the votes, acts and doings of said corporation at said meetings, are hereby ratified, confirmed and made valid.

"Sect. 2. Said corporation is authorized to raise money for an annual supply of water for fire and other municipal purposes, and for an annual rental of hydrants, in addition to the purposes now authorized, to be levied and assessed in the manner provided by its charter and by this act.

"Sect. 3. The existing contract of date of November twenty-seven, in the year of our Lord one thousand eight hundred and eighty-six, between said corporation and the Dover and Foxcroft Water Company, is hereby ratified, confirmed and made valid; and said fire company is authorized to raise such sums of money from time to time, as may be necessary for the purposes thereof."

On July 3, 1891, the Maine Water Company, by a deed of that date from the Dover and Foxcroft Water Company acquired "all the rights, privileges, immunities, franchises and property" of the Dover and Foxcroft Water Company, subject to all the then existing con-

tracts of this latter company, special reference being made to the contract under consideration in these words: "The said Maine Water Company hereby covenants and agrees that it will faithfully perform each and all of the obligations of all the contracts now existing between the Dover and Foxcroft Water Company and the Dover and Foxcroft Village Fire Company in each and every particular, and shall be subject to all the liabilities of said contracts, as fully and completely as if said Maine Water Company was a party to said contract."

On September 7, 1901, the Dover and Foxcroft Village Fire Company appointed a committee to proceed under item eighteenth, hereinbefore quoted, of this contract, with full power and authority to secure by agreement if possible, if not, by appraisal the valuation and amount of money necessary to purchase the water system, rights, property, privileges and franchise located in the towns of Dover and Foxcroft now owned by the Maine Water Company, in accordance with the provisions of the contract above referred to. And prior to the commencement of this bill, this committee in behalf of the village corporation had petitioned the chief justice of this court, setting out the contract in question, the fact of the appointment of the committee for the purpose above named and their authority, alleging that there was a disagreement between the village corporation and the Maine Water Company as to the price to be paid for the property, rights and privileges of the water company, and praying for the appointment of three disinterested appraisers to determine such price in accordance with the provisions of the contract.

Upon this petition notice was ordered returnable on Feb. 11, 1902. But, before that time, this bill in equity by certain tax-payers within the limits of the territory of the Village Fire Company, against that corporation and its committee, was filed praying for a preliminary and permanent injunction restraining the village corporation and its committee from taking further action in the matter, and an order was made upon the prayer contained in the bill for a preliminary injunction returnable at the same time and place as was the order upon the petition for the appointment of appraisers. No decree was made upon the prayer for a preliminary injunction, but the hearing

upon the petition for the appointment of appraisers was continued until the cause could be finally heard and a final decree made. The case has been reported to the law court for that purpose.

It is urged, in behalf of the complainants, that their prayer for a perpetual injunction should be granted because they contend that the contract between the Village Fire Company and the predecessor of the Maine Water Company was ultra vires; that the acts of the legislature above referred to and relied upon by the respondent as ratifying this contract, were insufficient for that purpose, at least so far as the provision relating to the purchase of the property is concerned; that it was not the intention of the legislature to ratify that clause and to give the village corporation the power to purchase the property of the water company; that even if such intention could be gathered from the language of the legislation and if the act was sufficient in terms, it was in violation of that provision of the state constitution which requires equal taxation.

Whatever may have been the extent of the powers granted to the village corporation in its original charter, to raise money for the purchase and maintenance of apparatus for the extinguishment of fire, in organizing and maintaining an efficient fire department, and "for the procuring of water," there can be no question as to the proposition that prior to the legislation of 1887, this corporation had no power to enter into a contract for the purchase of a system of water-works such as the water company contemplated building, intended to supply water, not only for protection against fire, but also for other municipal purposes and for domestic uses. The municipal purposes for which this corporation was created were limited to those named in the section already quoted. Such a public corporation certainly has no power, until invested with it by legislative action, to acquire by purchase or to construct a general water-works system built and designed to supply water for all municipal and domestic uses. This contract, therefore, when originally entered into was undoubtedly ultra vires.

But, it is equally beyond all question that the legislature may grant to any municipal corporation, whether its municipal powers and purposes be general or limited, the power to construct or to pur-

chase and to own and maintain a system of water-works either for the exclusive purpose of furnishing water for municipal purposes, or for that and in addition to furnish water for the use by its inhabitants for domestic and sanitary purposes. The instances of such grants of power by the legislature which have been upheld by the courts, or which have never been questioned, are too numerous to require the citation of authorities.

So that upon this branch of the case, the only question is as to the effect and meaning of the legislative acts of 1887, already quoted. It seems to us that the language of the sections before quoted of chap. 260, special laws of 1887, does not admit of any doubt that it was the plain intention of the legislature, in the enactment of this chapter, to give plenary authority, by way of ratification, to the village corporation to make this contract, including the important clause relating to the purchase of the property. We must assume that the legislature, when it passed this act, the main purpose of which was to ratify this contract, had knowledge of what the contract was and of this particular clause in question.

In the first section reference is made to the meeting of the inhabitants of the corporation in Mayo's Hall on November 18, 1886, and to the adjourned meeting on November 27. All of the proceedings, doings and acts of this meeting and of the adjourned meeting, were ratified, confirmed and made valid. These were the meetings, as we have already seen, when the proposition of the water company in the form of a draft of the contract, was discussed and accepted and the draft spread upon the records of the corporation.

By the second section, the corporation is authorized to raise money for an annual supply of water for fire and other municipal purposes, and for an annual rental of hydrants, in addition to the purposes previously authorized. By the third section this contract, definitely referred to, is ratified, confirmed and made valid; "and said fire company is authorized to raise such sums of money from time to time, as may be necessary for the purposes thereof." What purposes? Certainly not for an annual supply of water for protection against fire and other municipal purposes, nor for an annual rental of hydrants, because authority is granted to raise money for these pur-

poses in the section immediately preceding. The contract referred to in this section does not call for the payment of money for any other purpose, except for the purchase of the property. If this language was intended to have any meaning, and we certainly cannot assume that it was used without any purpose, it must have been intended, we think, to cover this very clause relative to the purchase of the property, and to authorize the village corporation to raise money for the purpose of paying for the property in case it exercised its option to purchase.

It is impossible for us to believe, from the language used, that the legislature intended to authorize and ratify all of the rest of this contract, and not to ratify the clause relative to the purchase of the property which must have been inserted entirely for the benefit of the village corporation, since, while it gave the latter the option to purchase, it placed no obligation upon it to purchase.

Counsel suggest various respects in which it is claimed the legislation referred to was inadequate to give the village corporation the necessary powers to purchase and subsequently maintain this water-works system, and therefore argue that it was not the intention of the legislature to confirm and ratify that particular portion of the contract, or to grant such power. For instance, it is said that the charter of the water company gave it the right to have a capital stock of one hundred thousand dollars, which as a matter of fact was fully issued by that company, and that no corresponding right was given to the village corporation in its amended charter. But while a capital stock is necessary for a private business corporation and represents the amount paid in or promised to be paid in by the members of the corporation, with which to do business, it is entirely unnecessary and would be most inappropriate for a municipal corporation to enable it to construct or to purchase property for public purposes. A municipal corporation no more needs a capital stock in order to own a system of water-works than does a quasi municipal corporation such as a county, to enable it to build a court-house.

It is said that the enabling act of the water company authorized it to hold real and personal property to the amount of one hundred thousand dollars, and that no such power was given to the village

corporation. But legislative authority given to a municipal corporation to acquire by purchase property to the extent in value of one hundred thousand dollars for a public purpose, must carry with it by necessary implication the power to hold that amount of property after it has once been acquired. And generally, as applicable to many of these suggestions, it must be remembered that municipal corporations can not only exercise such powers as are granted by their charters, or by general law, either expressly or by implication, but also such as are incidental to the powers expressly granted and such as are essential to the objects and purposes of the corporation.

Again, it is said that this village corporation can only raise money by taxation, except the comparatively small sum of two thousand dollars, which, by its original charter, it was authorized to borrow; and that in order to pay for this property it would be necessary to raise by taxation, at one time a very large amount, said to equal eight per centum of the whole taxable property within its territory. While this may be perhaps a serious practical difficulty in carrying out the contemplated purchase of the property, we cannot see that it affects the legal question involved.

It is said that the water company's charter made it liable to the two towns for all sums recovered against either of them on account of any defect in the highways caused by the company's negligence, but that the act of 1887, amending the charter of the village corporation contains no reference to any liability upon the part of it in the case of such purchase; and we are asked if the village corporation would be subjected to such a liability in case of the purchase of the property. The question does not arise in this case. We do not think that any argument can be drawn from the fact that the act is silent upon the subject. The question might well be left to be determined upon the general principles deducible from the nature of the municipal ownership of such property.

It seems that the Dover and Foxcroft Water Company during its ownership of the property, mortgaged it to secure bonds of which $60,000 in amount are now outstanding, and we are asked by counsel if the village corporation, in case the purchase of the property is effected, can or must assume these bonds, and if not, if the rights of

these bondholders will not be impaired by such purchase. We think it is a sufficient answer to this suggestion to call attention to the fact that this contract providing for the purchase was executed prior to the time that the mortgage was made, and was ratified by the very act of the legislature, chap. 31, special laws 1887, which authorized the water company to issue bonds and secure them by a mortgage upon its property and franchise, so that the holders of these first mortgage bonds took them subject to the then existing contract.

No point is made because the legislative authority in this case was given after the execution of this contract by way of a ratification of that contract. The sufficiency of such legislation in this state under circumstances similar to those involved in this case, has been frequently upheld. The following quotation from the opinion of the court in *Shurtleff* v. *Wiscasset*, 74 Maine, 130, is particularly applicable to the facts of this case:

"The legislative act is after all only a grant of authority, nunc pro tunc, a permission to the town to enter into the contract if they do not choose to reconsider their former action, and none the less valid because it was known to the legislature what the contract proposed was." The village corporation never reconsidered its action in making this contract, but, upon the contrary, both parties to it, and the successor of the water company, have always treated it as a valid and existing contract until this question arose.

It is further argued in behalf of the complainants, that, even if this act of the legislature of 1887 was broad enough to give the village corporation the power to acquire by purchase this property of the Maine Water Company under the contract with the latter's predecessor, this legislation is in violation of article IX, § 8 of our constitution, as follows: "All taxes upon real and personal estate, assessed by authority of the state, shall be apportioned and assessed equally according to the just value thereof."

As we have already seen, a portion of each of the towns of Dover and Foxcroft is not included within the limits of the territory of the village corporation. By the Dover and Foxcroft Water Company's enabling act, that corporation was "empowered to supply the towns of Dover and Foxcroft, and inhabitants thereof, with pure

water for domestic, sanitary and municipal purposes." At the time that these proceedings were instituted to have the value of the water company's property determined for the purpose of purchase, the water company was actually supplying water for domestic use to six takers, inhabitants of one or the other of these towns, who lived outside of the limits of the territory of the village corporation.

It is argued that, if the village corporation can purchase this property at all, it must do so subject to the same obligation as to furnishing water to takers outside of the village corporation as the water company is under now. In other words, that the village corporation, if it acquires by purchase all of the property of the water company, and all of its corporate rights and privileges, must do so subject to its public obligation to furnish water to all inhabitants of the two towns, without as well as within the limits of the territory of the village corporation; that consequently, in case of the purchase of this property by the corporation, the inhabitants thereof would necessarily be subject to taxation to pay for benefits common to those living both within and without the limits of the corporation, while those living in either of the two towns but outside of the territory of the corporation would not be liable to such taxation. So, it is argued, that a portion of the property of the town, that within the territory of the village corporation, will be subject to taxation, and the remainder exempt from such taxation, while the purpose of the tax is to obtain a benefit common both to the property taxed and that exempted.

