MAINE REPORTS

97

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1903

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1903

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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. 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.

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1903.

LAW TERMS.

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, POWERS, PEABODY, SPEAR, JJ.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

INHABITANTS OF HUDSON *vs.* INHABITANTS OF CHARLESTON.

Penobscot. Opinion October 30, 1902.

Pauper. Collusive Marriage. Evidence. R. S., c. 24, § 1.

In a pauper suit, in order to prevent the operation of the rule that a wife takes the settlement of her husband, the plaintiff town contended that the marriage of the pauper was procured through the agency of the selectmen of the defendant town, and that consequently her settlement was not changed thereby, but remained in the defendant town.

Held; that the testimony offered by the plaintiff town tending to show the admissions made by the municipal officers of the defendant town, and their narrations of past transactions, or statements in relation to pre-existing facts, is not competent evidence to prove their agency in procuring this marriage; but any declarations made by these officers accompanying their official acts in the premises and tending to explain them are admissible.

The principle upon which such evidence is admitted is, that the statement testified to is a verbal act illustrating or interpreting other parts of the transaction; that the declaration is essentially contemporaneous with the principal fact, and so far characterizes it as to be in a just sense a part of it.

Held; that the testimony showing the conduct and accompanying declarations of two of the selectmen and overseers of the poor of the defendant town, and of a constable of that town, acting under their authority, was sufficient, if believed, to warrant the jury in finding that the marriage of the pauper in question was procured by the agency of the town officers of the defendant town.

If the facts and circumstances surrounding these parties, as disclosed by the evidence, operated effectually to induce the marriage by means of their own weight and influence upon the minds of the parties without active interference by the municipal officers, the defendant town obviously could not be held chargeable with the result thus produced. But if the municipal officers of the town made use of the facts of the situation, either by way of advice, argument, persuasion or inducement, to induce the marriage for the purpose of changing the settlement, in such a sense that but for such act of the municipal officers the marriage would not have taken place, then the marriage was procured by the agency of the municipal officers to change the settlement.

Motion by defendant. Overruled.

Action to recover pauper supplies, in which the jury rendered a verdict for the plaintiff.

The verdict for the plaintiff at a former trial was set aside by the law court, no opinion by the court having been rendered.

The case appears in the opinion.

P. H. Gillin, T. B. Towle, J. H. Burgess and W. B. Peirce, for plaintiff.

L. C. Stearns and H. H. Patten, for defendant.

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

WHITEHOUSE, J. This is an action to recover the expense incurred for pauper supplies furnished to Clara L. Curtis, wife of Calvin L. Curtis. Her maiden name was Clara L. Tozier, and it was not in controversy that at the time of her marriage to Curtis, October 30, 1899, her pauper settlement was in the defendant town, and that the pauper settlement of Calvin L. Curtis was in the town of Alton. It was not in controversy that prior to and at the date of her marriage, Clara L. Tozier was a pauper receiving support from the defendant town.

It is provided in § 1 of c. 24, R. S., that "a married woman has the settlement of her husband if he has any in this state;" but it is further provided in the same section that "when in a suit between towns involving the settlement of a pauper it appears that a marriage was procured to change it by the agency or collusion of the officers

of either town, or of any person having charge of such pauper under authority of either town, the settlement is not affected by such marriage."

In order to prevent the operation in this case of the rule that a wife takes the settlement of her husband, the plaintiff town invoked the latter provision of the statute, contending that the marriage was procured through the agency of the selectmen of the defendant town, and that consequently the settlement of Clara L. Curtis was not changed thereby, but remained in the defendant town.

This issue has been twice presented to a jury, the trial in each instance resulting in a verdict for the plaintiff. It now comes to this court a second time on a motion to set aside the verdict as against the evidence.

It would not be expected that municipal officers, who were meditating a fraudulent practice for the purpose of relieving their town of a burden imposed by the pauper statute, would publicly declare their intention or openly employ active measures to accomplish their purpose. Evidence of explicit directions and positive utterances to induce a collusive marriage would not ordinarily be available. Indirection and concealment might be expected to characterize all efforts and proceedings to consummate the forbidden scheme, where exposure would at once destroy the advantage to be gained by it. In such a case, as well as in all similar inquiries, the proposition involved may be established by circumstantial as well as by direct evidence. The agency of the town officers may be deduced by the process of special inference, by means of the probabilities arising from established facts examined in the light of experience and observation.

The testimony offered by the plaintiff town tending to show the admissions made by the municipal officers of Charleston, and their narrations of past transactions, or statements in relation to pre-existing facts, was not competent evidence to prove their agency in procuring this marriage; but any declarations made by these officers accompanying their official acts in the premises and tending to explain them were admissible. *Corinna* v. *Exeter*, 13 Maine, 321; *Smyth* v. *Bangor*, 72 Maine, 249. The principle upon which such evidence is admitted is that the statement testified to is a verbal act

illustrating or interpreting other parts of the transaction; that the declaration is essentially contemporaneous with the principal fact, and so far characterizes it as to be in a just sense a part of it. *Barnes* v. *Rumford*, 96 Maine, 316.

After a careful examination of all the evidence now in the case, it is the opinion of the court that the testimony showing the conduct and accompanying declarations of Charles Tilton and Charles F. Tibbetts, two of the selectmen and overseers of the poor of the defendant town, and of David O. Pearl, a constable of that town, acting under their authority, was sufficient, if believed, to warrant the jury in finding that the marriage of the pauper in question was procured by the agency of the town officers of Charleston.

At the time of her marriage to Curtis, Clara L. Tozier was twenty years of age and the mother of three illegitimate children, the youngest being then about three months of age. She had received support as a pauper from the defendant town for three years prior to that time. Curtis was sixty-three years old, and had himself received assistance as a pauper from the town of Alton. Clara was at Tilton's residence May 9th, 1899, and went from his home to the poor-house in Charleston, remaining there three or four weeks. She was then allowed to go to the house of her brother, Charles Tozier, in Hudson, upon her promise not to incur any expense on account of the defendant town; and there, sometime in July, she gave birth to her third illegitimate child. September 12 following, the intentions of marriage of Clara L. Tozier and Calvin L. Curtis were recorded by the town clerk of Charleston pursuant to the directions contained in a letter purporting to be signed by Calvin L. Curtis. Unfortunately this letter was lost before the trial and no aid has been derived from the handwriting, but the plaintiff contends that errors in the vital statistics furnished, in connection with other significant circumstances, clearly indicate that the letter was prepared by some other hand than that of Calvin Curtis.

But the marriage was not solemnized as promptly as may have been expected, and the evidence tends to show that on the tenth day of October, Tilton and Tibbetts, receiving notice that Hudson had been called upon to pay Clara's bills, both went to the house of

Charles Tozier in Hudson, where Calvin Curtis and Clara then were, and informed Clara that she must go back to the poor-house; but she protested with so much feeling that they "concluded to try her two weeks longer," and before they left they told her, as the plaintiff contends, that if she was not married in two weeks they would send a constable who would take her back to the town farm. Thereupon she left Hudson and went to the house occupied by Calvin Curtis in West Oldtown, to serve as housekeeper for him, taking the children with her. But two days later Curtis brought the youngest child to Tilton's house, and it was thence taken by Tilton to the poor-house.

October 26 the same town officers issued a warrant to constable Pearl for the removal of Clara and her second child to the poor-house. Ostensibly in execution of this warrrant Pearl proceeded to West Oldtown and found that Curtis seemed at first unwilling to marry Clara. Pearl then stated to the magistrate in the presence of both Curtis and Clara that "he was going to see them married before he returned, or she was going with him." Curtis then said if Pearl would drive to Alton and obtain his certificate from the town clerk and "loan" him the money to pay the bills he would be married that night. Pearl complied, went to Alton with Clara and obtained the certificate, was present at the "wedding" and "loaned" Curtis $2.50 to pay the fees. For these services he received a town order for nine dollars, a sum considerably in excess of legal fees for serving the warrant. These facts justified the inference that Pearl had oral instructions from the town officers in addition to the command in the "warrant."

Edward J. Buzzell, a resident of the defendant town, testified that Tilton asked him if he knew Calvin Curtis of West Oldtown and added that Clara Tozier was down there at Curtis's house and "they would give twenty-five dollars to get rid of her." It was shown in defense that Buzzell's reputation for truth was bad and that he had threatened to have revenge against the town for refusing to pay his bill for labor on the road. But Tilton, while denying that he offered to pay Buzzell any money, admits that a conversation occurred between them in relation to the marriage in which Buzzell said he

thought that "while he was going back and forth, if a little time was put in he could get them married off." If this version of the interview be accepted as the correct one, the inference is still irresistible that Buzzell would not have volunteered even that suggestion without good reason to believe that it was in harmony with Tilton's desire and purpose. Buzzell's road bill was paid by the town before the second trial of this case.

Finally, it appears that at the former trial Tilton had testified positively that he was never at Curtis's house or door-yard in West Oldtown in his life, and in effect made the same statement at the second trial. But at the last trial three witnesses testified positively that they saw him and recognized him in West Oldtown about two weeks before the marriage, and two of them state that they saw him in Curtis's door-yard. One other witness recognized Tilton's team in Curtis's door-yard ten days or two weeks before the marriage. Notwithstanding Tilton's denial, this evidence was sufficient to warrant the conclusion that he was at Curtis's house about the time named; and that fact being established, Tilton's false denial of it justified the inference on the part of the jury that his presence there was incapable of any explanation consistent with his innocence.

If the facts and circumstances surrounding these parties, as disclosed by the foregoing statement, operated effectually to induce the marriage by means of their own weight and influence upon the minds of the parties without active interference by the municipal officers, the defendant town obviously could not be held chargeable with the result thus produced. But as stated by the court in *Minot* v. *Bowdoin*, 75 Maine, 205, "if a municipal officer of the town made use of the facts of the situation, either by way of advice, argument, persuasion or inducement, made use of any means to induce the marriage for the purpose of changing the settlement, in such a sense that but for such act of the municipal officer the marriage would not have taken place, if such a state of facts is shown, then the marriage was procured by the agency of the municipal officers to change the settlement."

In the case at bar two juries have found that the marriage was so procured by the agency of the municipal officers, and we cannot

say that their conclusion was so unmistakably wrong as to justify the court in setting aside this verdict.

Motion overruled.

JOHN E. COLLINS *vs.* EDWARD T. CAMPBELL.

EDWARD T. CAMPBELL and another, *vs.* JOHN E. COLLINS.

Hancock. Opinion November 5, 1902.

Set-off. R. S., c. 81, § 77; c. 82, § 57.

Statutes regulating the right of set-off usually limit its application to mutual demands, and if there are several plaintiffs the demands must be from all jointly, if several defendants to all jointly. But courts of common law have an equitable jurisdiction in cases of set-off independent of the statute, practically co-extensive with that of courts of equity, and opposite demands arising upon judgments may be, upon motion, set off against each other whenever such set-off is equitable.

It is generally held that a member of a firm, when sued for his individual debt cannot set off a claim due from the plaintiff to the firm without the consent of the other partners. But he may do this if he has the consent of his co-partners, and the rights of third parties will not be prejudiced.

Such set-off will not be allowed to defeat an attorney's lien for the taxable costs.

Mutuality is implied in the word "set-off" and is essential in every case dependent upon the discretion of the court, but it need not be nominal mutuality indicated by the record, but real mutuality shown by the evidence.

On report. Motion for set-off allowed.

Two actions of debt upon judgments rendered by the Common Pleas Division of the Supreme Court of Rhode Island. Both of said actions were defaulted.

Before the default of the actions and while both of said cases were pending in court, and before judgment, the plaintiffs in the suit of *Campbell et al.* v. *Collins* moved the court to order the judgment to be rendered by this court in the suit of *Campbell et al.* v. *Collins*

to be offset pro tanto against the judgment to be rendered by this court in the suit of *Collins* v. *Campbell*, except as to the taxable costs in such suit.

L. B. Deasy, for Collins.

A. W. King, for Campbell and Macomber.

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

PEABODY, J. The question presented by the report is the right of equitable set-off. It affects the judgments which may be recovered in two suits pending in the Supreme Judicial Court for the County of Hancock.

In one of these suits John E. Collins is plaintiff and Edward T. Campbell is defendant, and in the other Edward T. Campbell and John H. Macomber, as co-partners of the firm of Campbell & Macomber, are plaintiffs and John E. Collins is defendant.

The plaintiffs in the suit *Campbell et al.* v. *Collins*, by motion addressed to the court at nisi prius, ask that an order be made directing the judgment which may be recovered in that action to be set off pro tanto against the judgment which may be recovered in the action *Collins* v. *Campbell*, except as to the taxable costs in each suit. The pending actions are based upon judgments recovered in the Common Pleas Division of the Supreme Court of the State of Rhode Island.

The case shows that Collins was indebted to the firm of Campbell & Macomber on a protested draft in 1892, and was sued and arrested in legal proceedings in the State of Rhode Island, instituted by the firm, April 17, 1893, for the collection of their debt. Judgment was recovered against the debtor for $1100.76, which remains unsatisfied. He was released by the court from arrest, and November 16, 1894, brought suit in Rhode Island for false imprisonment against Campbell individually, who had, in behalf of the firm, caused his arrest, and recovered judgment for $2000, which remains unsatisfied. Collins assigned this judgment, soon after it was recovered, to his mother, Mary E. Collins, to secure his indebtedness to her for

$2800, borrowed money. He was insolvent at the time of the assignment, and the instrument seems to have been prepared by his attorney and the formalities of its execution made under his direction. The suit in his name is brought for the benefit of the assignee. Originally courts of equity alone had jurisdiction in cases of set-off. *Ex parte Stephens*, 11 Ves. 24. The right did not exist at common law until introduced into its practice by statute; but being found conducive to the administration of justice it has been greatly extended by legislative enactments and a liberal construction by the courts. And now courts of common law have an equitable jurisdiction in cases of set-off independent of the statute, practically coextensive with that of courts of equity, and opposite demands arising upon judgments may, upon motion, be set off against each other whenever such set-off is equitable. *Conable* v. *Bucklin*, 2 Aik. 221; *Donnell* v. *P. & O. R. R. Co.*, 76 Maine, 33; *Peirce* v. *Bent*, 69 Maine, 381.

By the exercise of this equitable jurisdiction the courts are enabled to do justice between the parties in cases not strictly within the provisions of the statute. Colb. Prac. 196; 2 Par. Con. 335; *Wright* v. *Cobleigh*, 3 Foster, 32; *Hutchins* v. *Riddle*, 12 N. H. 464; *Gould* v. *Parlin*, 7 Greenl. 82; *Simson* v. *Hart*, 14 Johns. 63.

The criterion by which it is to be determined is whether it is equitable. *Baker* v. *Hoag*, 59 Am. Dec. 431; 6 How. Prac. R. 201; *Makepeace* v. *Coates*, 8 Mass. 451.

Statutes regulating the right of set-off, while seeking to avoid multiplicity of suits and to afford speedy adjustment of conflicting claims between parties, usually limit its application to mutual demands, and if there are several plaintiffs the demands must be from all jointly, and if several defendants, to all jointly. *Williams* v. *Ocean Ins. Co.*, 2 Met. 303; Colb. Prac. 191; R. S., c. 32, §§ 55, 56, 57.

This case is to be decided independently of any statute, except so far as the spirit of statutory regulations may influence the judicial discretion of the court. 2 Par. Con. 240. In *Barker* v. *Braham*, 2 W. Black. 896, DeGray, C. J., favoring the motion of the defendant that the judgments recovered in different courts might be set off against each other, said he "desired it to be remembered that it was

a case of one judgment against another, and must be distinguished from setting off private debts upon which no judgments had been obtained." In *Mitchell* v. *Oldfield*, 4 T. R. 123, Lord Kenyon said "it did not depend upon the statute of set-off, but the general jurisdiction of the court over the suitors in it." *Duncan* v. *Bloomstock*, 2 McCord, 318, 13 Am. Dec. 729.

In this case the demands are not such as come within the conditions of the statutes of this state. They are excluded by the limitation of § 57, c. 82, R. S. The proceedings sought are not for a statutory set-off of the original judgments, but for a set-off of judgments to be recovered in cross actions upon the foreign judgments.

Section 77, c. 81, R. S., giving the right of set-off in cross actions anticipated equities which in particular cases justify a departure from the general rule, but it applies only where the parties are identical or where several defendants bring cross actions against a non-resident plaintiff, and does not authorize the set-off of a judgment to be recovered in an action of a firm against the judgment which a non-resident plaintiff may recover in his action against one of the partners.

There are ample authorities which hold that in the absence of such statutory authority the courts may allow a set-off of judgments when different parties are nominal plaintiff and nominal defendant. 2 Par. Con. 240; *Moody* v. *Towle*, 5 Greenl. 415; *Foot* v. *Ketchum*, 15 Vt. 258, 40 Am. Dec. 678; *Andrews* v. *Varrell*, 46 N. H. 17.

In *Hobbs* v. *Duff*, 23 Cal. 596, it was held "where the parties to two judgments are not the same, courts of equity will look beyond the nominal to the real parties in interest and adjudicate the rights of the parties accordingly."

Where a firm creditor has been sued by an individual member of the firm, he has been allowed to set off against the claim the debt of the co-partnership to him. *Hutchins* v. *Riddle*, 12 N. H. 464, supra. The reason assigned by the court in that case is, that each member is holden for the debts of the firm; but there are reason and authority also against the right in such cases. *Lamb* v. *Brolaski*, 38 Mo. 51. In the case last cited the court say: "Were it otherwise, a firm might be made to pay the private debts of one partner

to the injury of the other and the creditors of the co-partnership." But it should be considered that in each case the common law court exercises a judicial discretion in granting or refusing the set-off. *Simson* v. *Hart*, 14 Johns. 63, supra.

It is, however, generally held that a member of a firm when sued for his individual debt, can not set off a claim due from the plaintiff to the firm without the consent of the other partners. *Taylor* v. *Bass*, 5 Ala. 110; *Hoyt* v. *Murphy*, 18 Ala. 316; *Manning* v. *Maroney*, 87 Ala. 563, 13 Am. St. Rep. 67; *Howe* v. *Snow*, 3 Allen, 111. But it appears to be otherwise if he has the consent of his co-partners, and the rights of third persons will not be prejudiced. *Tustin* v. *Cameron*, 5 Whar. 379; *Montz* v. *Morris*, 89 Penn. 392; *Bartlett* v. *Loomis*, 16 Montg. Co. L. R. 206, cited in Am. Dig. 1901, A 4062; Spauld. Prac. 273.

If a person is sued solely by the plaintiff for a joint debt due from himself and another, he may be allowed to set off a debt due to them jointly from the plaintiff. *Stanwood* v. *Dunn*, 3 Q. B. (Adol. & Ell.) 822; *Mott* v. *Mott*, 5 Vt. 111.

Mutuality is implied in the word "set-off," which has been adopted as a legal term by the legislatures and courts, and is essential in every case dependent upon the discretion of the court, but it need not be a nominal mutuality indicated by the record, but real mutuality shown by the evidence. *Conable* v. *Bucklin*, 2 Aik. 221, supra; *Ward* v. *Martin*, 31 B. Mon. (Ky.) 18; *Chase* v. *Woodward*, 61 N. H. 79. In *Sullivant* v. *Reardon*, 5 Ark. 140, Paschal, J., says: "The true question is not as to the mutuality of the indebtedness of the parties to the action as they remain upon the record, but the mutuality of the indebtedness at the time of the commencement of the suit." The principal would doubtless extend to the original indebtedness or cause of action.

It is claimed by the applicants that the liability upon which judgment was recovered against Campbell individually was in reality a claim against the firm. It originated in the acts of a member of the firm justified as between the partners, not only by general authority under the law of partnership, but by the express consent of Macomber given to Campbell to do the precise thing which the court decided

was a tort against their debtor. Collins had a legal right of action against either or both of his judgment creditors. Am. & Eng. Ency. of Law, Vol. 17, p. 1066. Had he seen fit to sue both for false imprisonment and recovered judgment against them, the right of set-off would have been absolute under § 77, c. 81, R. S. He elected to sue Campbell alone, and the judgment against the individual partner can be set off pro tanto by the judgment of the firm only by the legal exercise of the discretionary power of the court, if, under the "particular circumstances," it is equitable and not inconsistent with the legal rights of the parties or those of third persons. As between the real parties in interest it would be eminently just, because Collins is a debtor of the firm of which Campbell is a member, and he is insolvent. It would not be prejudicial to Macomber or the partnership creditors, but beneficial to them because for whatever amount Campbell is compelled to pay to satisfy the judgment against him, he is entitled to be reimbursed by the partnership; and if the judgment may otherwise be set off it would not impair the legal rights of the assignee of Collins, who took the assignment of the judgment cum onere, subject to all equities in favor of the debtor, including the right of set-off. *Hooper* v. *Brundage*, 22 Maine, 460; *Burnham* v. *Tucker*, 18 Maine, 179; *Peirce* v. *Bent*, 69 Maine, 381, supra.

While the evidence shown by the report raises no question as to the validity of the assignment, the court in determining the equities which control the exercise of its discretionary power will observe that it was not a transfer for a present consideration, but as security for a pre-existing debt, given voluntarily by Collins to his mother, at a time when he was insolvent, and that the business was done by his own attorney acting for the assignor and assignee. The consent of Macomber was expressly given to the set-off when the application was made therefor to the court, or perhaps when the subject was first thought of and discussed, but after the date of the assignment; but his assent will be implied from the circumstances. The judgment recovered against Campbell was an incident to his effort to collect a debt of the firm. It was a risk incurred in its behalf, and, as has been said, whenever paid by him he might properly be reim-

bursed by the partnership. The case is novel, but we think it comes within the wide sphere of exceptions to the general rules of the law of set-off. *Blake* v. *Langdon*, 19 Vt. 485, 47 Am. Dec. 701; Story on Part. § 395; *Seaman* v. *Slater*, 49 F. R. 37. The equity is clearly in favor of the applicants.

Judgment in suit Edward T. Campbell et al. v. John E. Collins ordered to be set off pro tanto against the judgment of John E. Collins v. Edward T. Campbell, except as to the taxable costs in each suit.

INHABITANTS OF ORLAND *vs.* INHABITANTS OF PENOBSCOT.

Hancock. Opinion December 4, 1902.

Pauper Supplies. Private Charity. Subscription Paper. Motive of Donor. Belief of Pauper. R. S., c. 24, § 1, par. VI; § 2.

Pauper supplies, whether received directly or indirectly by the pauper, must be received from the town as a result of the obligation imposed upon it by the statute.

Voluntary contributions of private charity do not constitute such supplies. The motive of the donors is not material. The consequences attach to the act, not to the motive. It is the receipt of supplies from the town, not the motive which may have inspired any person or persons to do away with the necessity of the pauper receiving relief from the town, which affects the gaining of a pauper settlement.

The belief of the pauper that the supplies were furnished by the town in response to his application is not sufficient. It is the fact that they are so furnished, and not his belief, which constitutes them pauper supplies.

On report. Judgment for defendant.

Assumpsit for pauper supplies furnished one Wallace Heath.

The case is fully stated in the opinion.

O. F. Fellows, for plaintiff.

The supplies sued for when received were supposed by the pauper to have been furnished by the town of Penobscot and he did not know to the contrary for more than two weeks thereafter.

In an opinion given to the Governor and Council in 1831, this court says: "A person is to be considered as a pauper while he receives supplies, as such, ..." Opinion of Judges, 7 Maine, 497, 499.

The distress actually existed; the supplies were really furnished for his relief, and reached the pauper as a result of his application to the overseers of the town which he supposed supplied him.

The town of Penobscot did not pay for the supplies furnished through the agency of its overseers to this man; but adopted the method pursued with the design that the pauper might thereby gain a settlement in Orland.

Counsel cited: R. S., c. 24, § 1, par. I; *Foxcroft* v. *Corinth*, 61 Maine, 559; *Inhabitants of East Sudbury* v. *Inhabitants of Waltham*, 13 Mass. 459, 460.