In support of this contention counsel rely upon the case of *Dyar* v. *Farmington Village Corporation*, 70 Maine, 515. In that case the village corporation, embracing a portion of the territory of the town of Farmington, and created to provide the means of protection against fire, and for maintaining a local police, was authorized by an act of the legislature, upon a two-thirds vote of the legal voters of the corporation, to raise by tax or loan a sum of money, not exceeding a certain amount, and to appropriate the same in such manner as might be determined to aid in the extension of a railroad within or near the limits of the village corporation. The corporation attempted to act under this authority and to raise by loan a sum of

money to be used in aid of the building of the railroad. Upon a bill in equity asking for an injunction to restrain the corporation from proceeding further in this purpose, this court sustained the bill and granted the injunction upon the ground that the aid intended thus to be furnished by the village corporation for the building of a railroad would necessarily result in unequal taxation upon the property in the town, the property within the limits of the village corporation alone being taxed for a public purpose, or in case the town itself, under legislative authority should vote to grant aid to the same enterprise, then the property within the limits of the corporation would be subject to taxation by the town, as well as by the village corporation, for the same purposes, resulting, in either case, in unequal taxation.

The correctness of this decision cannot be questioned. The legislation in that case, and the action of the corporation under it, not only permitted, but made unequal taxation inevitable. But that case is to be distinguished from this in many important and controlling respects, and although in the opinion in that case certain expressions are used, which, taken by themselves, would seem applicable to the facts here involved, we do not consider it an authority for this contention of counsel. In the Farmington case the unequal taxation that would have resulted had not the action of the corporation been restrained, grew out of the aid to be granted in building a railroad, an improved highway, for the general benefit of the public at large, but the village corporation was not created for the purpose of building and maintaining highways; that burden is ordinarily placed by the sovereign power upon the towns. The property within the limits of the Farmington Village corporation was also within the limits of the town of Farmington and subject to its due share of the burden of building and maintaining highways, or of aiding in the building of railroads, in case the town should grant such aid under legislative authority, and this was the very reason why unequal taxation in that case should have necessarily resulted.

But the village corporation in this case was originally created for the very purpose of providing protection against fire. By the amendment of 1887, as we have seen, its powers in this respect were greatly

enlarged, and in addition it was given power to obtain water for other municipal purposes, and by necessary implication from the ratification of the contract to purchase, the power to furnish water for domestic use to its inhabitants. So that while in the Farmington case money was to be raised, eventually, by taxation upon the property within the village corporation to aid in a purpose for which it was in no way created, and which belonged to the general purposes of the town of which the village corporation was a component part, in this case the money to be raised by taxation upon the property within the limits of the village corporation, is in part to carry out a purpose for which the corporation was originally created, and in part within the powers and for the purposes granted and named in the amendment of 1887. So that even if the corporation may be subject, in case of purchase, to the obligation to furnish water to persons, inhabitants of either of the towns but not of the corporation, to the very limited extent that is probable, this is but an incident to the general lawful purpose to be accomplished, through the purchase of the water plant, to furnish water for its own municipal uses and for the domestic use of its own inhabitants.

The railroad to be aided in the Farmington case was for the general benefit of the public at large, with only incidental benefits to the village corporation. The purchase of the water-works system in this case is generally and primarily to carry out the lawful purposes of the village corporation, with incidental benefits to a small number of outside takers who happen to be located along the water main between the pumping station and the territory of the village corporation.

An illustration of this distinction may be found in the case of *Worden* v. *New Bedford*, 131 Mass. 23, 41 Am. Rep. 185, where the court decided that it was not ultra vires for a municipality to allow a public building built in good faith and used for municipal purposes, to be used incidentally for other purposes either gratuitously or for compensation. The same distinction was recognized and clearly pointed out by this court in *Camden* v. *Camden Village Corporation*, 77 Maine, 530, where the question was whether a building owned and used by the village corporation for its municipal

purposes became taxable in the town where it was situated because certain portions of the building, when not used for municipal purposes by the corporation, were let for hire. The court said: "The letting of those parts of the building, which are not in actual use by the corporation are incidental and subsidiary to the objects for which it was created, and do not take away its character as a public building, or render it liable to taxation by the town as it would be were this a private corporation and its building erected for private purposes. Many city and town halls in this state are so constructed that when not in use for strictly municipal purposes, they may be let for any proper use. Such fitting up and letting for hire are the incidents, and not the primary objects of such public building."

Again, while in the Farmington case unequal taxation would have inevitably resulted from the contemplated action of the village corporation, we do not think that it can be assumed in this case that the taxation of the property within the village corporation will ever be increased in the slightest degree by the fact that the corporation as a purchaser of this property may incidentally be obliged to furnish water to a few takers who reside outside the limits of the corporation, because if it should furnish water for domestic use in such cases we must presume that it will receive therefor a reasonable compensation, so that the burden of taxation upon property within the corporation limits will not be increased to any extent whatever.

We are therefore of the opinion, that the sovereign power of the state may authorize a municipal corporation, as one of the agencies of government, to purchase and pay for, by money raised by taxation or otherwise, an existing water-works system for the purpose of supplying water for its own municipal wants and for the domestic uses of its inhabitants; and that, if such purchase is made in good faith for these main and primary purposes, the constitutionality of the legislation authorizing such purchase, and the action thereunder, including the raising of money by taxation therefor, is not affected by the fact that incidentally and entirely subsidiary to these main and primary purposes in the purchasing of the property, the municipal corporation may be compelled to carry out the obligation of

the original water company in furnishing water for some takers outside of the limits of the purchasing municipality.

For these reasons we are satisfied that the acts of the legislature of 1887, were sufficient to ratify and make valid the contract between the village corporation and the water company; that the act amending the charter of the Dover and Foxcroft Village Fire Company gave to that corporation, by express grant or by necessary implication, the authority to carry out that contract by a purchase of the water-works system, and, subsequent to such purchase, to maintain and operate the same; and that this legislation was not in violation of the provisions of our state constitution above referred to.

This bill in equity will consequently be dismissed with one bill of costs for the respondents, and a decree to that effect will be filed below.

So ordered.

ABBIE C. SAVAGE, and another, Petitioners,

vs.

WILLIAM H. GRAY, and others.

Lincoln. Opinion September 10, 1902.

Partition. Notice. Unknown Owners. R. S., c. 88, § 4.

A petition for partition cannot be heard, when notice has not been ordered or given to co-tenants, who are not named, but who are described as "unknown."

On such a petition, notice, such as the court orders, to all co-tenants not named, is indispensable.

On report. Remanded to nisi prius.

Petition for partition of a lot of land fronting on Kennebec river in Dresden, Lincoln county, containing about ninety-seven acres.

The case is stated in the opinion.

John Scott for petitioners.

R. K. Sewall, for respondents.

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

SAVAGE, J. Petition for partition of land in Dresden.

The petitioners allege in their petition that they are tenants in common of the premises with the defendants, and with either "the heirs of Margaret G. Rines late of said Dresden, deceased, whose names are to your petitioners unknown, or some person or persons unknown," and the evidence, as reported, tends to show that the heirs of Margaret G. Rines are interested as such in one undivided-half of the premises. Notice has been ordered and served only on the persons named in the petition as co-tenants of the petitioners. No notice has been ordered or given to the co-tenants who are not named, but who are described as "unknown." Such a notice is indispensable. Revised Statutes, c. 88, § 4, provides that "when the co-tenants are not all named in the petition (for partition), ... such notice shall be given to the other co-tenants as the court orders."

And were the statute not imperative, in this case notice would be important, if not necessary. Of the parties who are named as co-tenants, one, Caroline A. Rines, appears as administratrix, and claims that her intestate, William Rines, first having an equitable title, thereafter became owner of all the premises by adverse possession. But she offers no admissible evidence which supports a title by adverse possession. Had she succeeded in establishing that claim, the heirs of William Rines, and not his administratrix, would now be the owners, and be entitled to notice. The evidence fails to show that William Rines had even an equitable title, as claimed. Another alleged co-tenant, Thomas Orman, claims one undivided-half by adverse possession, but he offers no proof of it. And another alleged co-tenant, Joseph Wade, is not connected with the case, as reported, in any way. There is, therefore, at least one undivided-half of the premises which is not represented, so far as the record shows, by any party now in court.

The case must go back to nisi prius for notice to the "unknown" co-tenants. *Richardson* v. *Watts*, 94 Maine, 476.

Report discharged.

AUSTIN L. DAVIS, and others, In Equity,

vs.

ZEBULON G. AULD, and others.

SAME *vs.* GEORGE SCHOPPE, and another,

Sagadahoc. Announced April 11, 1902.

Opinion September 12, 1902.

Equity. Injunction. Intox. Liquors. Nuisance. Const. Law. Jury Trial. R. S., c. 17. Stat. 1891, c. 98.

1. It is the duty of the state to guard the peace, safety, health and morals of its people, and for this purpose it may make use of all the powers and processes of government, executive, legislative and judicial, except where forbidden by some provision of the State or United States Constitution.
2. In this state it has long been settled by common consent expressed in both legislative and judicial action that "all buildings, shops or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away or dispensed in any manner not provided by law, are common nuisances,"—that is, are hurtful to the peace, safety, health or morals of the people. R. S., c. 17, § 1.
3. That the state by statute or common law can proceed, and has hitherto proceeded by criminal prosecution to punish for the maintenance of a common nuisance, and also to abate the nuisance, does not prevent the legislature authorizing it to proceed in equity to restrain, enjoin or abate such nuisance, by the use of the equity writ of injunction.
4. The statute of 1891, c. 98,—conferring upon the supreme judicial court and any justice thereof jurisdiction in equity, upon the petition of not less than twenty legal voters of the town where a liquor nuisance under R. S., c. 17, is alleged to exist, to restrain, enjoin or abate such nuisance and to issue an injunction for such purpose,—is within the legislative power and is not prohibited by any provision in either constitution.
5. There is no provision in either constitution, requiring an equity suit in behalf of the state or the people, to be begun and carried on by the official public prosecutor. Hence, the legislature may authorize such suit in the case of a common nuisance to be maintained by twenty legal voters in the town where the nuisance is alleged to exist.
6. The statute of 1891, c. 98, authorizes proceedings in equity without first obtaining a judgment at law.
7. That the disobedience by the defendant of the injunction in such suit is ipso facto and necessarily a criminal offense, subjecting him to punishment

for the crime, does not exempt him from other punishment by the court for disobedience of its injunction, as for contempt.

8. The operation of the statute is not to punish for past criminal acts, nor to enjoin from the commission of criminal acts in the future, but is to prevent the further continuance of a present, existing, continuous nuisance or hurt.

9. The procedure under the statute is according to the ordinary civil procedure in equity and the petition can be sustained upon a mere preponderance of evidence in favor, since none of the results of a conviction for crime follow.

10. The respondents in these cases did not claim nor ask for a jury trial but submitted, without such request, to a hearing by a single justice, as usual in equity proceedings. Hence, they have not been denied a jury trial, even if they were entitled to one under the constitution and laws.

11. When the findings of fact by the justice sitting in equity in the first instance are not shown upon the appeal to be clearly erroneous, they must be affirmed.

In Equity. On appeal and exceptions by defendants. Overruled.

Petitions by twenty tax-payers of the city of Bath under R. S., c. 17, § 1, as amended by statute of 1891, c. 98, against the owners and occupiers of certain buildings in that city; and praying for injunctions, both temporary and perpetual, against the defendants, and to restrain them from using or allowing said places to be used for the illegal sale or keeping for sale intoxicating liquors.

The defendants demurred; but the justice sitting below, in the first instance, overruled the demurrers, and having heard the parties who by answers denied the charges of the petitions, sustained the petitions and granted injunctions.

The defendants took appeals from the decrees ordering the injunctions; also filed exceptions to the rulings upon the demurrers.

The statute under which the petitions were brought is as follows:—"Sec. 1. . . . . all houses, shops or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner not provided for by law, are common nuisances. The supreme court shall have jurisdiction in equity, upon information filed by the county attorney or upon petition of not less than twenty legal voters of such town or city, setting forth

any of the facts contained herein, to restrain, enjoin or abate the same, and an injunction for such purpose may be issued by said court or any justice thereof."

Frank E. Southard, for plaintiffs.

Geo. E. Hughes, for defendants Auld and Davis.