A. W. King, for defendant.

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

POWERS, J. Assumpsit for pauper supplies furnished Wallace Heath.

The only question presented is, whether the pauper had his settlement in the defendant town on Feb. 1, 1901, when the supplies were furnished. From the report we find the following facts. The pauper had a derivative settlement in Penobscot up to June 4, 1895, when he became of age. He resided in Orland from that time to the time when the supplies sued for were received, and thereby gained a settlement in the plaintiff town, unless that result was prevented by the receipt of pauper supplies from Penobscot in March, 1899. At that time he and his minor children were sick with scarlet fever, and in need of immediate relief. He directed his wife to make an application, in his behalf, to the town of Penobscot, for pauper supplies. She wrote an order, stating what was needed for their relief, and sent it to Mark Devereux, one of the overseers of the poor of Penobscot. Upon receipt of the order Mr. Devereux had a consultation with the father and the uncle of the pauper, which

resulted in a relative, Howard Heath, going around through the town of Penobscot with a subscription paper for the relief of the pauper. From thirty to thirty-five persons, or families, residents of Penobscot, contributed, signing a paper showing the amount contributed by each, and the same day the provisions, and some of the money thus raised, was left at the pauper's house, the balance being afterward expended by his father for his benefit. When the pauper received the supplies thus furnished he believed that they were pauper supplies from the town. In fact, the defendant town neither furnished nor paid for any of the supplies, nor were they furnished upon its credit. It was under no obligation, either express or implied, to reimburse the persons making the donation.

Upon this state of facts it is urged that the object of Mr. Devereux in originating this subscription, and of the residents of Penobscot who contributed to it, was that the gaining of a settlement by the pauper in Orland might not be interrupted or prevented by his receiving supplies before the expiration of the five years that he had his home in that town; that to permit it to have that result would be an evasion of the statute, and a fraud upon the town of Orland; and that the supplies were, indirectly at least, furnished by Penobscot.

The rights, duties, and obligations of towns in regard to the relief of paupers are created and defined by the statute. A person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein. R. S., c. 24, § 1, par. VI. The supplies, however, must be received from the town, whether received directly or indirectly. Otherwise they do not constitute pauper supplies. The indirect receipt by the pauper of supplies from the town is put upon the same basis, and has the same effect, as the direct receipt of them, but in either case they must be furnished by the town. Numerous instances of the indirect receipt of supplies may be found in the reports, and it is unnecessary to cite them here; but in every case it will be found that they came from the town, were paid for by the town, or were furnished upon its credit, and the town was under an express or implied obligation to pay for them. The voluntary contributions of private charity stand upon a far different footing, and have never

been confounded with the relief which is the result of the municipal obligation imposed by the statute. In *Canaan* v. *Bloomfield*, 3 Maine, 172, the supplies were furnished upon the written order of the selectmen, but by one not the drawee. It was held that, the town being under no legal obligation to pay for them, they were not furnished by the town within the meaning of the statute, and were not such supplies as affected the pauper's settlement. In the present case, if the pauper had called upon the town of Orland for relief, and the donation had been made by the residents of Orland instead of Penobscot, would anyone claim that a suit could have been maintained by the town of Orland to recover for the voluntary gifts of its individual citizens?

Neither is the motive of Mr. Devereux, or of the donors, material. The consequences attach to the act, not to the motive. It is the receipt of supplies from the town, not the motive which may have inspired any person or persons to do away with the necessity of the pauper receiving relief from the town, which affects the gaining of a settlement. "It is wholly immaterial" says Shaw, C. J., in *Oakham* v. *Sutton*, 13 Met. 197, "whether the overseers in affording relief to Simpson, intended to fix, or change, or in any way affect his settlement, that result is collateral to the act of furnishing relief, and does not depend upon the intent with which it was done, but upon the provisions of law giving effect to it." The same may be said of the belief of the pauper that the supplies were pauper supplies furnished by the defendant town. It is true that to constitute pauper supplies they must be either applied for, or received, with a full knowledge that they are such supplies. R. S., c. 24, § 2. The absence of such application or knowledge may prevent that being pauper supplies which would otherwise be such. But the application alone is not sufficient; belief that the supplies are furnished by the town is not sufficient; it is the fact that they are received from the town in accordance with the obligation imposed by the statute upon the municipality, and not from individuals as the voluntary offerings of private charity, which constitutes them pauper supplies.

Judgment for defendant.

MATTHEW LAUGHLIN, Admr.,

vs.

MARGARET M. NORCROSS, Admrx.

Penobscot. Opinion December 4, 1902.

Life Insurance. Predecease of Beneficiary. Vested Interest. Will. After Acquired Property.

A policy of life insurance, the moment it is issued, creates a vested interest in the beneficiary therein named.

Such interest will pass under a devise of all the estate, real, personal, and mixed, wherever found and however situate, whereof the testatrix may die seized or possessed.

This result is not affected by the fact that the policy was not in existence at the date of the will. The will takes effect at the decease of the testatrix, and operates upon all property then owned by her.

On report. In equity. Bill sustained.

Bill, by her administrator with the will annexed, for the construction of the will of Harriet W. Norcross, deceased. Heard on bill and answers.

Plaintiff's testatrix made her will before her husband insured his life in her favor. He died intestate nearly ten years after her death, leaving a widow and two children by a second marriage.

The next of kin of Harriet W. Norcross, deceased, was her brother, Joseph N. Whittier, who contended that the life insurance did not pass by his sister's will, but that she died intestate as to that fund, one-half of which he claimed.

Matthew Laughlin, pro se.

Counsel argued that the insurance money passed under the broad residuary clause in the will of Harriet W. Norcross. And that while the whole fund in the first instance should be decreed to the administrator de bonis non with the will annexed of the estate of Harriet W. Norcross, deceased, it would eventually inure to the

benefit of Margaret M. Norcross, administratrix of the estate of the testatrix's deceased husband.

Norman Wardwell, for defendant Margaret M. Norcross, administratrix.

E. W. Freeman, for defendant Whittier.

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

POWERS, J. The complainant, as administrator with the will annexed of Harriet W. Norcross, has received the amount of a life insurance policy issued to her husband, Joseph N. Norcross, and brings this bill for a construction of her will and of said policy.

Joseph N. Norcross on Dec. 15, 1888, procured said policy of insurance upon his life for the sum of $1000.00, which, by the express terms of the policy, was payable upon his death to his wife Harriet W. Norcross, if living, and if deceased to her executors, administrators, or assigns. Harriet W. Norcross died January 21, 1892, leaving a will, dated May 5, 1887, by which she devised and bequeathed all her estate to her said husband. Nov. 4, 1901, Joseph died intestate, leaving a wife and children by a second marriage. The question presented is, whether the proceeds of the policy pass under the will, and are to be paid over to the legal representative of the husband, or should be distributed as intestate property, one-half to the estate of the husband, and one-half to the heir-at-law of the said Harriet.

It is settled by the great weight of authority that a policy of life insurance, the moment it is issued, creates a vested interest in the beneficiary therein named. *Hooker* v. *Sugg,* 102 N. C. 115, and note to the same in 11 Am. St. Rep. 717, 721, 3 L. R. A. 217; May on Ins. § 390; *Con. Life Ins. Co.* v. *Palmer,* 42 Conn. 60, 19 Am. Rep. 530; *Voss* v. *Conn. Mutual Life Ins. Co.,* 119 Mich. 161, 44 L. R. A. 689; *Harley* v. *Heist,* 86 Ind. 196, 44 Am. Rep. 285; *Cent. Nat'l Bank* v. *Hume,* 128 U. S. 195; Am. & Eng. Ency. of Law, 987; *Small* v. *Jose,* 86 Maine, 120. Such, in this case, was the plainly expressed intention of the parties to the contract, which pro-

vided that in case of the predecease of the beneficiary the amount of the policy should be payable to her "executors, administrators, and assigns." Both the defendants at bar claim under the beneficiary, and it cannot be seriously contended that she took such an interest as could be inherited, but not devised.

In determining whether the beneficiary's interest under the policy passed by the devise to her husband, the result is not affected by the fact that the policy was not in existence at the date of the will. Her interest under the policy vested the moment it was issued. The will took effect at her decease, and operated upon the property then owned by her. No more comprehensive terms could be used than those employed by the testatrix. She devised and bequeathed to her husband "his heirs and assigns forever, all the estate, real, personal, and mixed, wherever found and however situate, whereof I die seized and possessed." By this very language it was held in *Small* v. *Jose*, supra, that the testator evidently meant to include all kinds of rights that were transmissible. For still greater certainty however the testatrix adds, "I desire and intend all my property at my death to pass to the said Joseph N. Norcross, to be held by the said Joseph, his heirs and assigns forever." An intention so plainly and aptly expressed cannot be disregarded. The proceeds of the policy in the hands of the complainant passed under the will, and are to be paid over by him to the legal representative of Joseph N. Norcross, after deducting the costs of administration, and costs and reasonable counsel fees of these proceedings, which should be allowed to the complainant. A decree is to be entered in accordance with this opinion.

So ordered.

JOSEPH G. DAVIS *vs.* HENRY RANDALL.

Washington. Opinion December 4, 1902.

Stallion. Recovery for Service. Registry of Pedigree. Subsequent Change of Name and Owner. R. S., c. 38, § 61. Stat. 1873, c. 135.

The making and filing, by a former owner or keeper of a stallion of the certificate required by R. S., chap. 38, § 61, does not inure to the benefit of any subsequent owner or keeper.

No such owner or keeper, who himself neglects to file such certificate, before advertising the services of such stallion for breeding purposes, can recover compensation for such services.

When in a statute clear and unequivocal language is used, which admits of only one meaning, it must be intended to mean what it has plainly expressed, and it is not permissible to interpret that which stands in no need of interpretation.

Exceptions by defendant. Sustained.

Assumpsit on the following account annexed:

"Henry Randall,

To Joseph G. Davis, Dr.

1900.	
May 27, To services on horse's mouth,	$1.00
June 28, To use of stallion on mare,	12.00
June 28, To services on horse's mouth,	1.00
	$14.00"

The controversy was over the item of $12. for the use of the stallion.

The case came to this court below on appeal by defendant from judgment of a trial justice in favor of plaintiff.

Some time in the early spring of 1900, one Foster S. Reynolds of Lubec bought the stallion in question of one Perry E. Day of Princeton, in Washington County. He was then called "Black Harry," and not generally known in Lubec. Reynolds brought the stallion to Lubec and put him in the stable of Joseph G. Davis, the

plaintiff in this case, called the "Klondike Stable." Reynolds then changed the stallion's name to "Success, Jr.," and on March 13, 1900, the following notice appeared in the Lubec Herald, a weekly newspaper printed in Lubec:

"'SUCCESS, JR.'
Weight 1225 lbs.

Sired by the imported coach horse 'Success,' imported from England, registered in Book 2,500, No. 1,800, color black. Dam full blooded Morgan mare 'Curfew Bell.' 'Success, Jr.,' has a record of 2.26, and will stand at No. Lubec, Klondike stable, during the season of 1900. Fee, $12 to warrant; $2 at service, the balance at birth of colt. This horse is owned by F. S. Reynolds and handled by J. G. Davis," (the plaintiff in this case).

This notice was continued in the Herald down to August 7, 1900. Printed cards bearing a like notice were circulated through the town of Lubec. These advertisements were with the knowledge of the plaintiff, but he testified that he was not responsible for them.

Said stallion was never registered under the name of "Success, Jr."

The plaintiff claimed to have purchased this stallion from F. S. Reynolds sometime in May, 1900. After he purchased him he continued to keep him in the "Klondike Stable," and the mare was sired there.

The plaintiff did not have the stallion recorded in his own name.

Plaintiff offered, in evidence, the following record made by Perry E. Day, the former owner:

"'Black Harry,'

Age nine years, weight 1170 lbs., sired by 'Success.' Dam foaled by 'Lady Polly,' with the view of keeping said stallion for breeding purposes within the county aforesaid, I hereby register the same in the Registry of Deeds for Washington County, in accordance with Section 61, Chapter 38, Revised Statutes of Maine.

Feb. 1, 1893.

Perry E. Day.

Attest: H. R. Taylor, Register of Deeds."