Revised Statutes, c. 17, § 16, gives a remedy at law. These complainants have not invoked this remedy; their bill gives no special reason why the rights of the parties should not be first settled at law. A bill seeking an injunction must allege facts which clearly show that the plaintiff will suffer a substantial and irreparable injury which cannot be adequately remedied at law. *Haskell* v. *Thurston,* 80 Maine, p. 132; *Wasson* v. *Sanborn,* 45 N. H. 169; *Tracy* v. *LeBlanc,* 89 Maine, 304, and cases. Where an action at law may be maintained, it must appear by the bill that the remedy by it, is not plain, adequate and complete. *Porter* v. *Land and Water Company,* 84 Maine, 195. A court of equity will not undertake to decide whether a nuisance exists until the plaintiff shall fully establish his claims at law. *Eastman* v. *Amoskeag Man. Co.,* 47 N. H. 71. There is no suggestion in this bill, nor in the evidence introduced in the case to show, but what the petitioners have a plain, adequate and complete remedy by an action at law. "It is not every case which would furnish a right of action against a party for a nuisance which will justify the interposition of a court of equity to redress the injury or remove the annoyance." Story Eq. § 925. In this bill it is claimed that the alleged nuisance had been in existence at least one year, prior to the filing of the petition; if such be the case, the nuisance should have been established by a suit at common law before equity will interfere to abate it. *Porter* v. *Witham,* 17 Maine, 294.

In *Worthington* v. *Waring,* 157 Mass. 421, 422, the court said, "if the petition sets forth what constitutes a misdemeanor at common law, the remedy is by indictment." It is well established that equity has, in general, no jurisdiction to restrain the commission of crime or to assess damages for torts already committed. The bill charges these respondents with keeping and maintaining a nuisance which is criminal under our statutes, and for which the statute provides a penalty, and where a complete remedy is provided. This

looks like a proceeding to enjoin the defendants from selling intoxicating liquors with the end in view to punish, as disobedience of the injunction and contempt of court, the very act which was before punishable as a crime.

It never was the intention of the constitution that a party should be punished by proceedings in equity for violating general laws, nor should he be tried by a court acting without a jury. We have always enforced the statutes relative to the illegal sale of intoxicating liquors, by criminal complaints or indictments, and this proceeding is entirely novel and never was in vogue at the time the constitution was adopted, and for these reasons we think it is inconsistent with the constitution of Maine.

John Scott, for defendant Thompson.

Frank L. Staples, for defendant Schoppe.

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

EMERY, J. In this state it has long been settled by common consent, expressed in both legislative and judicial action, that "all buildings, shops or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided by law are common nuisances"—that is, are hurtful to the peace, safety, health or morals of the whole people. R. S., chap. 17, § 1.

Prior to 1891, one method provided by that statute for suppressing, restraining, or abating such nuisances was by a criminal prosecution against the persons keeping or maintaining them, followed upon conviction by fine or imprisonment of the individual, and, if need be, by a warrant for abatement by the sheriff. What other powers the courts then had to deal with such nuisances outside of the power above named need not now be considered.

In 1891, however, the legislature by statutory enactment expressly conferred upon this court and any justice thereof jurisdiction in equity, upon petition of not less than twenty legal voters of the

town where such nuisance is alleged to exist, to restrain, enjoin or abate the same and to issue an injunction for such purpose. Public Laws of 1891, c. 98. This equity jurisdiction, thus expressly conferred by statute, was in this proceeding invoked against these respondents by these petitioners, twenty legal voters of the city of Bath, to restrain and enjoin them from longer keeping or maintaining such a nuisance in Bath.

The respondents demurred to the petition and also answered, denying that they were keeping, or maintaining such nuisance as alleged. Upon hearing, the justice of the first instance overruled the demurrer, and, upon further hearing upon the issues of fact, found that the premises described in the petition were a common nuisance, and then decreed that the respondents be perpetually enjoined from using any part of the described premises for the illegal sale, or illegal keeping of intoxicating liquors. The respondents excepted to the overruling of their demurrer and also appealed from the final decree.

The respondents now urge several objections to this procedure and decree.

I. The respondents contend that this is really a criminal prosecution, though styled a petition in equity, and that if maintained it deprives them of safeguards placed by the constitution about all persons accused of crimes. The argument is that the purpose and effect of the proceeding are to place the respondents under a court injunction, and then further proceed against them for a violation of the injunction, as for contempt of court, and thus subject them to punishment in the discretion of the justices of the court without the protection afforded by the constitution and statutes to respondents in criminal prosecutions.

Whatever may be said of the argument, we cannot accept the respondents' premises. A criminal prosecution is to punish the individual for the criminal part of an act already committed. This procedure does not subject them to punishment nor seek to punish them for any past act. It does not subject the respondents to any fine, imprisonment or disability of any kind for anything they may have

done prior to the filing the petition. The record cannot be used against them as a conviction for any crime, even for the smallest misdemeanor. The procedure is purely civil in character as well as in name. It has none of the peculiar elements or consequences of a criminal prosecution. *Rancour's Petition*, 66 N. H. 172. But it is argued that if the decree be affirmed and they be hereafter charged with a violation of the injunction, they would then also and ipso facto be charged with a crime and be liable to punishment for the crime at the discretion of justices unrestrained by the rules and principles governing criminal prosecutions and sentences. It is true, that if the respondents violate the injunction, they will also and ipso facto commit an offense against the criminal law. The same act is often both a civil and criminal wrong. Many acts formerly regarded as civil wrongs only have later been made also criminal. They do not thereby become only criminal. The civil remedy is not taken away. The sufferer by fraud may maintain his civil action against the wrong doer, and the latter, because his act is also a crime, cannot successfully claim that he is to be tried only by the rules of the criminal law. The equity jurisdiction of the court to restrain and enjoin by equity procedure trespasses upon property has long been conceded. Many of such trespasses have also from time to time been made by statute indictable offenses. These statutes, however, have not abridged the equity jurisdiction of the court as to such trespasses and do not entitle the trespassers to any immunity from that equity jurisdiction.

Again, it should be noted that this statute of 1891 does not assume to confer upon the court power in equity to enjoin a person from committing mere criminal acts, not even such acts as unlawfully selling intoxicating liquors. Those are simple criminal acts to be dealt with by the courts under their criminal law procedure. However frequent and successive such acts, they are intermittent and each is a separate hurt. A nuisance, however, is one continuous, unintermittent hurt as long as it exists. Under this statute the state seeks not to punish for past criminal acts, nor even to enjoin future distinct and separate criminal acts, but to stop the continuance of a present existing hurt. Granting that under our constitution the state cannot use proceedings in equity to enjoin mere criminal acts, we think the

state may use them to cause the discontinuance, and perhaps removal, of a hurtful condition.

But we are reminded that these petitioners have not suffered any injury to their own persons or property by the acts complained of and that this is not a civil action to afford them redress or protection in any of their own affairs. We are further reminded that this proceeding is against a common or public nuisance only, with no suggestion of any private injury done or threatened. It is argued that, while an individual may maintain a civil action at law or in equity to redress or prevent special damage done or threatened him by what is also a common nuisance or crime, the state cannot, for public protection only, maintain or authorize any other action or process than a criminal prosecution either by indictment or information,—that "the law of the land" named in Art. 6 of the Bill of Rights necessarily implies such a restriction upon the powers of the government in such cases. To this we respond that, so far as at present advised, it appears to us that all the powers of a court whether at common law or in chancery may be called into action by the legislature in behalf of the whole people for the purpose of suppressing and preventing the continuance of common nuisances hurtful to the whole people. We know of no express prohibition in the constitution of this State or of the United States against the allowance of remedies in equity to effectuate such a purpose. Given the duty of the state to protect its people from nuisances hurtful to their health, morals or peace, it would seem to follow that the state may use all the processes of law and all the powers of its courts to prevent the evil as well as to punish for it as a crime after its mischief has been suffered. *Eilenbecker* v. *Dist. Court of Plymouth Co.*, 134 U. S. 31, 40.

We do not find that the jurisdiction of courts of equity to restrain and enjoin common nuisances on public account only has ever been denied. The proper occasions for the exercise of this jurisdiction, and what rules should be applied, have often been questioned, but the existence of this jurisdiction has been conceded. The English author of Adams' Equity, writing, at page 210, of public as well as private nuisances, says that by reason of the often inefficiency of

the remedies at law to restrain or prevent nuisances "there is a jurisdiction in equity to enjoin, if the fact of the nuisance be admitted or established at law, whenever the nature of the injury is such that it cannot be adequately compensated in damages, or will occasion a constantly recurring grievance." He cites several English cases of injunction against public nuisances at the suit of the attorney general. In Story's Equity Vol. 2, § 921, it is laid down: "In regard to public nuisances the jurisdiction of a court of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth." In Pomroy's Eq. Juris. it is laid down in § 1349, that "a court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general in England, and at the suit of the state, or the people, or the municipality of some proper officer representing the commonwealth in this country." He also cites numerous English and American cases.

In *Pennsylvania* v. *The Wheeling Bridge Co.*, 13 How. 518, the supreme court of the United States, without special statutory authorization, sustained a bill in equity by and in the name of the state of Pennsylvania to enjoin the erection and continuance of what was claimed to be a public nuisance. In *District Attorney* v. *Lynn & Boston R. R. Co.*, 16 Gray, 242, the Massachusetts court decided that in that particular case there was no ground for the exercise of its equity jurisdiction, but was careful to say: "The authority of the attorney general, or other law officer empowered to represent the government, to file an information in equity to restrain and prevent a public nuisance seems to be well established in England, citing some English authorities." In the same case the court further said, "nor are we able to see that any serious objection exists to this method of reaching and restraining a public nuisance. By it a nuisance which is threatened or in progress can be arrested, which cannot be done by proceedings at law; an injunction is more complete in its operation, because it prevents future acts as well as restrains present nuisances; and it affords a more prompt and immediate relief than could be obtained by other process." A somewhat analogous proceeding for the prevention of crime is provided in

R. S., c. 130, under which a justice of a court, and even a trial justice may upon application summarily require a respondent to furnish sureties to keep the peace, and in default of such sureties being furnished may commit him to jail. If an appeal is taken the justice of the appellate court proceeds in the same summary way.

Convinced by these authorities and the intrinsic reason of the matter, we believe that this proceeding under the statute of 1891 above cited, to restrain and enjoin this hurtful common nuisance, is strictly according to "the law of the land," in the full sense in which that term is used in the Bill of Rights.

It is true, that proceedings in equity against public nuisances have been and are usually in the name of the state itself or its attorney general, but we do not find that the state is limited by the constitution to such a form of suit. It may authorize a suit in its own name, or in the name of any officer, or municipality or other agency. Its power to authorize penal actions by and in the name of an individual for violations of law has often been exercised, and never denied. If the state has the duty to protect its people by efficient legal and equitable remedies, it certainly has the power to permit any of them to protect themselves by pursuing such remedies in their own name. At any rate, we find no constitutional inhibition of such a course.

II. The respondents further contend that this statute breaks against their immunities under the Bill of Rights, in that it does not provide for a jury trial, though directly affecting their use of their property. It is not necessary that a statute conferring upon the court jurisdiction at law or in equity, affecting personal rights or property, should in terms provide for a jury trial. The constitution is always the fundamental law and is read into every statute. Whatever right to a jury trial is given by the constitution exists under every statute, and will be fully accorded by the court whatever the language of the statute. Any statute denying such right whether in terms or by implication will be so far refused judicial cognizance.

In this case the record does not show that the respondents ever

have been or will be denied a jury trial. It does not show they ever requested a jury trial. In equity proceedings, at least, where the court usually proceeds without a jury, a party should ask for a jury trial, if he desires it, and the chancery rules point out how and when the request may be made. In this case the respondents voluntarily let the case take the usual course of a case in equity, and voluntarily submitted the issues of fact to the court in the usual way without asking for a jury. So far, therefore, they cannot correctly say they have been denied any constitutional right to a jury trial. The question whether they are entitled under the constitution to a jury trial at any step in this proceeding is not yet presented and so of course need not be decided. Interesting and exhaustive discussions of the question may be found in the following cases. *Carleton* v. *Rugg*, 149 Mass. 550; *State* v. *Saunders*, 66 N. H. 39; *Eilenbecker* v. *Plymouth Co.*, 134 U. S. 31; *Littleton* v. *Fritz*, 65 Iowa, 488.

III. The respondents further contend that this statute of 1891 is only amendatory of R. S., c. 17, relative to nuisances, and is therefore limited in its operation by the other provisions of that chapter. They still further contend that whatever equity jurisdiction is thus conferred is to be exercised under the recognized limitations of equity procedure in nuisance cases. The inference drawn is that the fact of an existing or threatened nuisance must first be established in an action at law or in a criminal proceeding, before the court will issue the extraordinary writ of injunction,—that being the course indicated in R. S., c. 17, and followed in equity proceedings against nuisances. If the statute of 1891 is thus limited in its operation, it is superfluous. It adds nothing to the powers of the court or the government. Already, under R. S., c. 17, the court had the power to abate the nuisance after verdict, and also by injunction to stay or prevent the nuisance before verdict pending the prosecution. Without the statute of 1891, the court had the power under its general equity jurisdiction to restrain, enjoin and abate after a verdict at law. It could do so even without a verdict at law in clear cases. While this power was sparingly and

cautiously exercised at first; courts of equity never doubted their right to exercise this power in cases apparently requiring it.

The language of the statute of 1891 is explicit. There must have been a purpose. The legislature evidently intended to increase the power of the court in nuisance cases, or at least to facilitate the exercise of such power as it already possessed. The court is to have clear, indisputable jurisdiction in equity to restrain, enjoin or abate certain nuisances upon mere petition. No conditions or preliminaries are named. The court is authorized to exercise its amplest powers and procedure in the matter. It need not now await the result of an action or indictment at law before preventing the threatened nuisance. The construction contended for would make the statute nugatory, and hence cannot be admitted.

All the foregoing contentions of the respondents were raised, considered and overruled in an elaborate opinion by the supreme court of Iowa in *Littleton* v. *Fritz*, 65 Iowa, 488, 54 Am. Rep. 19. We have found no case holding this or similar statutes unconstitutional.

IV. If not sustained in any of the positions taken under this demurrer, the respondents urge, under their appeal, that the evidence did not justify the finding of the court and the order for the injunction. This is a question of fact in determining which we must give great weight to the opinion of the justice who heard and saw the parties and the witnesses. Appeals in equity upon questions of fact are not to be taken as matter of course, but only when the appellants feel they can demonstrate that the finding appealed from is clearly wrong. After careful study of the reported evidence we do not feel at all clear that the respondents were not keeping or maintaining a nuisance as alleged. The evidence was uncontradicted; and there were several very suspicious circumstances, none of which were explained. The respondents refrained from placing themselves under cross-examination. We do not feel clear that the inference that they were keeping a nuisance was clearly wrong.

The respondents invoke the expressed policy of this court to be conservative in its use of so heavy and sharp a weapon as the writ

of injunction. The greater the danger of infringing in the least upon the smallest personal or property right, the greater should be the caution exercised by the court, and the more clear the proof demanded. Here, however, there is no such danger. It is not proposed to remove their property, or interfere in any way with its legitimate use. They have no right to use it for the unlawful sale or keeping of intoxicating liquors. They never had nor can they have any such right, nor do they claim any such right. The decree will not in the least abridge any personal or property right existing or claimed to exist. The prohibited use of their property is confessedly unlawful and one they admit they should voluntarily abandon. We cannot see any chance of legal harm in granting the injunction. There is absolutely no question that the enjoined use would be a common nuisance. The result is that the decree below must be affirmed with additional costs of this court, and it is,

So ordered.

LARKIN D. SNOW, Appellant from Decree of Probate Court.

Cumberland. Opinion September 18, 1902.

Probate. Sales. License to Sell Real Estate. Defective Petition. R. S., c. 71, § 1, cl. 1-3; c. 71, § 12.

In order to justify a decree licensing an executor or administrator to sell real estate of the deceased, it must be averred and proved that such sale is necessary to pay debts, legacies or expenses of sale and administration; or that a sale of some portion of the real estate is necessary for these purposes, and that, by a partial sale, the residue would be greatly depreciated.

The decree is not evidence of these facts. The party seeking the decree, or to have the decree affirmed, must prove them.

To authorize the appellate court to affirm the decree, enough of these facts must be proved or admitted in the supreme court of probate to make out a case for the original petitioner.

Such petition which contains no allegation that the sale of the real estate is necessary to pay debts is not sufficient.

To authorize a sale of all the real estate of the deceased, where the debts amount to less than the value of the whole, it must appear by the petition and proof that the residue would be greatly depreciated by a sale of any portion. *Held;* no such allegation is found in this petition, nor is such proof supplied by the agreed statement of facts.

A license to accept an advantageous offer can only be granted where the court may grant license to sell at public auction as provided in R. S., c. 71, § 1.

See *Snow* v. *Russell*, 93 Maine, 362.

Exceptions by appellee. Overruled.

Petition of Isaac L. Elder, administrator de bonis non with the will annexed of Submit C. Russell, praying that a new license may be granted him to sell at private sale, in accordance with an offer, the real estate described in the original petition of John H. Russell, which latter petition was dated April 13th, 1898.

This court had already held in *Snow* v. *Russell*, reported in 93 Maine, 362, that the original decree granting license to John H. Russell, executor, was void, inasmuch as it dispensed with the bond required by the statute; that the license issued thereupon was also void, as was the deed of the real estate attempted to be made by the executor.

The case is stated in the opinion.

W. R. Anthoine and T. L. Talbot, for appellant.

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

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

STROUT, J. Submit C. Russell deceased possessed of a parcel of real estate and a small amount of personalty. John H. Russell was executor of her will. George F. Russell had a claim against her estate, upon which he obtained judgment for thirteen hundred and fifty dollars and fifty cents at the November term of the superior court, 1897. Upon a proper petition to the probate court presented on March 5, 1898, after notice and hearing, on April 13, 1898, that court granted a license to John H. Russell, as executor, to sell said

real estate at public or private sale. Afterward, on May 3, 1898, John H. Russell sold the real estate to George F. Russell, for twenty-two hundred dollars and delivered to him a deed of the same. He accepted as payment a discharge of George F. Russell's execution issued upon his judgment, and three hundred dollars in cash, and his promise to pay the balance of five hundred and forty-nine dollars and fifty cents. The license was issued without bond given by John H. Russell. The sale therefore was void, and George F. Russell acquired no title under his deed. *Snow* v. *Russell*, 93 Maine, 362, 74 Am. St. Rep. 350.

John H. Russell having deceased, Isaac L. Elder was appointed administrator de bonis non, with the will annexed, of Submit C. Russell on February 7, 1900. Elder filed a petition in the probate court stating these facts, and also stating that George F. Russell offered to pay for the same parcel of real estate "the sum of five hundred and forty-nine dollars and fifty cents in addition to the sum of sixteen hundred and fifty dollars and fifty cents which he had already paid to the said John H. Russell, executor aforesaid, making in all the sum of two thousand two hundred dollars for said real estate, which is an advantageous offer therefor, and that the interest of all concerned will be promoted by an acceptance of said offer." He prayed for license to sell the real estate at private sale in accordance with said offer. After notice and hearing, on May 18, 1900, the probate court decreed "that said petitioner have license as prayed for, to sell and convey said real estate described in said petition at private sale, in accordance with said offer, for the purpose therein named," upon giving bond.

From this decree Snow appealed to the supreme court of probate. Upon hearing in that court upon the appeal and agreed statement of facts, the decree of the probate court was reversed, and the petition for license to sell upon an advantageous offer dismissed. The case comes here upon exceptions to this ruling.

The third and seventh reasons of appeal are as follows:

"Third: Because no list of claims has been filed by the administrator with his petition, nor does said petition set forth that any legal debts are due from the estate, nor is any evidence of such debts

produced to this court, consequently this court has no jurisdiction to issue a license to sell real estate."

"Seventh: Because the petition of said administrator does not present a case under any of the clauses of section 1 of chapter 71 of the revised statutes, which prescribe the issuing of licenses for sale of real estate. It alleges an agreement between George F. Russell and John H. Russell, executor, regarding the sale of the real estate of the testatrix; payment by George F. Russell in pursuance of that agreement of $1650, and readiness to pay $550 more; the failure of the deed of John H. Russell, executor, to convey to George F. Russell the legal title to the estate. The petition asks that license issue to enable the administrator to convey the real estate in execution of the agreement between George F. and John H. Russell."

Under the third reason of appeal the question is fairly presented whether there is sufficient allegation and proof of such debts produced to this court as give it jurisdiction to sell this real estate. It is true that this reason of appeal is unnecessarily broad, that it denies all allegation and evidence of indebtedness. But it may fairly be said that the greater denial includes the less; that the fact that the appellant denies all allegation, and all proof of indebtedness, does not relieve the appellee from the burden of showing sufficient allegation and proof of indebtedness to give the court jurisdiction to make the decree appealed from.

Under the seventh reason of appeal the appellee must unquestionably show that the petition does present a case under some one of the clauses of R. S., c. 71, § 1.

In order to justify a decree licensing an executor or administrator to sell real estate of the deceased, it must be averred and proved that such sale is necessary to pay debts, legacies or expenses of sale and administration; or that a sale of some portion of the real estate is necessary for these purposes, and that, by a partial sale, the residue would be greatly depreciated. Revised Statutes, c. 71, § 1, items 1 and 3. *Gross* v. *Howard*, 52 Maine, 195. The decree is not evidence of these facts. The party seeking the decree, or to have the decree affirmed, must prove them. *Gross* v. *Howard*, supra. In this case we can only look to the petition for the necessary averments, and to

the agreed statement of facts for the proof. The reference by the administrator in the petition to a prior petition filed by a former administrator cannot supplement the statements in his own petition, as there is no averment in the latter that the statements in the former are true.

Turning now to the petition and the agreed statement of facts, and putting upon them the construction most favorable to the appellee, we find an allegation and proof of the existence of a debt of $1650.50. We find neither allegation or proof of the existence of any other debt, of any legacy, or of any expenses of sale and administration. If it be conceded that a sale would necessarily involve expense, still, it would be trifling. We find neither allegation nor proof that the sale of this real estate is "necessary to pay debts." This is one of the facts referred to by BARROWS, J., in *Gross* v. *Howard*, above, when he says,— "To authorize the appellate court to affirm the decree, enough of these facts must be proved or admitted in the supreme court of probate to make out a case for the original petitioner." For aught that appears, either in the petition or proof, there may be ample personal property to pay this debt, and which it is the duty of the administrator to apply to that purpose before resorting to the real estate. More than this, even if there is no personal property, it affirmatively appears both by allegation and proof that it is not necessary to sell the whole of this real estate to pay this debt, the only debt named or proved. The debt is only $1650.50. The real estate is of the value of $2200. That is the price which the agreed statement shows the purchaser was to pay for it, and the price which the administrator asks leave to sell it for. But it cannot be necessary to sell real estate at $2200 to pay $1650.50. The statute expressly provides that, in order to authorize a sale of the whole under these circumstances, it must "appear by the petition and proof," that the residue would be greatly depreciated by a sale of any portion. Revised Statutes, c. 71, § 1, item 3. We search this petition in vain for any such allegation, as we do the agreed statement for any such proof.

Courts of probate have no authority to grant licenses to sell real estate to accept advantageous offers as such. They can do so in

cases where they may grant license to sell at public auction (R. S., c. 71, § 12) and those cases are alone those enumerated in section 1 of that chapter. The objections made by the appellant, under the third and seventh reasons of appeal, antedate all questions of advantageous offers, and until the facts required by section 1 are alleged and proved, there is no advantageous offer for the court to consider.

For these reasons the appeal was properly sustained, and the decree of the probate court reversed by the supreme court of probate.

Exceptions overruled: Decree of the probate court reversed, and petition for license dismissed.

IN MEMORIAM.

PROCEEDINGS BEFORE THE LAW COURT, HELD IN PORTLAND, FRIDAY, JULY 3, 1902, IN RELATION TO THE DEATH OF THE

HON. WILLIAM HENRY FOGLER,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT FROM MARCH 25, 1898, TO FEBRUARY 18, 1902, AND DIED AT HIS RESIDENCE IN ROCKLAND, IN HIS SIXTY-FIFTH YEAR.

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

The court having assembled, Hon. David N. Mortland, President of the Knox County Bar, announced the death of Justice FOGLER in the following remarks:—

May it please your Honors:

It has been intrusted to me by my brethren of Knox Bar, to call the attention of the court to the decease of the Honorable WILLIAM H. FOGLER, one of the Associate Justices of this court, which occurred at his home in Rockland on the morning of February 18th, last. His death was the culmination of a disease from which he had suffered for many years and throughout the entire term of his judicial life. Although it was known to his immediate friends and acquaintances that he was continually suffering from the inroads of an incurable and fatal malady, he seldom alluded to it or betrayed its existence by shirking hardships or exposures, or by avoiding or declining any official duties; and to the last, I may say, by the exercise of extraordinary will power, he endured pain and suffering

with a cheerful countenance and an assumed buoyancy which tended to lull the fears of his family and friends.