To the admission of this record the defendant seasonably objected,

but his objection was overruled and the record admitted, to which ruling defendant reserved and alleged exceptions.

H. E. Saunders, for plaintiff.

J. H. Gray, for defendant.

SITTING: WISWELL, C. J., EMERY, POWERS, SPEAR, JJ.

POWERS, J. Assumpsit by the owner and keeper to recover for the services of a stallion.

The plaintiff advertised the services of the stallion under the name of "Success Jr.," but before doing so did not himself make and file in the registry of deeds the certificate required by R. S., c. 38, § 61. Against the defendant's objection, such a certificate by a former owner of the stallion under the name of "Black Harry" was introduced in evidence. The defendant excepts to the instruction of the presiding justice that when such a certificate was once filed, it attached to the animal, so far as to give the benefit of it to any subsequent owner, while the service was confined to that county, and he was advertised, if at all, under the same name that he bore in the certificate originally filed; that it was not necessary for any subsequent owner or keeper to file another certificate in order to comply with the statute; and that it was not in controversy that the horse called Black Harry in the original certificate was there represented to have been one of the progeny of a horse known as "Success" and in that sense was, in truth and in fact, a "Success Jr."

The statute is as follows: "The owner or keeper of any stallion for breeding purposes, before advertising, by written or printed notices, the services thereof, shall file a certificate with the register of deeds in the county where said stallion is owned or kept, stating the name, color, age, and size, of the same, together with the pedigree of said stallion as fully as obtainable, and the name of the person by whom he was bred. Whoever neglects to make and file such certificate shall recover no compensation for said services."

In construing this statute it is to be observed that the language used is not technical, but that its popular meaning is clear and

unequivocal. The duty of filing the certificate "before advertising" is, in the first sentence, by the plain command of the statute, imposed upon the owner or keeper. What owner or keeper? Evidently any and all owners or keepers who advertise the stallion's services. Then follows the provision, "Whoever neglects to make and file such certificate shall recover no compensation for such services." The plaintiff made and filed no certificate, but did advertise the services of the stallion. Can it be said that this was no neglect on the plaintiff's part because a former owner performed the duty imposed by the statute upon such owner? If such was the intention of the legislature it would have been easy to have said so. On the contrary, in as plain words as plain people can use, it has imposed the duty of making and filing the certificate upon all who advertise, and, when the services are advertised, has expressly confined the right to recover to those, and those only, who, before advertising, do not neglect to file such certificate.

It is urged that such a requirement is unreasonable; that the information having been once given to the public, no useful purpose would be subserved by having it spread anew upon the record by each successive owner. That consideration is for the legislature. The language used being clear and unequivocal, it must be intended to mean what it has plainly expressed. There is nothing in the context, or the consequences, which affords adequate grounds for departing from the rule of literal interpretation. When clear and unequivocal language is used, which admits of only one meaning, it is not permissible to interpret what has no need of interpretation. Endlich on Interpretation of Statutes, § 4. Neither is it clear that the requirement is unreasonable. If the purpose of the statute is the better preservation of horse records, as appears by the title to the original act, Stat. 1873, c. 135, they should be so kept that the record of the horse may be found and identified. In the case at bar, if the defendant sought in the registry of deeds for the record of "Success Jr.", he would find no certificate filed by the plaintiff Davis, who owned, kept, and advertised the stallion, but only a certificate by one Day relating to "Black Harry," who was a "Success Jr." in the same sense only as all the other progeny of "Success." It would be

merely a matter of conjecture whether the certificate filed related at all to the horse advertised. We believe rather that when the legislature enacted the statute quoted, and in the same section further imposed a penalty of $100.00 upon any one who wilfully made and filed a false certificate, it intended to give to the defendant, and those in like situation, this liability of the owner or keeper of the horse, who advertised him, with whom they contracted, to whom they were to pay their money, and upon the strength of whose representations the contract may well be presumed to have been made, as security that the statements made in the certificate required were, so far as he knew, true in fact.

Exceptions sustained.

CHESTER E. MATTHEWS

vs.

FLORENCE D. MATTHEWS, and another.

Cumberland. Opinion December 4, 1902.

Lost Bills and Notes. Indemnity to Payor. Practice.

In a suit upon a note claimed to have been lost, the court in its discretion will determine, in accordance with the facts of each particular case, whether the plaintiff shall have judgment without furnishing the defendant with indemnity.

Although the loss of the note without indorsement and after maturity is established by the weight of evidence, it is not therefore to be necessarily and conclusively assumed that the maker will be subjected to no loss on account of its reappearance.

In such case the court may in its discretion, and as a condition to the rendition of judgment, order such indemnity given as will reasonably protect and secure the defendant from possible loss, or it may order the case continued for judgment from term to term until the note has been barred by the statute of limitations.

Held; that, in this case, defendant should be defaulted for the amount of the note in suit, and the case continued for judgment from term to term

until the note is barred by the statute of limitations, or until the plaintiff furnishes the defendant such indemnity as the judge of the court hearing the case shall order and determine.

On report. Continued for judgment for plaintiff.

Assumpsit on a promissory note which plaintiff's testimony showed to be lost.

The case was reported from the Superior Court of Cumberland County for such judgment as the legal rights of the parties might require.

The facts appear in the opinion.

C. J. Nichols, for plaintiff.

It is not usual and not required in the Federal Courts to declare specially on a lost note as lost, no special count being necessary in such a case. *Renner* v. *The Bank of Columbia,* 9 Wheat. 581; *Dupignac* v. *Quick,* 56 N. Y. Sup. 385; *Adams* v. *Baker,* 16 R. I. 1, 27 Am. St. Rep. 721; *Monroe* v. *Weir,* 177 Mass. 301.

In Ohio where a note is lost which has never been indorsed by the payee, he may maintain an action at law against the maker without tendering indemnity against future liability. *Citizen's Nat'l Bank* v. *Brown,* 45 Ohio State, 39, 4 Am. St. Rep. 526.

A bond is not required to be given, even if the instrument is negotiable, if lost after maturity. *Kirkwood* v. *First National Bank,* 40 Neb. 484, 42 Am. St. Rep. 683, 24 L. R. A. 444; *Palmer* v. *Carpenter,* 53 Neb. 396; *Thayer* v. *King,* 15 Ohio, 242.

Counsel also cited: Greenleaf on Evidence, Vol. 2, § 17; *Branch* v. *Tillman,* 12 Ala. 214; *Jones* v. *Fales,* 5 Mass. 101; *Fales* v. *Russell,* 16 Pick, 315, 317, 318; *Schmidt* v. *People's National Bank,* 153 Mass. 550, 552; *Chaudron* v. *Hunt,* 3 Stewart, (Ala.) 31, 20 Am. Dec. 60; *Partard* v. *Tuckington,* 10 Johns. (N. Y.) 104; *Streeter* v. *Bank of Fort Edward,* 34 N. Y. 415.

A. F. Moulton, for defendants.

Counsel cited: Byles on Bills, 5th Ed. *363; Story on Prom. Notes, 5th Ed. § 450; 2 Parsons on Notes and Bills, 304; *McGregory* v. *McGregory,* 107 Mass. 543, 546; *McCann* v. *Randall,* 147 Mass. 81, 95, 9 Am. St. Rep. 666; *Tucker* v. *Tucker,* 119 Mass. 79, 81; *Perkins* v. *Cushman,* 44 Maine, 484, 490.

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

POWERS, J. This is an action by the payee against the maker of a negotiable promissory note, claimed to have been lost after its maturity, and without indorsement. The case comes before us upon report, and all technical questions of pleading, not being specially reserved, must be considered waived.

In this State it is settled that an action at law may be maintained against the maker upon a lost note. *Torrey* v. *Foss*, 40 Maine, 74; *Moore* v. *Fall*, 42 Maine, 450, 66 Am. Dec. 297.

The principal contention of the parties is as to whether the plaintiff should have judgment without furnishing the defendant with a reasonable bond of indemnity. This is addressed to the discretion of the court and must be determined in accordance with the facts of each particular case. The loss of the note generally implies some negligence on the part of the loser, and the consequences should not fall upon the innocent maker. If the note has been destroyed, or is at the time barred by the statute of limitations, it is evident that he is as effectually protected as he would be if it were produced and surrendered. So if the note is payable to the plaintiff, either originally or by indorsement, and it is admitted it has not been indorsed by him, the maker needs no further security. The recovery of a judgment by the one having the legal title to the note would be a good defense to a suit on the note in the hands of any other person. Other illustrations might be given. When, on the other hand, the maker is liable to suffer loss or expense through the reappearance of the note, he should have such indemnity as is reasonably equivalent to that which is afforded by its production and surrender.

In the case before us the defendant contends that there is no sufficient evidence of the loss of the note, or that, if lost, it was without indorsement, or after maturity. We think, however, that the plaintiff has established all these facts by a fair preponderance of the evidence. Upon such a preponderance of proof, however, while it is sufficient to authorize a finding in the plaintiff's favor, it is not to be assumed conclusively that the note will never reappear, and that the

defendant will be subjected to no further risk, loss, or expense on account of it. In such a case the court may in its discretion and as a condition to the rendition of judgment, order such indemnity given as will reasonably protect and secure the defendant from possible loss, or it may order the case continued for judgment from term to term, until the note has been barred by the statute of limitations. The particular form of such indemnity or security can usually be best determined at nisi prius, upon a hearing by the judge, who is cognizant of the circumstances of the case, and the condition of the parties.

The defendant should be defaulted for the amount of the note in suit, and the case continued for judgment from term to term until the note is barred by the statute of limitations, or until the plaintiff furnishes the defendant such indemnity as the judge of the Superior Court shall order and determine.

So ordered.

THOMAS M. NICHOLSON

vs.

MAINE CENTRAL RAILROAD COMPANY.

Hancock. Opinion December 4, 1902.

Railroads. Filing and Recording Location. Commissioner's Court. Ratification. R. S., c. 51, § 4. Special Laws, 1870, c. 359; 1873, c. 232.

Held; that the recorded location of the Bucksport and Bangor Railroad in 1873, is a substantial and sufficient compliance with the requirements of the statute in force at that time.

This location was unquestionably filed with the county commissioners "within the time and substantially according to the description in the charter," and this identical location is distinctly shown by the express terms of the recorded certificate of the clerk of courts appended to the record of the location to have been "approved by the county commissioners and ordered to be recorded March 18, 1873," as of the "January Adj. Term, 1873."

No reason has been assigned for impeaching the clerk's record or questioning the accuracy of the date of that record. The location itself, when originally filed, may have been without date and in that condition approved and recorded March 18, 1873; and it is not improbable that when the absence of the date was subsequently discovered, the deficiency was supplied as of that time, and the entry of "April 7, 1873" made upon the record without observing the date of the record in the clerk's certificate. But however this discrepancy in the dates may have been occasioned, the fact remains that the location spread upon the pages of the county commissioners' records was approved and recorded March 18, 1873. There is no suggestion of the existence of any different location to which the clerk's certificate of approval could possibly relate.

It is immaterial whether this location bore any date or not when originally filed. It must have been filed before it was approved by the county commissioners, and the subsequent insertion of an erroneous date by mistake cannot change the fact that this particular location of the defendant's railroad in the County of Hancock was filed, approved and recorded long prior to December 31, 1874, the time fixed in the amended charter. And this was all the law required.

If the president's communication accompanying the act of filing the location, stating that he was acting by authority of the board of directors of the railroad company, is not sufficient evidence of his authority, the acquiescence of that and subsequent boards in this act of the president, for a period of nearly thirty years must be accepted as satisfactory evidence of their approbation and ratification of it. It is not open to the plaintiff to make this objection.

The board of county commissioners is a court having a recording officer whose duty it is to register its decrees, and the attestation of the clerk is all that is necessary to give validity to the record of its transactions and judgments. The record was legally and properly made. There is no law requiring the signatures of the members of the board to be subscribed to their judgments or appended to their records.

On motion and exceptions by defendant. Exceptions sustained.