My first acquaintance with him was when he was a student in the law office of Hon. Nehemiah Abbott in Belfast, in the winter of 1860–61, just prior to the breaking out of the war of the rebellion. He had, by his own individual labor, acquired a liberal education, and was then pursuing the study of law at intervals while teaching schools or laboring in the hayfield, or at other employment which would enable him to obtain the means to pursue such study. Like many others in this country, he rose from poverty and obscurity, and by his individual efforts obtained many enviable positions as citizen, soldier, lawyer and justice of this Honorable Court. He was admitted to the bar prior to entering the army in 1862. He commenced practice in Belfast soon after his return from the army and became one of the leading lawyers in that county and in the state. In 1890 he removed to Rockland, carrying there with him a well earned reputation for learning and ability which was immediately recognized in his new field of labor. His term upon the bench as justice of this court was but brief, being less than four years, but his long experience in the trial of causes gave him great facility as a presiding justice. His transition from the bar to the bench seemed for him easy and natural and apparently caused him little trouble or anxiety. He was patient in investigation, and was never unmindful of the courtesy which should be maintained between the bar and the bench; the youngest and least experienced practitioner received at his hands the kindest courtesy and forbearance, and was listened to by him with patient attention. Though his ruling or decision might be adverse, no lawyer, I believe, ever left Judge FOGLER'S presence with his feelings wounded by any rude or unkind remark. His worth as an associate on the bench your Honors will recognize.

At the last March term of court in Knox county, suitable memorial services were held on a day set apart for that purpose, at which time the following resolutions were presented and adopted. With your Honors' permission I will now read said resolutions, and I move that the same be entered here of record.

RESOLVES.

The Knox County Bar, entertaining the highest respect and esteem for our adopted brother, Honorable WILLIAM H. FOGLER, who came to us in the height of his power and maturity of his experience, as a practicing lawyer, and was from our midst elevated to an honored place upon the bench of the Supreme Court, wishes to place on the records of this court a fitting memorial to his memory.

We cannot too highly honor one who by his own effort rose from the humblest walks of life to be a leader of his profession, and who in a brief service as a judge of our court of last resort, carved for himself a place among the leading jurists of our State. Never a favorite of fortune he gained by perseverance and intrinsic merit the fame and distinction to which he attained. So situated in youth that the battle of life was not easy, he nevertheless battled for his country and there as in his chosen profession achieved success and distinction, and acquired a fund of experience he afterwards so fondly related.

We esteemed, respected and loved him when living for what he accomplished, by his ability, honor and integrity, for his good fellowship. We revere his memory because of these qualities, now that he is dead.

J. H. Montgomery, Esq., seconded the resolutions and spoke as follows:—

May it please the court:—

A remarkable personality has been taken from the judiciary in the death of Judge FOGLER. I say "personality," as I cannot designate the effect of his living in any other term. It was not his being a man that made him known to us, for in that he could not be accounted remarkable. But it was his living influence that marked him among us, and that spoke to us, and, being dead, now speaks to us. It is the characteristic of all the living to have this noticeable being in a measure, but it is reserved to the few to be pronounced in it.

He was among the few, in this respect, and now that he is dead

we may read the story of his personality as it wrought among mankind, to the end that it may be a lesson to the living.

He was simple and unassuming in all his ways. He did not live for show, nor, to an extent, to denote the importance of his life. He did not surround himself in business with any ostentation or show. In his business he did not advertise, and, yet, all knew where he lived; all knew he was a lawyer, and among the first of the profession.

He did not seek to be heard anywhere. He worked arduously in his home with his favorite authors, and at his office with his law books. He observed all things. He thought always; when it was his turn to speak he had things in abundance to relate, and those who heard him were glad to hear him again. It was his readiness that made him interesting in conversation, convincing in argument, and adroit in debate.

He was impressionable, and receptive of all that met him in the course of his daily life. He knew what was going on from a national issue to the individual romances of the little world of "around-town-talks." Every phase of life interested him. He had a natural side for all conditions. Everything attracted his attention. He received them into his concern, and applied them "to enforce an argument or adorn a tale." It made him a dangerous adversary in the trial before juries. It was why he never over did in acting, or in statement. He was touched by the humanities of all mankind, everywhere,—with the thoughts they were thinking, and with their desires, and their hopes.

He was courageous. He had hope,—almost godlike. He knew what thought could do. He knew how far endeavor could reach, and he stood in his place, undaunted by the fatal malady affecting his body; or the sorrow and bereavements of his home sickness and loss; or the pain his slightest efforts evoked. These things were constant before him, telling him of the end, when he must gather up his work, and complete his mission; and yet, he labored with zeal, ever desirous to finish the work before him, and make each his most finished effort. It is heroic thus to live, putting the spirit supreme

over the body's weakness, and going forward to the highest attainments, when,

> "Trembling nerves compel thee to restrain
> Thy noble efforts to contend with pain."

He was a brave soldier in actual war. In the full vigor of life, when men hate death, he was in the battle of Gettysburg, exposed to the dangers of the picket line when the battle raged the fiercest. He knew the glory of bodily strength and vigor. He had tested, and seen it, and yet its loss did not daunt his vigor or impede his course. And, until his tired body could no longer bear his spirit up, he did not cease to live and hope.

Such was the man WILLIAM H. FOGLER. He was a personality, simple, yet shining, strong by ingenious effort; full of human kindness and love; brave with hope and doing deeds that shall inspire all who are called to stand in the front rank of human effort.

Whence were these qualities? Was he born to them? Did he acquire them? How came this personality? We ask these questions not from curiosity, but from deep interest in the character he presents. We know him, and yet we did not know him. Those who knew him best could hardly tell the name of his father or mother, none knew the spot where he was born. He was not sure he knew where it was himself. We have examples of greatness springing from an early life of poverty and lowliness. And those examples are the theme of story and song, and the hope and reliance of this, our great republic. It makes us brave, encourages the humble, and restrains the proud. It gives every boy a chance. It gives our institutions assurance of safety. May the possibilities to be great never be taken from those of humble birth. The humble beginning of Judge FOGLER'S life may inspire the ambition of the poorest lad that awakens to the possibilities which ever attend upon the industrious, the self-reliant, and the brave of heart.

Judge FOGLER spent his boyhood days near the village of Searsmont, and had the advantages of the schools of that village. He had there encouragement, and example from the well-circumstanced men who made that place noted for thrift and learning. The schools there, at his school day, were the first in the state, and, he himself, at

an early period of his life became a teacher in them, and a participant in their debating societies. He was successful at teaching, and in that way fitted himself for entering the higher grades of learning. He graduated from none. He did not have the means, or time to graduate. He got what was needed from each source to make him efficient in what duties he was called to perform, and he constantly advanced, from scholar to teacher, to soldier, to lawyer, and to Judge. To tell his life more minutely would be to do more than he ever did. He spoke seldom of his life, except in anecdote, or incident, and then, only, to enliven his conversation or illustrate his theme.

It was about his fellows and companions that he talked without restraint. They were ever at his call, their sayings, and the things they did. It was from these anecdotes and narrations, drawn from his intercourse with men, that we discover the nature of his living, the breadth of his observation, and the accuracy of his judgment. We study him through his companions as we saw them from day to day with him, or heard him talk with them. He made their wit, their wisdom, and their experience, his own. There was none so poor in spirit that he did not find in them something for mirth or seriousness, and none were so stern in knowledge or power that he did not see in them a practical virtue. In the wide range of his influence all localities had their individual characters, and all those characters were noted by him. It was by this knowledge of men that he governed the school as a teacher, led the company as a captain, and won the hearts of men who met him in daily life.

He has been the only member of the Supreme Court of the state from Knox County. He was the choice of a united bar and people. All recognized his fitness for the high position. He had demonstrated it before the courts in the cases that he had won, and the cases that he had lost. If he won, there was clearness and precision in the management, and the losing side had the advantage of fairness and courtesy from him. If he lost, the reason was apparent, for all that was favorable to the losing side had been presented. He was a companion of all the members of the bar, and their support of him for the high honor of Judge was, not only on account of his fitness

for the position, but that he might there round out the fullness of his legal career, and give to the profession he loved and honored the richness of his personality.

The county of Knox was proud of him as a Judge. For among its gifted, scrupulous, refined and powerful minds, he shone a peer. We do not know all that he would have accomplished there had his health been strong, and his life spared. Had he been relieved of pain, and care and anxiety, during his career as Judge, we might readily predict that the level of his attainments would have been on the highest plain.

Hon. Enoch Foster then addressed the court:—

May it please the court:—

At a time like this, on an occasion where all that may be said in reference to the life and the character of our departed friend will add no laurel to the wreath he had won in life, it seems befitting that I may say one word.

I had known the deceased long before he had been elevated to the bench, and, perhaps I may say, in the busiest years of his professional life. He frequently appeared before the court in important cases, and as an advocate he had few equals. He was affable, obliging to opposing counsel, and always courteous and sincere with the court. This characteristic was ever noticeable so long as he practiced at the bar.

When called to take a seat upon the bench, he still possessed those qualities that endeared him not only to his associates at the bar, but to every member of the court.

A Judge of great experience at the bar, and a man of keen and far-reaching discrimination, he became an ornament to the Supreme Bench; and in paying a tribute to his memory everyone who knew him can but say that he filled the position to which he was called with entire acceptance to the profession and to all who had business in his court.

He was an eminent lawyer, and he was a model Judge.

His death came at a time when he was at the meridian of his usefulness to the state. He had, in earlier life, gone forth to do service

in the cause of his country. He had achieved distinction as a soldier. When the angry clouds burst in the storm of civil war, and the fate of the Union hung upon the fearful arbitrament of battle, and when animated with one purpose,—the preservation of the Union,—the patriotic sons of the North hurried to its defense, Judge FOGLER, then but just commencing the practice of law, was commissioned by the governor of the state, and went forth to do valiant service in the field. His personal bravery, firmness, and integrity soon won for him the confidence of his superior officers and the affections of his men. He participated in many battles, and distinguished himself in the field.

But the eye that flashed with intelligence is dark; the voice that quivered with emotion, or inspired like the summons of the bugle in the crash of battle is silent. The hand of might and power is nerveless forever; the presence which was familiar in court and in camp, or in the councils of state is seen no more among men. In brief, the man is gone. And yet because he is not wholly gone we pause to pay tribute to his memory on this memorial occasion.

There is something peculiarly touching and sad in contemplating the death of those who are stricken down in the very meridian of manhood, cut off at the time when the hopes are highest and prospects brightest, and yet who can say that death comes before the life is complete!

But death neither comes nor stays his hand at our own bidding,—but it comes to all at last. Death is no respecter of persons. The strong, and the brave—the wise and the unlearned, are stricken down side by side, with the feeble and the timid; the rich, the poor, the noble and the base,—peasant and king,—are subject alike to his fatal shaft, and meet upon the level of the tomb.

One may live as a conqueror or king, but he must die as a man. Death brings every human being to his own individuality—to his relation between himself and his creator. The great river must be crossed alone. Here it is that fame and renown cannot assist us, and even friends, affection and devotion cannot help us. This inexorable law we must all sooner or later obey.

But few, comparatively, ever rise to eminence in professional life,

in politics, statesmanship, in the arts, or in arms, or leave a name to go echoing down the ages, but each one by the influence he exerts upon those with whom he is brought in contact, whether in professional life or upon the broader fields of life wherever he may be can impart a spirit which will make itself felt long after he shall have passed away. Such was the influence which he exerted whom we mourn to-day.

Hon. Reuel Robinson then spoke as follows:

May it please the court:—

It is a sad pleasure for me, on this occasion, to add briefly my tribute to what has already been so eloquently and feelingly said by my brothers in memory of the distinguished lawyer and judge whose death we have so recently been called to mourn. It is difficult to put in proper compass and appropriate words the virtues and accomplishments of a man like Judge FOGLER. His biography as a citizen, a soldier, a legislator, a lawyer, a judge, a husband and father, would make a volume. We cannot here repeat the history of his life. We have not the time and there is no need. We, who knew him best, the members of his profession and his bar, need not the printed page nor the burning words of eulogy to recall to our memories his many noble qualities of heart and mind. His life is known and read as an open book by the members of our profession throughout the State of Maine. We can honor his memory by our words, but we cannot add one cubit to the stature of his greatness by elaborate encomiums upon his life or fervid applause for his deeds.