This was a real action brought by T. M. Nicholson against the Maine Central R. R. Company to recover certain real estate situated in the town of Bucksport, and claimed by that company as part of its right of way. The defense was the general issue with a brief statement claiming a strip of land six rods wide, three rods on either side of a certain line described, commencing at Long Wharf in Bucksport village running across the lot described in plaintiff writ, in all 250 feet. This strip of land the defendant claims under and by virtue of the location duly made by the Bucksport & Bangor R. R. Co. in the year 1873. The defendant claimed through several

railroad companies by leases, all of which were admitted. The defendant further claimed that for a period of more than twenty years, it and its predecessors in title have occupied it continually so as to gain title to said property and land, or a portion of it, by adverse possession.

The case appears in the opinion.

O. F. Fellows and O. P. Cunningham, for plaintiff.

C. F. Woodard, for defendant.

SITTING: WHITEHOUSE, POWERS, PEABODY, SPEAR, JJ.

WHITEHOUSE, J. This is a real action in which the plaintiff seeks to establish his ownership and right to the possession of a strip of land in Bucksport, six rods wide, included in the original location of the railroad operated by the defendant company.

It was not controverted that the plaintiff was entitled to judgment establishing his title to the fee in the land in question, but it was contended that the plaintiff was not entitled to have judgment and execution that would exclude the defendant from possession and control of the premises for all purposes involved in the exercise of its corporate franchise. The defendant claimed, in the first place, that it obtained an easement in the land for railroad purposes by virtue of a legal location of its roads under a charter, over a strip six rods in width; and secondly, the defendant contended that if its location was not legal and sufficient, it had acquired such easement by prescription over that portion of the strip actually occupied for railroad purposes by virtue of an exclusive, uninterrupted and adverse possession for a term of twenty years.

In his charge to the jury the presiding justice gave the following instruction respecting the question of the defendant's location: "I instruct you for the purpose of this trial that the location as filed and the proceedings of the railroad, the predecessor of the Maine Central, the original Bangor and Bucksport road, that condemned or attempted to condemn this land, were insufficient." Thereupon the trial proceeded upon the question of an easement by prescription, and the jury returned a general verdict in favor of the plaintiff, with a

special finding that the defendant company and its predecessors in title had not acquired an easement by prescription for its railroad purposes over any portion of the demanded premises.

The case comes to this court on the defendant's exceptions to the ruling of the presiding justice respecting the validity of its location, and a motion to set aside the special verdict as against the evidence.

It is admitted that the railroad company, known in 1873 as the Bucksport and Bangor Railroad, was first incorporated under the name of the Penobscot and Union River Railroad Company by act of the legislature approved March 1st, 1870; that by chapter 232 of the Private Acts of 1873 the title of the Penobscot and Union River Railroad Company was changed to the Bucksport and Bangor Railroad Company; that Nov. 10, 1873, the Bucksport and Bangor Railroad Company executed a mortgage to trustees to secure its bonded indebtedness; that on the 28th day of February, 1882, the mortgage having been duly foreclosed, the bondholders organized as a corporation under the name of the Eastern Maine Railroad Company, and that this last named corporation thereby acquired all the rights previously enjoyed by the Bucksport and Bangor Railroad Company; that the Eastern Maine Railroad Company executed a lease of its road, and all rights thereto pertaining, to the Maine Central Railroad Company which has had possession of the property under its lease from that date to the present time.

It is not in controversy, therefore, that if the location made by the Bucksport and Bangor Railroad Company was legal and sufficient, all rights thereunder finally passed to the defendant company by virtue of the transactions above stated.

For the purpose of showing a location of the Bucksport and Bangor Railroad Company in the County of Hancock, and across the plaintiff's land in question, the defendant introduced a certified copy of the record of the court of county commissioners for that county bearing date March 18, 1873, purporting to be the record of such a location filed April 7, 1873.

By chapter 232 of the Private Acts of 1873 the time for making the location of the railroad specified in the original charter of 1870, was extended to December 31, 1874. It is not in controversy there-

fore that a location appears from this record to have been seasonably filed.

The law in force at the time the location appears from this record to have been filed with the county commissioners as well as at the time it appears to have been approved by that court and recorded, is to be found in the Revised Statutes of 1871, chapter 51, section 4, and is as follows: "The railroad is to be located within the time and substantially according to the description in the charter; and the location is to be filed with the county commissioners, approved by them and recorded."

The copy of the record introduced comprises a detailed report of "Parker Spofford, Engineer" in manner following: "To the county commissioners of the county of Hancock in the state of Maine: The Bucksport and Bangor Railroad Company beg leave to file, in the county of Hancock, before the commissioners of said county, the location of a portion of the railroad in said county, the width of the right of way being six rods, and the center line of which is as follows: Beginning at a stake thirty-three (33) feet from the north-east corner and in line with the east side of the so-called 'Long Wharf' in the town of Bucksport, and running to the north line of the county by the straight lines and curves shown in the following notes of alignment." The specifications of sixty-seven different measurements are then inserted with the length of the straight lines given in feet with the "bearing of the same," and the length of each curve and the radius of the curve given in feet. As recorded, the report bears date April 7, 1873. The following communication signed by "Sewall B. Swazey, Pres't B. & B. R. R. Co.", then appears as a part of the record:

"The directors of the Bucksport and Bangor Railroad Company, having accepted and approved of the above location of their road in the county of Hancock in the state of Maine, direct me to present the same to the commissioners of said county for their approval and to be put on record." This bears date "Bucksport, April 7, 1873."

The record is then authenticated by the following certificate signed by the clerk:

"Court of County Commissioners. Hancock, ss. January Adj. Term, 1873.

"The county commissioners having approved the above location of the Bucksport and Bangor Railroad, order the same to be entered of record. Approved by the county commissioners and ordered to be recorded March 18, 1873.

Attest, H. B. Saunders, Clerk."

The principal objection which the plaintiff interposes to this location is, that according to the record it appears to have been approved by the county commissioners before it was filed in court; and it is true, as has been seen, that the location appears from the record to have been approved by the board of county commissioners March 17, 1873, while the statement from the president of the company that it had accepted and approved this location bears date April 7, 1873.

For the purpose of showing that this apparent anachronism was only the result of a clerical error, the defendant offered what appears to be a duplicate of the location recorded, except that it bears only the date "A. D. 1873" on the report of Parker Spofford, and "Bucksport . . . . 1873" on the communication from President Swazey. In each place a blank space is left for the date of the month. But the evidence fails to show in whose handwriting this "duplicate" appears to be, or whether it was the original location or a copy. It appears to have been found among the papers of the county commissioners in the custody of the clerk, in a wrapper marked in the handwriting of the present clerk of courts, "Location of Bucksport and Bangor Railroad;" but it is not attested as a copy, nor in any way authenticated as an original paper by the clerk of courts in office at that time. Such a document in no way certified by the proper officer, cannot be deemed competent evidence to explain the discrepancy in the date of filing a location duly recorded and properly certified by the clerk in office at the time the record was made.

It is the opinion of the court, however, that without the aid of such explanation the recorded location above described is a substantial and sufficient compliance with the requirements of the statute in force at that time. This location was unquestionably filed with the

county commissioners "within the time and substantially according to the description in the charter," and this identical location is distinctly shown by the express terms of the recorded certificate of the clerk of courts appended to the record of the location to have been "approved by the county commissioners and ordered to be recorded March 18, 1873," as of the "January Adj. Term, 1873." No reason has been assigned for impeaching the clerk's record or questioning the accuracy of the date of that record. The location itself, when originally filed, may have been without date and in that condition approved and recorded March 18, 1873; and it is not improbable that when the absence of the date was subsequently discovered the deficiency was supplied as of that time, and the entry of "April 7, 1873" made upon the record without observing the date of the record in the clerk's certificate. But however this discrepancy in the dates may have been occasioned, the fact remains that the location spread upon the pages of the county commissioners' records was approved and recorded March 18, 1873. There is no suggestion of the existence of any different location to which the clerk's certificate of approval could possibly relate. It is immaterial whether this location bore any date or not when originally filed. It must have been filed before it was approved by the county commissioners, and the subsequent insertion of an erroneous date by mistake cannot change the fact that this particular location of the defendant's railroad in the County of Hancock was filed, approved and recorded long prior to December 31, 1874, the time fixed in the amended charter. And this was all the law required.

The other reasons suggested for questioning the validity of the location are evidently not relied upon by the plaintiff. The objection that the president of the corporation is not shown by competent evidence to have been duly empowered to act for the corporation in filing the location with the county commissioners, cannot be sustained for obvious reasons. If the president's communication accompanying the act of filing the location, stating that he was acting by authority of the board of directors of the defendant company, is not sufficient evidence of his authority, the acquiescence of that and subsequent boards in this act of the president, for a period of nearly thirty

years must be accepted as satisfactory evidence of their approbation and ratification of it. It is not open to the plaintiff to make this objection.

The further objection that the approval of the location by the county commissioners was not signed by the different members of the board, is also untenable. The board of county commissioners is a court (*Chapman* v. *County Commissioners*, 79 Maine, 269) having a recording officer whose duty it is to register its decrees, and the attestation of the clerk is all that is necessary to give validity to the record of its transactions and judgments. As stated above, the certified copy of the record of the location in this case shows that the act of the court of county commissioners in approving the location, was duly attested by "H. B. Saunders, Clerk." The record was thus legally and properly made. There is no law requiring the signatures of the members of the board to be subscribed to their judgments or appended to their records.

The ruling of the presiding justice that the "location as filed" is insufficient must accordingly be held erroneous.

Whether any part of the right of way secured by this location over the land now owned by the plaintiff has been voluntarily abandoned by the defendant company, is a question not now before the court.

Exceptions sustained.

STATE OF MAINE *vs.* HENRY LAMBERT.

Piscataquis. Opinion December 6, 1902.

Murder. Jury. Appeal. Evidence.

In determining an appeal of one convicted of murder, the single question presented is whether, in view of all the testimony in the case the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the defendant was guilty of the crime charged against him.

The jury must be the final arbiters of questions of fact, when the evidence in support of their conclusion, considered in connection with all the other evidence is of such a character, such a quality and such weight as to warrant them in believing it.

While evidence of single circumstances standing alone might not be sufficient to warrant the conviction of one accused of crime, the combined force of many concomitant and interlacing circumstances each insufficient in itself, may lead a reasoning mind irresistibly to a conclusion of guilt.

Held; that the verdict of the jury sustaining the defendant's guilt was well warranted by the evidence.

On appeal by defendant. Appeal denied. Judgment for the State.

The defendant was convicted by a jury in Piscataquis County for the murder in the first degree of J. Wesley Allen of Shirley. He made a motion in the court below to have the verdict set aside. This motion having been overruled, he appealed to this court.

The case appears fully in the opinion.

Geo. M. Seiders, Attorney General, *M. L. Durgin*, County Attorney, with him, for State.

Henry Hudson, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, SAVAGE, POWERS, PEABODY, SPEAR, JJ.

SAVAGE, J. The evidence is plenary, and it is not now controverted, that in the evening or night of Sunday, May 12, 1901, J. Wesley Allen of Shirley, his wife, and their daughter Carrie, were

murdered, and that the farm buildings of Allen in Shirley, house, ell, shed and barn, were burned to destroy the evidences of the crime. The defendant was indicted for the murder of J. Wesley Allen. As the result of a lengthy trial in which all of his rights seem to have been carefully protected by the presiding justice, he was convicted of murder in the first degree. His motion to set aside the verdict was overruled and he has appealed from that decision to this court. No exceptions have been reserved, and the single question presented for our consideration is whether in view of all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the defendant was guilty of the crime charged against him. We have examined the voluminous record with great care and solicitude. The evidence relied upon by the State to support the conviction is almost wholly circumstantial, and as to the existence of many of the circumstances relied upon there is a sharp conflict of testimony. We may say at the outset that in considering the weight of this testimony, depending as it does for its effect upon the credibility of the witnesses, we cannot put ourselves in the place of the jury, nor usurp that province of deciding questions of fact which the law imposed upon them. Their conclusions, if warranted by the evidence, are to stand. We have before us only the pages of a printed record, aided somewhat by an inspection of the exhibits which were introduced in evidence at the trial. The jury had before them the living, speaking witnesses. The degree of credence properly to be given to the story of a witness may depend much upon his appearance upon the stand, upon his air of candor and truthfulness, upon his seeming intelligence and honesty, upon his apparent want of bias or interest or prejudice. The want of such characteristics may render testimony of little value. And the appearance of such characteristics, or the want of them, is not always transcribed upon the record of a case. If the story of a witness is seemingly credible and probable, and not inconsistent with other admitted or proven facts, the listener has much better opportunity to judge correctly of its truthfulness than a reader has. From the bare record we might be in grave doubt as to which of two conflicting statements is true. The jury, seeing the witnesses, might

have no reasonable doubt. And it follows that in cases like the one under consideration, as in all others, the jury must be the final arbiters of questions of fact, when the evidence in support of their conclusions, considered in connection with all the other evidence, is of such a character, such a quality and such weight, as to warrant them in believing it. We shall endeavor to apply these principles in our consideration of this case.

The State claims that the defendant, who had spent all day Saturday, May 11, and the greater part of Sunday, May 12, at West Cove in Greenville, left West Cove Sunday afterooon about four o'clock; that he had on his feet a pair of new rubbers, No. 6 1-2, Bay State, which he had purchased the previous Friday evening, and in his hand an umbrella, which he used as a cane; and that he had in his pocket a quart bottle nearly or quite full of whiskey. The State further claims that he proceeded southward by the track of the Bangor & Aroostook Railroad to the "Bully road" so-called. The Bully road is an old unused logging road or path, leading across from the railroad to the Shirley Mills road, and the latter road leads to the main traveled road from Greenville to Blanchard called the Lake road. The Bully road proceeds for the most part through a woody growth on either hand. It is claimed that he walked through the Bully road to the Shirley Mills road, along the Shirley Mills road towards the Lake road, and then down the Lake road to a point about a mile and a half north of the Allen place, where he left the Lake road and walked along another old unused logging road, called the "Spencer road", to the immediate vicinity of the Allen house; and that he went to a small wooden structure, situated thirty-four rods from the Allen place, which he had formerly owned, but which he had recently sold with its contents to one Elmer Huff, with the privilege of occupying it from time to time, by first obtaining the key from Huff. That structure was called "Lambert's camp." The State claims that the defendant, while in the camp, left the umbrella with which he started, and what remained of a box of "blazer" or "safety" matches which he had purchased in West Cove that day. It is further claimed that he then went to the Allen buildings, murdered Allen and his wife and daughter, and fired the

buildings; that he walked back to the house of Telos Smith, which is situated on the Lake road somewhat northerly of the Shirley Mills road; that he arrived there sometime during the night; that when he arrived the bottoms of his trousers' legs and his stockings were muddy; that he had the appearance of having walked very fast; and that some of the whiskey was gone from the bottle. The distance from West Cove to the Allen place by the route which it is claimed that the defendant walked is a little more than nine and two-thirds miles, and from the Allen place back to Telos Smith's house, three miles. It seems to be satisfactorily proved that the fire at the Allen place occurred, or was first observable, between the hours of nine and ten that night, probably nearer nine than ten. Upon the theory of the State it is evident that the distance from West Cove to Allen's did not preclude opportunity.

The State contends that the motive for the crime, or to speak more exactly, the motive which led the defendant to the Allen house on the night in question, was not ill-will, for none has been shown, nor robbery or burglary, for there is no evidence of any theft, but that it was lust for Carrie Allen, who, though only a little more than fourteen years old, was a large and fleshy girl. It is claimed that on previous occasions he had expressed lascivious desires concerning this girl, his expressions looking even to the putting of "the old folks out of the way," if necessary. The State's theory is that he accomplished his purpose by violence, and that he took Allen's life either before-hand to prevent interference with the intended rape, or afterwards in some altercation which resulted from it. In support of this contention the State relies much upon the fact that when the defendant's trunk was searched after his arrest, the white shirt which he admittedly wore that Sunday night was found, and when found, a rectangular piece seven or eight inches across had been cut out of the lower end of the front flap. The defendant, however, says that he cut the piece out of the shirt at another place and for another purpose, to be noted hereafter, and says that he left the piece somewhere about his room at Telos Smith's. This piece though searched for was never discovered. One witness testified that on the day succeeding the fire, at the premises, the defendant told him that "he

(the defendant) came pretty near being in the house," "that he started for Allen's place" when he left Greenville. The evidence indicates that the fatal wounds were inflicted upon Allen about twenty-five feet from his barn, where two large blood spots were found upon the ground, and that the body was then removed, but not dragged, to within the barn, where his remains were afterwards found in the ruins.

The defendant's version of his whereabouts on that Sunday evening is substantially as follows: He says he left West Cove between five and six o'clock, nearer six than five, and that he had no rubbers on, nor umbrella with him. He says that he left the rubbers which he bought Friday night in the office of the Bartley House at West Cove Saturday morning, together with an umbrella which he had borrowed from Telos Smith Friday night, and that he never used nor saw either the rubbers or the umbrella afterwards. He denies that he purchased any "blazer" matches at West Cove that day, or that he had ever used or had the possession of any such matches. He claims that he had on his feet only his stockings and a pair of thin, low shoes, with patent leather toes and patent leather up the front. He says that he walked from West Cove by the track of the Canadian Pacific Railway to the Lake road at King's Crossing, a mile and two-thirds, then down the road a little over two miles to a point near the house of Charles Roberts, where there was a spring six or eight rods from the road; that he reached that point about seven o'clock; that he went to the spring and drank from it; and that the spring was an open one, with the water bubbling up. He says that his left foot hurt him in consequence of his boots being tight; that he took off his shoe and stocking and bathed his foot which was sore and blistered; that he cut the missing piece out of the front flap of his shirt with his knife, and used it to wrap between his toes, so as to make walking less uncomfortable; that he then put on his stocking and shoe over the piece of cloth, and walked southerly through a pine growth forty-five or fifty rods until he came to the Lake road again, traveling about ten rods from the road; that he walked down the road to the Mansell line, and then crossed the road and walked in the pasture beside the road for about one hundred rods, that he

then came into the road again and walked to Telos Smith's, where he arrived at a little past eight o'clock; that he went immediately to bed, and it would seem, supperless; and that he was not out of the house or his room again that night. He says he is able to fix the time of his arrival at Telos Smith's, because he noticed his watch when he got up to wind it, after having gone to bed. He says he walked in the pine woods and in the pasture on account of the muddy condition of the road. The distance from West Cove to Telos Smith's house by the route the defendant says he travelled is six miles and two-thirds, and from Smith's to the Allen place is three miles. It is evident that if the defendant's statement is true, he had no opportunity to commit the crime charged.

To connect the defendant with the crime, the State seeks first to show that he was in the vicinity of the Allen place Sunday night, and to show this, testimony was introduced that he left West Cove at about four o'clock in the afternoon, walking upon the railroad in the direction of Shirley with rubbers and umbrella. In addition to this the State relies chiefly upon the following circumstances:

1. That fresh rubber tracks in the mud were found Monday morning between the Allen house and the "camp," and later in the week in the Bully road and the Spencer road, which tracks were made by the defendant's new rubbers.

2. That an umbrella found in the camp Monday afternoon had been in the defendant's possession at West Cove Sunday afternoon.

3. That "blazer" or "safety" matches were found in the camp Monday forenoon of the same kind that the defendant had purchased in West Cove Sunday forenoon.

4. That human blood was found on the defendant's clothing.

While it is not disputed that rubber tracks were found at the times and in the places claimed, and that an umbrella and "blazer" matches were found in his camp Monday, it should be remembered that the defendant denies that he wore any rubbers at all Sunday night, and says that he had no rubbers or umbrella in his possession at West Cove after Saturday morning, and that he did not purchase or have in his possession any "blazer" matches Sunday or at any other time. But the State claims, and properly, that even these denials, if untrue, may add to the force of the circumstantial evidence.

Rubber Tracks. Notwithstanding the defendant's denial that he wore or saw his rubbers after Saturday morning, there is some evidence that he had on a pair of rubbers Sunday, at one time at least, though perhaps not all of the time. The testimony of those who saw him without rubbers, or did not notice rubbers, is not necessarily inconsistent with the State's claim that he wore rubbers on Sunday. As bearing upon the probabilities it appears that it had rained more or less for two or three days previously and that the ground was muddy, and that the shoes worn by the defendant were thin, low ones. The bottoms of the defendant's trouser's legs were muddy when he arrived at Telos Smith's, and his stockings were afterwards found to be muddy, though he says he got the mud on his stockings by using them to clean his muddy shoes. His shoes were introduced in evidence, and have been submitted to our inspection. As a result of that inspection, we are of opinion that the jury were justified in believing, if not compelled to believe, that the defendant did not walk in them that night without rubbers, in the muddy road and through woods and pasture for over six miles, as he says he did, and that, therefore, when he left West Cove, by whichever route he took, he had rubbers on his feet.

That the rubber tracks were made by new rubbers is uncontroverted. But the learned counsel for the defendant strenuously contends that the difference between the size of the defendant's rubbers and the size of the tracks found is so great as to preclude the possibility that the tracks were made by the defendant. The defendant's new rubbers as claimed by the State were No. 6 1-2 Bay State, cadet toe. The pattern designer of the manufacturer, a witness for the defendant, testified that a No. 6 1-2 rubber of that grade was 11 5-16 inches long, 4 1-16 inches wide across the ball, with a heel 3 inches long. It is to be regretted that there was not that degree of definiteness in the measurement of the tracks that would have been desirable. One of the two State's witnesses, who testified to measurements, says of one track that he measured it to the "best of his observation," while the other says of another track that he measured it as "near as he could come at it in a muddy place." A witness for the defendant, however, testified unqualifiedly that one

of the tracks was 10 1-2 inches long. Whether these measurements were in a straight line from end of heel to end of toe, or followed the contour of the ball to the toe does not appear. It is easily demonstrated that a No. 6 1-2 Bay State rubber measures more than a quarter of an inch longer, laying a rule upon it so as to follow the contour of the ball to the toe, than the same rubber measures in a straight line from heel to toe, when it stands naturally. Nor does it appear that the witness measured the width of the ball of the rubber at the same point in the ball that the other witnesses measured the ball in the tracks. A measurement of the No. 6 1-2 Bay State rubber introduced in evidence shows that at its widest point the ball is nearly a quarter of an inch wider than it is at its center, and at the widest point it measures 3 13-16 inches instead of 4 1-16 as testified to by the witness. It is claimed by the State that rubbers of the same number are not always exactly of the same size, and one witness measuring in the presence of the jury, testified that out of two pairs of No. 6 1-2 rubbers, three rubbers measured alike, while the fourth was a quarter of an inch shorter than the others and the ball an eighth of an inch wider. Moreover, it appears that these tracks were found in mud that had been soft, "in clear mud," as a witness for the defendant testified, and we are not satisfied that the measurement of a rubber track made in soft mud is always to be deemed a certain indication of the size of the rubber which made it. It is common knowledge that in very soft mud, the imprint of tracks may be filled and even obliterated by the yielding walls of mud. How well and how long such a track will retain its shape and size must depend to some extent at least upon the nature of the soil and the consistency or sponginess of the mud. To these special features attention does not appear to have been called, further than has already been stated. Upon the whole we can not say that the tracks could not have been made by the defendant's rubbers. Whether in fact they were so made involves other inquiries.

Under the circumstances of this case, a jury might well associate the maker of those tracks with the murderer of Mr. Allen. And the series of tracks from the railroad through the Bully road, the series of similar tracks through the Spencer road—all pointing towards

the Allen place—and the tracks of the same size and character back and forth between the Allen place and the camp, certainly would justify the jury in believing that the maker of the tracks first came down the railroad from the direction of West Cove, then through the Bully road and on through the Spencer road to the Allen place. It is to be noticed that though search was made for them in the place where he said he left them, the defendant's new rubbers were never found, and though he knew the officers were to make the search for them and the umbrella, he never manifested any interest in the result of their search.