I did not enjoy the acquaintance of Judge FOGLER for so long a period as some of my associates at the bar. My real acquaintance with him dates from the year 1890, when he removed to Rockland and identified himself with the Knox county bar. Prior to that time I had respected him as a man who had won an enviable reputation as an able lawyer. After my acquaintance with him ripened, my respect for his ability increased, and to this was added an ever growing regard for him as a gentleman and a friend. That he should be the recipient of honors from his fellow-citizens was but natural; that he should be selected for preferment and elevated to

the bench, seemed but a matter of course, but no honor or preferment ever made him forget the courtesy due to those whom he had outstripped in the race, or the admonition that a "time will come when all distinction but that of goodness shall cease, and death, the great leveler of human greatness, shall reduce all to the same state."

Judge FOGLER'S life was another example so often seen in this country of ours, of a poor boy, the child of humble parents, rising by his own ability, his own merit, and his own strenuous efforts, to an exalted position in the military and civil affairs of his state and nation; but through all the gradations that he passed, from the country boy up to the greatest height he reached, as diligent student, patriotic soldier, efficient military leader, conscientious counsellor, faithful representative and legislator, and dignified judge, his heart never grew cold to the common people from whom he sprang, and he never turned away from his earlier associates and friends.

Though esteemed, respected and honored by his fellow-citizens far beyond the lot of most men, Judge FOGLER was never a demi-god to be placed upon a lofty pedestal and observed from afar-off with dread and awe; he was never an aristocrat, out of touch with common humanity, one apart from his fellow-men, unable to understand and appreciate their passions and prejudices, their joys and sorrows, their hopes and fears. He was always and distinctively a kind soul, simple-hearted, broad-minded, democratic man, who understood the trials, appreciated the temptations, sympathized with the sorrows, rejoiced in the pleasures, and comprehended the aspirations of those with whom he came in contact.

He had a resolute heart to face the cannon of his country's enemies; a cool head for all emergencies in war or peace; the trained advocate's power to simplify complex legal propositions, and convince juries by his eloquence and logic; the true lawyer's analytical mind and the judge's dignity of mien; but the qualities that most endeared him to his associates and friends were his kind heart, his winning smile, his genial comradeship, his ever ready helpfulness, sympathy and friendship, which the hand of sickness and pain and physical weakness could not destroy and even the great sorrow of his life could not diminish,—for during the last sad and weary month of his life, stag-

gering under the burden of a fatal disease and overwhelmed with grief at the loss of his faithful wife, his voice was kinder, his greeting more cordial, his sympathy more tender and his smile more sweet, than even in the days of his strength and happiness.

We shall all miss his ready counsel, his friendly advice, his amusing anecdotes skilfully told, his social good-fellowship, his cordial hand-clasp, his kindly greetings, but his memory will live long in the hearts of us who knew him well.

What better tribute can we pay to him than that? We may well speak of his intellectual ability, of his triumphs in the forum and in the legislative halls, of his private and public successes, of his distinguished career as a soldier, and of his renown as a lawyer and a jurist; but in all that we say we cannot pay a nobler tribute than to say that he was a kind friend, a well loved comrade, a just and merciful judge, a true and noble man, whose memory will long be green in the hearts of those who knew him.

As has been beautifully said of another:

"His memory is the shrine
Of pleasant thoughts, soft as the scent of flowers,
Calm as on windless eve the sun's decline;
Sweet as the song of birds among the flowers;
Rich as a rainbow with its hues of light;
Pure as the moonbeams of an Autumn night;
Weep not for him!"

Arthur S. Littlefield, Esq., spoke as follows:—

Judge FOGLER, a friend of every member of the bar, was particularly a friend of mine and I would offer a brief personal tribute to his memory.

As an opponent, associate, or judge, he was uniformly considerate and kind. He was the embodiment of these and many other good qualities, which were withal so unobtrusive and naturally a part of himself, so much a matter of course, that like the beauties of nature or the common comforts of home, they are only fully appreciated when missed. Our resolutions epitomize his career and character.

He was in the vigor of manhood, a hero on the field of battle, and

in riper years a hero in his daily life. Though disease had crept upon him, undermining health and obscuring vision, with courage and cheerfulness he performed his daily task at a sacrifice of comfort and cost in effort of which his calm and serene exterior gave little evidence. Courteous and even cheerful he was in doing the work which crowns his professional career, when most men would have done naught but nurse their ills. He became a most popular judge, universally liked, esteemed and respected; liked for his kindness and good fellowship; esteemed for his learning and ability and respected for his genuine worth.

Surely, physical vigor would have written his name high among able jurists when, in so short time, he accomplished so much under difficulties that make an uncomplaining performance of daily duties heroic.

When we have said that he cheerfully performed his daily duties under these circumstances we can hardly say more. Such characteristics can only accompany and be part of the character of true manhood. We, to-day commemorate the life and character of a *man*.

Hon. Joseph E. Moore spoke as follows:

May it please the court:

Silence is golden and therefore more fitting than words, which are only silvern, to express my true feelings on account of the death of our distinguished brother and cherished friend, Judge FOGLER; but this occasion being a public expression of the respect and honor in which this bar held him, reveres his memory, and sorrows at his death, I join in a few feeble words.

Although in poor health he attended to his judicial work to within a day of his death, and seemed as well as usual on Saturday before he died on Monday.

> "So softly death succeeded life in him,
> He did but dream of Heaven, and he was there."

I do not know when I first became acquainted with him, but my first association with him in court was when he assisted me in a trial at Wiscasset many years ago. He had no time for preparation. I was impressed with the quickness with which he grasped every phase

of the case, and no point in issue or in evidence escaped him. He tried it with great ease and composure. I think equipoise was one of the strong elements in his character, and gave him great strength in his profession. He was successful before a jury. He was not blinded by technicalities. He judged men accurately. He did not waste his strength in trying to make the mind untrained in legal lore mark fine distinctions. He was severely logical and easily carried the mind of the jury along with his, to what he shew them was the only possible conclusion. His memory was accurate, and he was careful not to misstate evidence and won the confidence of the jury. His law arguments were models of conciseness, clearness and completeness.

As a judge he was careful and painstaking, though without the stimulus of winning a victory. I saw him often, as I succeeded to his office, and he was attached to locality, and enjoyed a smoke in his old quarters. He studied carefully the arguments of counsel, but also pursued a laborious investigation of authorities independently. He sought only for the truth. He was honest in all the processes of his mind; indeed, he was sensitively so, and possessed "that chastity of honor that felt a stain like a wound." It was, perhaps, as much that, as a well-trained intellect, that gave him his broad and lasting success and high standing. It is said that the brightest record in Westminster Abbey is Sir Isaac Newton's, for he sought the simple truth unembarrassed by the fact that it might be contrary to his preconceived notions, which never blinded him. Edmund Burke says that, "all men that are ruined, are ruined on the side of their natural propensities." Is not this principle equally true as to men's highest and most substantial success? Judge FOGLER'S natural propensities were for high and honorable character and hence the solidity of his success.

He rejoiced at another's good fortune and felt honest sympathy for another's failure or misfortune. His kindness of heart made his duty of dealing with the penal, unpleasant.

At the bar he was courteous and careful not to wound his brethren, or in any way create even suppressed ill-feeling by harsh words, or conduct, and was specially kind to the young lawyer.

He had a fine literary taste, and kept in touch with the best books of the day. He was the most companionable of men. He was wonderfully versatile and easily adapted himself to any company. His conversation was pleasing and instructive, full of wit and humor, and interspersed with apt stories and pleasing reminiscenses. Ridicule of persons had no place in his conversation, and his wit was not that which wounds.

He suffered very much the year before he died from trouble with his eyes from which he did not entirely recover, and which made his labors slow and painful, and the sickness and death of his wife but a short time before his death, told heavily upon him. Yet he did not cease or shirk his labors, and who at any time ever heard him utter one complaining word, or admit that he was sick? He had most wonderful will power and nerve force. On Saturday, before his death, he spoke of a Latin sentence he had been looking for and had just found used in the connection he had understood. How appropriate that I should apply it to his life:—"res ipsa loquitur." It speaks for itself. It needs no explanation, no apology. He had simple habits, and lived in a quiet, unostentatious way, but had made small material acquisitions. I do not think he appreciated for himself the commercial spirit of the times. His benevolence and large charity would materially interfere with his accumulating property.

Judge FOGLER was a general favorite, loved and honored for large ability, high character and genial disposition. If "to live in hearts we leave behind is not to die," then Judge FOGLER still lives, and will live so long as one who knew him well survives this side the dark veil. He acted, as much as any one I ever knew, on the sentiment expressed by Drummond:—"I shall pass through this world but once. Any good thing, therefore, that I can do, or any kindness that I can show to any human being, let me do it now. Let me not defer it, or neglect it, for I shall not pass this way again."

We shall miss him. The affairs of the world are influenced for good by his having lived.

The brave and strong are rapidly falling by the way. The affairs

of the world, however, do not stop. The horizon of the best and strongest is limited. No human life is indispensable, and the death of no one person can bring desolation. That has passed. There was but one Prince of Gallilee, one death when the heavens were darkened and the earth quaked and the veil of the temple was rent; and that brought sadness but not desolation, and from it came the cross, the way of salvation and christian civilization.

We do well to pause and pay a tribute to the memory of our dead associate and friend. I cannot express what I would, for as I said silence seems the only true expression — for spoken words are cold and formal. In silent thought we see his genial face, hear his hearty laugh, feel his cordial touch, and look into his responding eye; but cannot describe it, — for combined they make an atmosphere of fond friendship, that no words exist to express.

In the excavations at Athens has been found an ancient cemetery, containing headstones erected before Paul preached on Mars Hill, and on which are carved the representation of the one deceased taking farewell leave of the family and friends, as would be done on separating in life, and sometime to meet again, — just a simple going away. Were not the ancients wise, and worthy of imitation? To part during life, or by death, is sad, but hope of reunion dulls the sting of separation. Let it be, then simply, farewell!

> "Farewell; — a word that must be, and hath been,
> A sound which makes us linger; — yet — farewell."

Chief Justice WISWELL then responded for the court:

Gentlemen of the bar: —

Once more death has entered our ranks, and again we put aside for a time the customary work of the court and join with the bar in the observance of appropriate services for the purpose of paying our tribute of respect to the memory of our associate and friend whose sudden death brought great sorrow to his associates upon the bench and to his friends everywhere.

Allow me to assure you that the members of the court are in entire sympathy with the sentiment of the resolutions presented by your committee, and with the graceful tributes of affection that have

been paid by the members of the bar to the memory of our deceased friend.

Judge FOGLER came to the bench remarkably well equipped for the performance of judicial duties. For many years he had been in the active practice of his profession; and a considerable portion of that practice had consisted in the trial of causes in court. In fact, I doubt if there is a lawyer in the state who has tried as many cases to the jury as had Judge FOGLER at the time of his appointment to the bench. And while this branch of a lawyer's practice in these days may not be as lucrative as some others, it must be admitted, I think, that there is none which makes such a constant and imperative demand upon a lawyer's resources and abilities.

With the great benefit of this experience in the courts, Judge FOGLER came to the bench on March 25, 1898; and although his service was less than four years in duration it was sufficiently long for him, by reason of his qualifications for the position, to make for himself an enviable reputation both as a trial and a law judge, and to obtain the respect, esteem and affection of the members of the bar throughout the state and of his associates upon the bench.

As might have been expected he was especially successful in nisi prius work. Here his long and varied experience in the trial of jury cases was of the greatest possible advantage to him, so that even in the beginning of his work in presiding at such terms, where questions of procedure and practice and those involving a knowledge of the law and rules of evidence are constantly arising and must be speedily ruled upon, his extensive acquaintance and intimate knowledge of these matters acquired in the thorough school of practical experience enabled him to do so with the readiness and confidence of one whose life work it has been. In addition to this, his manner of presiding and of conducting the business of a term were most fortunate. He was patient and painstaking, courteous and even cordial with all who had business before the court, but he presided with a dignity that was sure to retain and increase the respect for the court. His nisi prius terms were generally long and always busy, and final adjournment never was reached until the business of the term was concluded;

the length of his terms of court was not measured to any extent by his personal convenience.