The Umbrella. The defendant says he borrowed an umbrella of Telos Smith Friday night, took it to Greenville, left it at the Bartley House Saturday morning, and never saw it afterwards. There is the testimony of two witnesses that he had an umbrella in his possession Sunday, one of them saying that he had it in his right hand using it as a cane at about four o'clock and on the railroad, that is, at the very moment when the State claims he was leaving West Cove for Shirley. He did not have any umbrella when he reached Telos Smith's. He admits that he was in the vicinity of the Allen place and the camp Monday afternoon after the tragedy. Two girls testified that the defendant then sent their brother to the camp to get an umbrella for them, for it was raining; that he said "you can go down to my camp and get my umbrella, it is sitting there in the corner." The defendant denies this statement. But an umbrella was found at the camp by the brother, taken home by these girls, and taken to the defendant at Smith's on Wednesday by the mother of the girls. She testified that at first the defendant said that he didn't know whether it was his umbrella or not, that his was a double ribbed umbrella. She testified further that upon the defendant's attention being called to the fact that the umbrella returned was a double ribbed one, he said "It must be mine then," and that he then took it into the house. The defendant testified that he said that the umbrella was not his, but that the umbrella he had at the camp was something like that one, and in this connection he added, "I was satisfied it was the one I sold Elmer Huff. I am now very positive of it. The last time I saw it, it hung up in the camp at the foot of the bed on the wall on

a nail." In fact, the defendant had sold to Huff all that was in the camp except his trunk and clothes. But Huff testified that immediately after purchasing the camp he stayed in it for about five days, that he looked the camp over, and that neither when he purchased nor while he was staying there did he see any umbrella. Telos Smith, his daughter-in-law Ida and the defendant himself all testified that the umbrella borrowed by the defendant was not the one returned on Wednesday.

If the jury believed that the defendant had an umbrella when he left West Cove Sunday afternoon, but brought none home to the Smith house Sunday night, if they believed that he left no umbrella at the camp when he sold it, but that there was an umbrella there Monday and that the defendant knew it was there and where it stood, though he had not been in the camp that day, they might very pertinently inquire, how and when did that umbrella get into the camp, and how did the defendant know it was there if he did not carry it there himself. That the umbrella found was not the one borrowed from Telos Smith's, if such was the fact, we do not regard as of especial significance. Exchange of umbrellas, even accidental, is not an unknown occurrence. But whether the defendant had some umbrella in his possession at West Cove Sunday is important, and if so, his knowledge that an umbrella was in the camp Monday is of much significance.

Matches. There was evidence that a box of "blazer" or "safety" matches was found in the camp Monday forenoon, four matches remaining unused, that no matches of that kind had ever been used or seen in the camp before that time, and further that the defendant purchased a box of such matches at West Cove Sunday forenoon. The defendant denied making any such purchase, or any knowledge of the matches, and there was evidence that several dealers in the vicinity of Shirley were accustomed to buy and sell such matches. If the jury believed that the defendant purchased blazer matches Sunday, it is significant, indeed, that matches of the same peculiar kind, never before known to have been in the camp, were found there on Monday, and all the more significant in view of the fact that the defendant denies purchasing any such matches.

Blood Spots. It does not seem to be controverted that blood, which answered all the tests of human blood, was found on the inside of the defendant's right trousers' pocket, on each cuff of his white shirt, and on the inside of the left cuff of his undershirt. But the defendant explained the existence of blood spots by saying that after he had purchased these clothes, he had been afflicted with a humor on both hands, which caused them to become sore and raw. And in this last statement he was corroborated by other witnesses. No other blood, however, was found upon his clothing, and it is urgently claimed by his learned counsel, that it would have been practically impossible for the defendant, a slight man, to remove the bleeding body of Allen, a large man, from the large blood spots on the ground to the barn, twenty-five feet, without getting blood upon the outside of his clothing, and that this impossibility is all the more apparent in view of the fact, as testified to by some of the witnesses for the State, that there was no appearance of the body's having been dragged on the ground. This is, indeed, a fact of much significance. We should expect under such circumstances to find blood upon the clothing. The absence of blood would be a matter of grave consideration. But we cannot say that such a condition of things is necessarily inconsistent with the guilt of the defendant as charged, or that the jury, if they believed from the other evidence in the case that the defendant was present at the scene of the tragedy, would not be warranted in saying also that he removed the body. For unquestionably the murderer did remove it.

Besides these circumstances, the State places much reliance upon the failure or inability of the defendant to give a truthful account of his movements Sunday night. The State claims that his story about walking down the Lake road is shown to be false,—that it was the effort of a guilty mind to throw pursuers off the scent,—and that his statement of the manner in which and the purpose for which he cut the piece from the flap of his shirt is demonstrably false. There is evidence that two teams passed over the Lake road going northerly between the hours of six and seven o'clock, while the defendant according to his story must have been in the road between King's Crossing and the spring, and that the occupants met no one

walking down. The defendant says he did not meet or see anyone after he got into the Lake road, and does not say that he heard any teams while he was out of the road. There was the testimony of ten witnesses, living or being between King's Crossing and Telos Smith's on the Lake road between the hours of five and eight o'clock that evening, all of whom were more or less out of doors and about their buildings and in their yards, not one of whom saw any man walking down the road. Several of them testified to seeing the two teams. Two witnesses state that they were at the Bodfish place forty-five rods north of Telos Smith's that evening, that they were in the yard three rods from the road all of the time from half past seven to half past eight, and that they saw no one pass. But the defendant, if his story is true, must have passed the Bodfish house in the road at about eight o'clock. There is some evidence, also, that the defendant's description of the spring which he says he visited is incorrect.

But perhaps the most potent evidence against the defendant in this connection is his account of the manner and purpose of cutting the piece from the flap of his shirt. This shirt was exhibited to the court at the time of the argument. We think a jury would have been warranted in believing it utterly improbable, if not impossible, that so even and regular and smooth a cut as this one is across the top of the piece could have been made by the defendant with a knife while the shirt was upon his person, as he testifies. But this missing piece of the flap has a deeper significance than merely to convict the defendant of falsehood. Why was it cut? The defendant says that it was to furnish a wrapping for his sore toes. But this explanation can hardly be deemed satisfactory in view of the fact that the defendant then had a handkerchief in his pocket, and apparently owned no other white shirt. What became of the piece? The defendant says he left it somewhere about his room. But it has never been found though careful search was made for it. Was it destroyed by the defendant? If so, why? Did it bear upon it, as the State contends, the incriminating marks of an accomplished rape of Carrie Allen, as the result of his lascivious desires, inflamed perhaps by the whiskey he had drunk? Undoubtedly the defendant is the only person who can answer these questions with absolute certainty. But

in view of the other evidence in the case, this circumstance has great significance, and was entitled to grave consideration by the jury.

While it may be said with truth, that evidence of single circumstances standing alone, as of the rubber tracks, or of the umbrella, or of the matches, or of the blood spots, or of the missing piece of the shirt, might not be sufficient to warrant a conviction, yet the combined force of many concomitant and interlacing circumstances, each insufficient in itself, may lead a reasoning mind irresistibly to the conclusion of guilt.

To summarize the propositions, in support of each of which there is some apparently credible testimony: — If the jury believed that the defendant's story of his walk from West Cove down the Lake road was not true, that his story that he wore no rubbers was not true, that the story of the purpose for which he cut his shirt was not true, that his story about leaving his rubbers and borrowed umbrella at the Bartley House Saturday morning was not true; if they believed, notwithstanding his statements, that he did buy a box of blazer matches in West Cove Sunday, that he did have rubbers and an umbrella in his possession Sunday, that he did start down the railroad towards Shirley with rubbers on his feet and an umbrella in his hand; if they believed that the rubber tracks in the Bully road, the Spencer road, and the path between the Allen place and the camps, might have been made by his rubbers; if they believed that he took no umbrella home to Telos Smith's that night, that on the following day he knew that an umbrella was standing in the camp; if they believed that he had not left any umbrella in the camp when he sold out to Huff, and that the presence of the umbrella in the camp was not otherwise accounted for; if similar matches were found in the camp like those he had purchased the day before; if after inspection of his shoes they believed that he wore his rubbers from West Cove, though he and Telos Smith and Ida Smith testified that his shoes were muddy, and if they believed further that there was some cause for the disappearance of the rubbers, which might be that there was some tell-tale mark upon them, or that the defendant had learned, as he undoubtedly did learn on Monday, that rubber tracks had been discovered; if they disbelieved his story about the cutting

of the shirt, but believed that the missing piece, for some cause, had been put out of the way by him,—to say nothing about the blood spots on his clothing, which the jury may have considered were satisfactorily explained,—we can not say that the jury were not warranted in believing beyond a reasonable doubt that the defendant was at the "camp" Sunday night, and in the path between the camp and the Allen place. All of these circumstances tend very strongly indeed to show that the defendant was there. And if he was there, there can be no reasonable doubt of his guilt, under the circumstances.

So much for the incriminating circumstances relied upon by the State. There was other evidence, as for example, the testimony of a detective, who had various conversations with the defendant, which we do not deem it important to consider in detail.

It is necessary now only to notice more specifically the defendant's claim of an alibi. Besides his own testimony, he strongly relies upon the testimony of Telos Smith and his daughter-in-law Ida Smith to show that he was at the Smith house and in bed not later than quarter past nine o'clock, which was just about the hour when the reflection of the Allen fire was first noticed, and presumably a very short time after the fire had been set. He insists that if the testimony of the Smiths as to the time of his arrival is true, he could not possibly have committed the crime at the Allen place three miles away. He claims that if he had committed the crime of murder and set the fire long enough before nine o'clock for him to get back to Smith's at about that time, the fire must have been noticed earlier than it was, and that if the fire was not set until a short time before its reflection was seen, as it probably was not, he, if he had set it, could not have got to Smith's as early as Telos Smith and Ida Smith testified that he did. This claim is probably quite true. The element of uncertainty about it, upon the defendant's assumption, is that neither Telos Smith nor Ida Smith state definitely the hour when the defendant reached their house. They state it only by judgment or estimate.

We think it is evident that the jury did not give full credit to the testimony of the Smiths. They were friends of the defendant, of the

same nationality as he, and in whose house he made his home for the time being. Neither of their statements, as to the time he arrived, agrees with the defendant's statement, nor with each other's. The defendant says he arrived there "at a little past eight o'clock" by his watch, which he noticed. Telos Smith testified that he himself went up stairs to bed at a quarter past eight, that he could not tell exactly how long he had been in bed when the defendant came. He said it was "about half an hour, or may be three-quarters of an hour, or may be an hour," "my judgment would be three-quarters of an hour." He testified that he had not been asleep. But a witness in rebuttal testified that Smith told him that he had been asleep, that sometime during the night his son's wife called him and said there was a man at the door, that it was the defendant, and that Smith further said he didn't know what time it was. Smith denied this however. Ida Smith testified that the defendant came fifteen or twenty minutes "after Telos came up stairs." There was some evidence in impeachment, that she had expressed a purpose of "standing by" the defendant. But this she denied. It must be conceded, we think, that the evidence even of reliable witnesses as to the lapse of time in the night, when they are abed, at an hour when consciousness is likely to be dulled, and when there is nothing to impress time particularly upon judgment or memory, is not a satisfactory basis upon which to erect an alibi, particularly so, when, as in this case, the change of an hour, and perhaps less, may weaken or altogether destroy its probative force. Under these circumstances, and remembering that the jury could determine much better than we can how much credit should be given to the Smiths as witnesses, we are of the opinion that there is nothing in the attempted alibi which requires the verdict to be set aside.

Appeal denied. Judgment on the verdict.

STATE OF MAINE *vs.* CHARLES W. MITCHELL.

Somerset. Opinion December 9, 1902.

Hawkers and Peddlers. Const. Law, XIVth Amend. U. S. Constitution. Art. 1, § 1, Const. of Maine. Stat. 1901, c. 277.