During Judge FOGLER'S four years' service upon the bench he also performed his full share of the law work of the court. During this time he attended nine sessions of the law court and I think it happened that rather more than his proportion of the important cases, that were argued before the court, fell to him for the duty of preparing the opinion of the court.

One of the most important cases in which he expressed the decision of the court was announced after his death; it is that of the Kennebec Water District *vs.* Waterville, 96 Maine, 234, wherein were involved a number of important questions and, among others, whether the following provision of our state constitution: "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced," is applicable to cases where property is taken under the exercise of the right of eminent domain, for the purpose of ascertaining the just compensation to be paid therefor. The question had never directly arisen in this state before, although as said in the opinion dicta were to be found in previous decisions of the court upon both sides of the question. The question is very ably and exhaustively discussed by Judge FOGLER in his opinion and the doubt in regard thereto forever put to rest in this state.

Perhaps the most marked characteristic of our friend was his great courage. I do not now refer alone or especially to that physical courage which, to a very marked degree, he displayed in the presence of personal danger, when as a very young man he fought for the cause of the Union in many of the great battles of the Rebellion, at Fredericksburg, Chancellorsville, in the Wilderness, at Spottsylvania, Gettysburg, and on many other battle fields, until in 1864 when in command of his regiment he was severely wounded; but rather to that perhaps of a higher type which enabled him to face and overcome obstacles and difficulties of many kinds with the utmost intrepidity and to faithfully perform the duties of any position in which he might be placed with the greatest patience. We who were associated with him in the administration of justice,

as well as neighbors and intimate friends, knew that much of his judicial work was performed while he was suffering from the effects of ill health and when his vision was so impaired that progress in his work was at times painfully slow, but no one ever heard complaint from him; he patiently persisted until the matter in hand was completed. He was at all times cheerful and in good spirits, and would never admit his poor health or the difficulties under which he labored.

Judge FOGLER died in the sixty-fifth year of his age, in the maturity of his intellectual powers, with a wisdom ripened by experience and with a knowledge of the science of jurisprudence acquired by a lifetime devoted to its study. His death was a distinct loss to the state and to the court and a personal loss to a host of friends who highly prized his friendship, admired his loyalty in every relation of life, and enjoyed his genial companionship. But for him broken hearted by the death, only a month before, of his wife, the companion almost of a lifetime, with no children nor near relatives, it may have been, and we must believe it was, for the best.

Judge FOGLER was a brave and gallant soldier, a faithful and able counsellor, a wise and learned judge, and above all and at all times a kind-hearted and true gentleman.

The court then ordered the Resolutions to be recorded and as a further mark of respect adjourned.

MEMORANDUM.

On the first day of March, 1902, the Honorable ALBERT MOORE SPEAR was appointed a Justice of the court, and took his seat upon the bench at Belfast, Waldo county, on the following April, being the fifteenth day of the month.

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Action by creditor of a Kansas, *Pulsifer* v. *Greene*, 438 ; *Same* v. *Heard*, 438.
to enforce double liability in a banking, *Ib.*
liability of contractual nature, *Ib.*
and begins with acceptance of stock, *Ib.*
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Kansas stat. of limitations no bar, *Ib.*
they were not integral part of remedy, *Ib.*

COSTS.

In judgments against exors. and admrs., *Bank* v. *Turner*, 380.
one exon. for, against exor. and admr., *Ib.*
another exon. for debt against estate, *Ib.*
levy void if two exons. combined in one, *Ib.*
R. S., c. 87, § 2, gives not cumulative remedy, *Ib.*

Will be allowed plff. in trustee process, *Meserve* v. *Nason*, 412.
claimant occasioned plff. delay and expense, *Ib.*

CO-TENANT.

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DAMAGES.

Plff. was illegally assessed taxes for two years by different assessors, *Allison* v. *Hobbs*, 26.
was arrested simultaneously on two warrants for non-payment of taxes, *Ib.*
held; plaintiff sustained no separate injury in the concurrent arrest except the tax and costs, *Ib.*
Plff. not entitled to, for R. R. trestle in Perry obstructing tide-water channel, *Frost* v. *R. R. Co.*, 76.
trestle built under act of congress, *Ib.*
case of damnum absque injuria, *Ib.*
Exemplary, under Civil Damage Act, *Campbell* v. *Harmon*, 87.
seller and building owner made defts., *Ib.*
Verdict under stat. 1891, c. 124, case of death, reduced from $2,031.81 to $1250. *Ward* v. *R. R. Co.*, 136.
Assessed at $100 for illegal arrest and imprisonment under tax warrant, *Jacques* v. *Parks*, 268.
None after date of writ, *Wilkins* v. *Slate Co.*, 385.
case of, by blasts in quarry and rocks thrown on plff.'s premises, *Ib*

DEATH.

See NEGLIGENCE. RAILROADS.

DEATH BY WRONGFUL ACT.

Case of, *Conley* v. *Gas Light Co.*, 281.
declaration was at common law and not under the statute of 1891, *Ib.*
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DEEDS.

See ADVERSE POSSESSION. HUSBAND AND WIFE.

Copies of, not admitted in evidence where plff. claims as heir of grantee, *Egan* v. *Horrigan*, 46.
R. S., c. 82, § 110, does not apply, *Ib.*
execution of original, or its loss not proved, *Ib.*
record of, not always proof of delivery, *Ib.*
held; no delivery of, proven, *Ib.*
grantee in, an infant twelve years old, *Ib.*

(DEEDS concluded.)

Trees reserved in, for five years, *Erskine* v. *Savage*, 57.
plff. was purchaser of rights reserved and cut but did not remove all the trees, *Ib.*
held; trees severed became personalty, *Ib.*
defendant liable in trover for forbidding plff. to remove wood from the land, *Ib.*

Actual survey controls plan, *Coleman* v. *Lord*, 192.
same rule applies when bounds and plan agree, *Ib.*

A, granting water power, *Rackliff* v. *Rackliff*, 261.
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held not a measure of power, *Ib.*
easement held extinguished by union of all of several lots, *Ib.*

As affected by Ordinance of 1641–7, *Proctor* v. *R. R. Co.*, 458.
owner to low water mark but not over 100 rods, *Ib.*
he may separate by, flats from upland, *Ib.*
flats pass by, of upland when not excluded by its terms, *Ib.*
intention controls, if possible, *Ib.*
rule for determining intent, *Ib.*
ancient town records as evidence, *Ib.*
quære as to lots not in dispute, *Ib.*
held not affecting, in question, *Ib.*
case of flats passing by, *Ib.*
other not so passing, *Ib.*
"bank" means land adjacent to shore, *Ib.*
"bank" is a definite monument, *Ib.*

A tax, held void, *Littlefield* v. *Prince*, 499.
sale of non-resident property, *Ib.*
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Buildings pass not by, of land when erected by consent on another's land, *Peaks* v. *Hutchinson*, 530.

DELIVERY.

See DEEDS. GIFTS.

DEMAND.

See BILLS AND NOTES.

DEMURRER.

See PLEADING.

DISCHARGE.

See INSOLVENCY. MORTGAGES.

DOMICIL.

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DRUGGIST.

May keep "all medicines and poisons authorized by U. S. Dispensatory and Pharmacopœia of recognized utility" and intox. liquors are within this description, *Pollard* v. *Allen*, 455.

he bot. them in Boston and did not testify in action to recover their price, *Ib.*

deft. held liable to pay, *Ib.*

EASEMENTS.

See DEEDS. FIXTURES. SREET RAILWAYS.

An, in a building destroyed, *Bonney* v. *Greenwood*, 335.

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also plff. estopped now to claim the, *Ib.*

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ELECTION.

See FENCE. VOTE.

ELECTRICITY.

See FORCIBLE ENTRY AND DETAINER. WATER COMPANY.

EMINENT DOMAIN.

See STREET RAILWAYS. WATER COMPANY.

EQUITY.

Creditor's bill under R. S., c. 77, § 6, par. 4, *Shaw* v. *Slate Co.*, 41.

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Decree in, by single justice sustained, *Tribou* v. *Tribou*, 305.

jury found fraud and undue influence, *Ib.*

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deft. obtained of plff. his niece's property, worth $20,000 for $10,000 by fraud, *Ib.*

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Bill to redeem a mortgage, *Lumsden* v. *Manson*, 357.

must allege tender or facts excusing tender, *Ib.*

tender with conditions not sufficient, *Ib.*

bill may be dismissed without prejudice, *Ib.*

Liquor nuisance may be abated in, *Davis* v. *Auld*, 559; *Same* v. *Schoppe*, 559.

on petition of twenty legal voters,

Stat. 1891, c. 98, gives court this power, *Ib.*

judgment at law not required, *Ib.*

statute held constitutional, *Ib.*

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ESTOPPEL.

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As applied to suit in replevin, *McLeod* v. *Johnson*, 271.

deft. pleaded title of chattels in third party, *Ib.*

had sold them to plaintiffs with warranty, *Ib.*

estopped in setting up such plea, *Ib.*

Easements in building lost by, *Bonney* v. *Greenwood*, 335.

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also abandoned in rebuilding, *Ib.*

also openings in party-wall legally closed, *Ib.*

Deft. sold quarry to plff., *Wilkins* v. *Slate Co.*, 385.

deft. damaged plff. by quarry blasts by throwing rocks on plff.' spremises, *Ib.*

no, of plff.'s action for damages, *Ib.*

EVIDENCE.

See DAMAGES. NEW TRIAL. RAILROADS. REVENUE LAWS.

Introductory questions in, admissible, *Waldron* v. *Priest*, 36.

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$6.67 money charge by book account, *Ib.*

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Copies of deeds not admitted in, where plff. claims as heir of grantee, *Egan* v. *Horrigan*, 46.

R. S., c. 82, § 110, does not apply, *Ib.*

(EVIDENCE concluded.)

execution of original or its loss not proved, *Ib.*
record of deed not always, of delivery, *Ib.*
held; no delivery of deed proven, *Ib.*
grantee an infant of twelve years, *Ib.*

Sanity of testatrix proven by conversation, acts, claims, etc., *Wells, Applt.*, 161.
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A will defeats not real action by heirs of deceased without, of its contents, *Walsh* v. *Wheelwright*, 174.

Rules of, in state courts not controlled by congress, *Wade* v. *Foss*, 230.

Words and acts not always res gestae, *McLeod* v. *Johnson*, 271.
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there was no ambiguity in the contract, *Ib.*

Declarations of pauper prior to his removal not admitted in, *Atkinson* v. *Orneville*, 311.

Burden of proof on lender to towns, *Pierce* v. *Greenfield*, 350.
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Voluntary confessions of crime admitted in, *State* v. *Grover*, 363.
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An accident not, of negligence, *Pellerin* v. *Paper Co.*, 388.
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Record not controlled by parol, *Pennell* v. *Card*, 392.
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Indictment for liquor nuisance, *State* v. *Wold*, 401.
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Druggist bot. intox. liquors in Boston, *Pollard* v. *Allen*, 455.
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was some, to sustain finding of court below that he was liable, *Ib.*
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Ancient town records as, in grants under Ordinance of 1641–47, *Proctor* v. *R. R. Co.*, 458.
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By-Laws of savings bank how proved, *Ladd* v. *Savings Bank*, 510.
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When taken to evidence but none to charge, *Atkinson* v. *Orneville*, 311.
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Must state facts found on hearing of petition for review, *Bradford* v. *Philbrick*, 420.
otherwise no exceptions to ruling, *Ib.*
Bills of, must show party is injured, *Copeland* v. *Hewett*, 525.
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EXECUTION.

In suits against exors. and admrs., *Bank* v. *Turner*, 380.
one, for debt against goods of estate and another for costs against exor. and admr., *Ib.*
levy void if two, combined in one, *Ib.*
R. S., c. 87, § 2, gives not cumulative remedy, *Ib.*

EXECUTORS AND ADMINISTRATORS.

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Claims on insolvent estates, *Morgan* v. *McCausland*, 449.
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Of sales by, in probate court, *Snow, Applt.*, 570.
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EXEMPTIONS.

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FELLOW-SERVANT.

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FENCE.

Selectmen not authorized to act as, viewers under stat. as in 1898, *Bradford* v. *Hawkins*, 484.
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FIXTURES.

Water-works on defts.' land by his license became not, *Salley* v. *Robinson*, 474.
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Buildings erected on another's land with his consent remain property of builder, *Peaks* v. *Hutchinson*, 530.
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FLATS.

Effect of Ordinance of 1641–7, *Proctor* v. *R. R. Co.*, 458.
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owner may separate, from upland by deed, *Ib.*
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FORCIBLE ENTRY AND DETAINER.

Will lie against quasi-public corporations engaged in supplying electricity, *Water Power Co.* v. *Electric Co.*, 117.
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FORGERY.

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FRAUD.

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Deft. gave plffs. bill of sale of horses with warranty, *McLeod* v. *Johnson*, 271.
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Deft. obtained of plff. his niece's property worth $20,000 for $10,000 by *Tribou* v. *Tribou*, 305.
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GIFT.

Valid gift inter vivos defined, *Savings Inst.* v. *Titcomb*, 62.
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donor parts absolutely with dominion and control, *Ib.*
to take effect immediately and transfer complete, *Ib.*
effect of transfer from old to new book same as originally depositing of money, *Ib.*
delivery to bank same as to donee, *Ib.*
otherwise if depositor retains book, *Ib.*
case of valid equitable gift, *Ib.*
equitable title may pass by declaration, *Ib.*
A parol, of real property, *Wiggin* v. *Mullen*, 375.
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HARBOR MASTER.

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HUSBAND AND WIFE.

Pauper settlement of wife, *Portland* v. *Auburn*, 501.
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wife's settlement lost under stat. 1893, c. 269.
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They may contract with each other that buildings erected on the other's land may remain builder's, *Peaks* v. *Hutchinson*, 530.
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INDICTMENT.

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INFANTS.

Not liable in tort when ground of action is substantially contract, *Caswell* v. *Parker*, 39.
are liable for torts but form of action determines not their liability, *Ib.*
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Grantee in deed an, of twelve years, *Egan* v. *Horrigan*, 46.
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INSANE HOSPITAL.

Action against husband for wife's support by town in the, *Kittery* v. *Dixon*, 368.
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physicians' certificate alone not sufficient, *Ib.*
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"due inquiry and personal examination" must appear in physicians' certificate, *Ib.*
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INSOLVENCY.

Mortgage not a preference unless recorded within three months before proceedings in, *Partridge, Applt.*, 52.
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creditor allowed to prove his claim, *Ib.*
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State law of, suspended by bankrupt act of July 1, 1898, *Littlefield* v. *Gay*, 422
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Foreign creditor was not a party, *Swift* v. *Winchester*, 480.
discharge in, is not a bar, *Ib.*
he did not prove his claim, etc., *Ib.*
discharge in, depends on jurisdiction of court in, and not conduct of party, *Ib.*
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Chicago plff. did business in this state as Bangor Beef Co., *Ib.*

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW. INTOX. LIQUORS.

INTOXICATING LIQUORS.

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immaterial that others were found and seized, *Ib.*
deft. was arrested at time of seizure and before warrant issued, *Ib.*
validity of complaint, etc., not affected, *Ib.*
Having possession of, with intent to sell and maintaining common nuisance, *State* v. *Wold*, 401.
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(INTOXICATING LIQUORS concluded.)
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Search and seizure warrant, *State* v. *Connolly*, 405.
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no search of person and warrant held valid, *Ib.*
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they were stored at place of ultimate destination, *Ib.*
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shipped from N. Y. to Lewiston and came by Me. Cent. instead of G. T. Ry., as ordered, *Ib.*
Druggist bot., in Boston, *Pollard* v. *Allen*, 455.
did not testify in action to recover their price, *Ib.*
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finding conclusive, being based on evidence, *Ib.*
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Liquor nuisance enjoined in equity on petition of twenty legal voters, *Davis* v. *Auld*, 559. *Same* v. *Schoppe*, 559.
stat. 1891, c. 98, gives court this power, *Ib.*
judgment at law not required, *Ib.*
statute held constitutional, *Ib.*
suit need not be by public officer, *Ib.*
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JUDGMENT.

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A, recovered for single breach of contract, *Willoughby* v. *Atkinson Co.*, 372.
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prior, *held;* a bar, *Ib.*
A, should follow writ and declaration, *Bank* v. *Turner*, 380.
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exon. for costs against executor, *Ib.*
levy void if two exons. combined in one, *Ib.*
R. S., c. 87, § 2, gives not cumulative remedy, *Ib.*

JURISDICTION.

See APPEAL. TRIAL JUSTICE.

Of mun. court to enforce lien for board of horses, *McGillicuddy* v. *Edwards*, 347.
R. S. c. 91, § 56, not limited by stat. 1901, c. 262, *Ib.*
horse owner did not reside in same county as petitioner, *Ib.*

LEASE.

A clause in a, giving option to landlord to "either to buy or allow to be removed" certain property of the tenant, *held;* to give tenant right of removal after expiration of lease unless landlord exercises the option of purchase, *Water Power Co.* v. *Electric Co.*, 117.
did not postpone expiration of the, *Ib.*
did not prevent forcible entry and detainer, *Ib.*

LEVY.

See EXECUTION.

LIBEL AND SLANDER.

"Due from Louise Pease three dollars" was inserted in annual town report, *Pease* v. *Bamford*, 23.
unearned witness fee and *held;* not a, *Ib.*

Slander charging larceny, *Kimball* v. *Page*, 487.
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LICENSE.

See DEED. EXECUTORS AND ADMINISTRATORS.

Water works erected by, on deft.'s land, *Salley* v. *Robinson*, 474.
they did not become part of realty, *Ib.*
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reasonable notice required, *Ib.*
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LIEN.

Petition to enforce a, for board of horse is purely a proceeding in rem, *McGillicuddy* v. *Edwards*, 347.
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R. S., c. 91, § 56, not limited by stat. 1901, c. 262, *Ib.*

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Action by receiver of Minn. corporation, *Hale* v. *Cushman*, 148.
R. S., c. 81, § 82, *held;* not a bar, *Ib.*
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Same principle, *Pulsifer* v. *Greene*, 438. *Same* v. *Heard*, 438.
Kansas stat. of, not integral part of remedy, *Ib.*

LOGS.

See ASSUMPSIT. REPLEVIN.

LORD'S DAY.

Search and seizure warrant on the, before stat. 1901, c, 239, was valid, *State* v. *Conwell*, 172.
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MARINE RAILWAY.

See NEGLIGENCE.

MASTER AND SERVANT.

See NEGLIGENCE.

Master liable for defective machinery, *Drapeau* v. *Paper Co.*, 299.
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MORTGAGE.

Payment of a, by holder of the equity, *Lumsden* v. *Manson*, 357.
effects a discharge of the, only *Ib.*
assignment of the, cannot be required, *Ib.*
prior agreement between mortgagor and assignee of mortgagee to purchase the, etc., affects not same result, *Ib.*
bill to redeem a, must aver tender or facts excusing omission of tender, *Ib.*
tender coupled with condition requiring an assignment of a, not sufficient, *Ib.*
bill did not allege lawful tender but may be dismissed without prejudice, *Ib.*

MUNICIPAL CORPORATIONS.

See PUBLIC OFFICER. WAY.

Power to contract for water supply, *Mayo* v. *Vill. Fire Co.*, 539.
ultra vires contract made valid by subsequent legislation, *Ib.*
purchase of water works system held valid, *Ib.*
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NEGLIGENCE.

See DEATH BY WRONGFUL ACT. WAY.

Master bound to supply safe machinery, *Stewart* v. *Paper Co.*, 30.
servant assumes ordinary risks, *Ib.*
master not liable for, of fellow-servant, *Ib.*
ordinary use of machinery may be left to competent hands, *Ib.*
servant left open a drain for carrying away waste in pulp mill, *Ib.*
held; that the servant who removed the plank was not performing duties that the master owed his employees, *Ib.*
the negligence was that of a co-servant, *Ib.*

Deft.'s engineer did not use due care, *Ward* v. *R. R. Co.*, 136.
case of death under stat. 1891, c. 124, *Ib.*
after verdict for plff. on motion, *held;* deceased went upon station grounds on business and was not mere licensee, *Ib.*
deceased not negligent in avoiding danger, *Ib.*
he was thrown on track by frightened horse, *Ib.*

Owners of marine railway not guilty of, *Moore* v. *Stetson*, 197.
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Laborer held not to assume risks, when, *Drapeau* v. *Paper Co.*, 299.
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Use of R. R. bed by placing culvert pipe on it held not to be, *Witham* v. *R. R. Co.*, 326.
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Deft. liable for blasts in quarry which threw rocks on plff.'s premises, *Wilkins* v. *Slate Co.*, 385.
deft. sold quarry to plff. but not estopped in his action, *Ib.*

No action for, of fellow-servant, *Pellerin* v. *Paper Co.*, 388.
no presumption of, from an accident, *Ib.*
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Savings bank held liable for, *Ladd* v. *Savings Bank*, 510-520.
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NEW TRIAL.

Motion for a, denied, *Fitch* v. *Sidelinger*, 70.
irregular testimony not considered, *Ib.*
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Not granted when fair trial had, *Atkinson* v. *Orneville*, 311.

(NEW TRIAL concluded.)

Rules for granting a, on newly-discovered evidence, *Parsons* v. *St. Ry.*, 503.
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but not absolute in all cases, *Ib.*
is subject to sound discretion of the court, *Ib.*
if evidence is cumulative more is required, *Ib.*
Linscott v. *Orient Ins. Co.*, 88 Maine, 497, and *State* v. *Stain*, 82 Maine, 472, criticised, *Ib.*

NOTICE.

See SAVINGS BANK. WAY.

Lost savings bank-book, *Ladd* v. *Savings Bank*, 520.
no, of loss given to bank, *Ib.*
bank had no by-law in such case and held liable to depositor whose money was drawn on forged order, *Ib.*

Must be given to all co-tenants in partition proceedings, *Savage* v. *Gray*, 557

NUISANCE.

See INTOX. LIQUORS.

Illegal sale of intox. liquors, held a common, *Davis* v. *Auld*, 559; *Same* v *Schoppe*, 559.
may be enjoined in equity on petition of twenty legal voters, *Ib.*
suit need not be by public officer, *Ib.*
statute held constitutional, *Ib.*
judgment at law not required, *Ib.*

OATH.

See EXECUTORS AND ADMINISTRATORS.

OBSTRUCTING OFFICER.

See PLEADING.

OFFICE.

City Marshal of Biddeford, *Cote* v. *Biddeford*, 491.
held to have abandoned his, *Ib.*
various acts showing abandonment, viz: was illegally removed, but did not perform the duties of it, engaged in other occupations, demanded no compensation, earlier part of salary became barred, never tested title to the, by legal proceedings, *Ib.*
action for salary denied, *Ib.*

OFFICER.

Not protected for making arrest when, *Jacques* v. *Parks*, 268.
precept not legal on its face, *Ib.*
not issued by competent authority, *Ib.*
case of illegal tax warrant, *Ib.*

PARTY WALL.

See EASEMENTS.

PARTITION.

Notice must be given to co-tenants not named but described as unknown, *Savage* v. *Gray*, 557.

PARTIES.

See PARTITION.

Joint promise implied when it moves from several, jointly, *Eveleth* v. *Sawyer*, 227.
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her guardian could not then convey, *Ib.*
validity of sales before her death not decided grantees not being made parties, *Ib.*
costs allowed to each party out of estate, *Ib.*
A, defeats not a real action by heirs of deceased without evidence of its contents, *Walsh* v. *Wheelwright*, 174.

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See WILL.

Failed to attend court and cannot retain fee for travel, etc., *Pease* v. *Bamford*, 23.

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Deft. a non-resident was only commorant in the state, *Thomas* v. *Thomas*, 223.
summons at "her last and usual place of abode," *held;* insufficient, *Ib.*
Taking of bail bond to be noted on, *Maxcy Co.* v. *Bowie*, 435.
R. S., c. 85, § 1, is directory, *Ib.*

ERRATA.

Page 162, fifth line from top. For No read *Yes.*
" 172, ninth line from bottom. For c. 201 read c. *239.*
" 309, for "Exceptions by plaintiffs sustained," read, *Exceptions by defendant overruled.*