1. The Federal Constitution in Amendment XIV, the last clause of the first section, and the Constitution of this State in § 1 of Art. 1, affirmatively guarantee to all persons an equality of right to pursue any lawful occupation under equal regulation and protection by law, whatever the difference in their personal powers, attributes, conditions or possessions.
2. While these constitutional provisions do not prohibit the state diversifying its legislation to meet and equalize diversities in different kinds of occupations, such diversities must really exist, inherent in the subject matter legislated upon, to justify any legislative discrimination. A merely arbitrary classification not based on actual differences in kind is forbidden by the Constitution.
3. The discrimination sought to be made in the Hawkers and Peddlers Act, Laws of 1901, c. 277, in the last clause of § 4, between those who own and pay taxes on a stock in trade to the amount of twenty-five dollars, and those who pay a less tax on their stock in trade (exempting the former from paying license fees, while requiring the latter to pay them) is a mere arbitrary discrimination not based on any inherent difference in kind, and offends against that equality of right established by the fundamental law.
4. By reason of such attempted unconstitutional discrimination, no one can be required to pay the license fees named in said act, or be punished for refusing to pay them.

Appeal from the Municipal Court of Skowhegan, in Somerset County, for violating the Hawkers and Peddlers Law, Stat. of 1901, c. 277. Judgment for defendant.

The defendant having been convicted on the following complaint, to which he demurred, appealed to the court sitting at nisi prius.

STATE OF MAINE.

Somerset, ss.

To the judge of our Municipal Court of Skowhegan, in the County of Somerset, in constant session for the cognizance of criminal actions.

Hiram P. Thing of Skowhegan, in the County of Somerset, and State of Maine, in behalf of said State, on oath complains, that Charles W. Mitchell late of Skowhegan in said County of Somerset at Skowhegan aforesaid in the County of Somerset aforesaid on the sixteenth day of October in the year of our Lord nineteen hundred and one, not having procured a license therefor, as provided by law and chapter two hundred seventy-seven of the Public Laws of A. D. 1901 of the State of Maine, and not then and there being a commercial agent selling goods by sample to dealers only, did then and there go from place to place in the town of Skowhegan in said County of Somerset exposing for sale and selling goods and chattels other than fruit grown in the United States, fruit trees, provisions, live animals, brooms, pianos, organs, wagons, sleighs, agricultural implements, fuel, newspapers, agricultural products of the United States, the products of his own labor or the labor of his family, any map made and copyrighted in his name, any patent of his own invention or in which he has become interested by being a member of any firm or stockholder in any corporation which has purchased the patent, to wit, selling patent medicine, against the peace of the State, and contrary to the statute in such case made and provided.

Wherefore the said Hiram P. Thing prays that the said Charles W. Mitchell may be apprehended, and held to answer to this complaint, and further dealt with relative to the same as law and justice may require.

Dated at Skowhegan, in said County of Somerset this sixteenth day of October in the year of our Lord one thousand nine hundred and one.

H. P. THING.

The grounds of demurrer set forth in the Court below were as follows:—

1 In that that the complaint in said cause charges no offense;

2 That the offense purporting to have been committed by said defendant in said complaint is not set forth with sufficient certainty;

3 That said respondent could have done all that said complaint alleges against him and yet have been guilty of no offense, nor violated any statute;

4 That chapter 277 of the public laws A. D. 1901 for the State of Maine enacts among other things in section six thereof "Any soldier or sailor disabled in the military or naval service of the United States, or by sickness or disability contracted therein, or since his discharge from service, and any person who is blind shall be exempt from paying the license fees required by this chapter," and said complaint does not negative these exceptions contained in said statute and cited above, which it should;

5 That said chapter 277 among other things enacts in section 4 thereof "But any resident of a town having a place of business therein owning and paying taxes to the amount of twenty-five dollars on his stock in trade, can peddle his goods in his own town without paying any license fee therefor", and said complaint does not negative this exception contained in said statute, which it should do; said complaint not showing but that said respondent at the time of said alleged offense was a resident of said Skowhegan, having stock of goods therein, and owning and paying taxes to the amount of twenty-five dollars on his said stock in trade, and hence not liable to the tax imposed by said chapter 277;

6 That said chapter provides among other things said sections 4 and 6 as above referred to and set out, and said complaint does not negative the exceptions therein set forth which it should, said complaint not showing but that said respondent comes within the exceptions therein, and is a soldier or sailor disabled in the military or naval service of the United States, or by sickness or by disability contracted therein, or since his discharge from service, or is blind,— or having said stock of goods and paying taxes to the amount of $25.00 being a resident of said Skowhegan at time of said alleged offense, and hence within the exceptions as contained in said sections Nos. 4 and 6;

7 Because the statute upon which said complaint is founded is in conflict with the Constitution of the State of Maine;

8 Because said statute is in conflict with the Constitution and laws of the United States;

9 Because said public laws of the State of Maine are not uni-

form, and they discriminate in favor of one class of individuals against another, and are not valid;

10 Because said public laws exempt a certain class of persons from the payment of the fees provided by law, which is unconstitutional;

11 Because said State of Maine has no right to impose a license or tax as provided by said chap. 277 laws of 1901.

And for other and sufficient causes of demurrer, said complaint is not sufficient in law, and this he is ready to verify.

The defendant's demurrer was overruled in this court below and he alleged exceptions.

The case is stated in the opinion.

Geo. W. Gower, County Attorney, for the State.

Counsel argued: As to the sufficiency of the complaint, Laws 1891 c. 277; *State* v. *Montgomery*, 92 Maine, 435; *U. S.* v. *Cook*, 17 Wallace, 168; Bish. New Cr. Pr. vol. 1, §§ 631, 632.

As to constitutional questions, cases cited in *State* v. *Montgomery*, 92 Maine, 436; S. C. 94 Maine, 192.

See also *Lunt's case*, 6 Maine, 412; *Spring* v. *Russell*, 7 Maine, 273; *Lord* v. *Chadbourne* 42 Maine, 429; *Opinion of Justices*, 166 Mass. 589; Stats. 1885, c. 268; 1893, c. 203; 1899, c. 2; Mass. Rev. Laws, c. 65, § 21; *People* v. *Nagle* (Cal.) 52 Am. Dec. 313; *Leavitt Railway Co.*, 90 Maine, 153.

J. S. Williams, for defendant.

SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, PEABODY, SPEAR, JJ.

EMERY, J. The Statute ch. 277 of the Public Laws of 1901 entitled "An Act relating to Hawkers and Peddlers" provides in § 1, that no person shall go about from town to town, or from place to place in the same town, exposing for sale or selling, certain enumerated merchandise, until he shall have procured a license so to do as thereinafter provided. Section 2 provides that the Secretary of State shall grant such license to any person who files in his office a

specified certificate of good moral character, but not to any other person. Sections 3 and 4 provide that the applicant for such license shall pay to the Secretary of State a fee of one dollar and to the treasurer of each town mentioned in his license a further sum varying from three to twenty dollars according to the population of the town. The concluding clause of § 4 is as follows:— "but any resident of a town having a place of business therein, owning and paying taxes to the amount of twenty-five dollars on his stock in trade, can peddle said goods in his own town without paying any license fee whatever."

The defendant was convicted in the Skowhegan Municipal Court of a violation of this statute and appealed to this court, where by consent he filed a demurrer to the complaint which demurrer was overruled and the defendant excepted. Among other causes, the defendant sets up as cause for demurrer that, by reason of the exemption from its operation of certain classes of persons specified in the concluding clause of § 4 above quoted, the statute denies him the "equal protection of the laws" specifically guaranteed to him by the last clause of the first section of the XIVth amendment to the United States Constitution, as well as denying him the equal right to acquire property and pursue happiness guaranteed to him by the first section of the Maine Bill of Rights.

The scope of the clause cited from the XIVth amendment, that "no State shall deny any person within its jurisdiction the equal protection of the laws," has often been considered by the Federal and State Courts and more or less conflict of opinion has been developed. Some doctrines, however, have become fairly well established. Though the words of the clause are prohibitory, they contain a necessary implication of a positive right, the right of every person to an equality before every law, the right to be free from any discriminations as to legal rights or duties a State may seek to make between him and other persons. *Strauder* v. *West Virginia*, 100 U. S. 303. In effect, the clause adds a federal sanction to the equality of right embedded in the Maine Bill of Rights. It enables the Federal Courts to enforce the right, even when the State Courts shall refuse to do so.

No one now questions that these constitutional provisions prevent

a state making discrimination as to their legal rights and duties between persons on account of their nativity, their ancestry, their race, their creed, their previous condition, their color of skin, or eyes, or hair, their height, weight, physical or mental strength, their wealth or poverty, or other personal characteristics or attributes, or the amount of business they do. It must be conceded, on the other hand, that these constitutional provisions do not prevent a State diversifying its legislation or other action to meet diversities in situations and conditions within its borders. There is no inhibition against a State making different regulations for different localities, for different kinds of business and occupations, for different rates and modes of taxation upon different kinds of occupations, and generally for different matters affecting differently the welfare of the people. Such different regulations of different matters are not discriminations between persons, but only between things or situations. They make no discriminations for or against anyone as an individual, or as one of a class of individuals, but only for or against his locality, his business or occupation, the nature of his property, etc. He can avoid the discrimination by varying his location, business, property, etc. See *Leavitt* v. *Canadian Pacific Railway Co.*, 90 Maine, 153, 38 L. R. A. 152, for a full and clear exposition of this doctrine.

But even these differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification even of such matters is forbidden by the Constitution. If there be no real difference between the localities, or business, or occupation, or property, the State cannot make one in order to favor some persons over others. This will be made clear by a few citations of decided cases and quotations from judicial opinions. In *Pearsons* v. *Portland*, 69, Maine, 278, 31 Am. Rep. 276, a statute denying to a certain class of aliens the right of action against towns accorded to citizens of the State for damages suffered from defects in highways was held unconstitutional as denying equal protection of the laws. In *State* v. *Furbush*, 72 Maine, 493, a statutory discrimination between persons peddling goods manufactured in the State and those peddling goods manufactured out of the State, exempting the former from paying license fees, was held

unconstitutional. The business was the same, the kind of goods was the same. The difference in the place of manufacture afforded no ground for a discrimination between persons selling them. In *State* v. *Montgomery*, 94 Maine, 192, 80 Am. St. Rep. 386, a statutory discrimination between citizens and aliens, permitting the former but forbidding the latter class of persons to obtain licenses to peddle goods, was held to make the statute unconstitutional. The court said, citing several cases, "the discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges upon the same conditions. The inhibition of the XIV Amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons being singled out as a special subject for discriminating and favoring legislation." Hostile and favoring legislation would seem to be equally inhibited. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, a city ordinance prohibiting the maintenance of a laundry in a wooden building without the consent of the board of supervisors was held unconstitutional on the ground that it enabled the supervisors to discriminate between persons arbitrarily. In *Gulf C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, a State statute requiring railway corporations to pay an attorney fee of $10, in addition to costs in certain cases, was held unconstitutional upon the ground that no such burden was placed upon other corporations or individuals in similar cases. In *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, a State statute classifying as public stockyards those doing more than a certain amount of business annually and then making certain special requirements of their owners or operators was held unconstitutional upon the ground that the classification was arbitrary, not being based on any inherent difference in stockyards. The court said: "Recognizing the right of the classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed and that such equal protection is denied when, two parties being engaged in the same kind of business and under the same conditions, burdens are cast upon the one that are not cast upon the other. This statute

is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do." In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, a State statute forbidding certain trade combinations was held unconstitutional because of its 9th section which was as follows:—"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The court quoted with approval from a prior opinion this language: "The equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in the same place and under like circumstances."

In *State* v. *Haun*, 61 Kansas 146, 47 L. R. A. 369, quoted with approval in *Cotting* v. *Kansas City Stockyards Co.*, supra, a statute requiring corporations or trusts employing more than ten persons to pay wages in cash only, was held obnoxious to the XIVth Amendment on the ground that the classification was arbitrary. In *Fox* v. *Mohawk and Hudson River Humane Society*, 165 N. Y. 517, 80 Am. St. Rep. 767, a statute requiring owners and keepers of dogs to pay certain license fees was held void because it exempted the defendant society from paying license fees for dogs it kept. In *Sayre* v. *Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. Rep. 76, a borough ordinance requiring license fees of all peddlers except those resident in the borough was held not to be a valid exercise of the police power, but a discrimination in favor of residents and therefore void. In *State* v. *Conlon*, 65 Conn. 478, 48 Am. St. Rep. 227, 31 L. R. A. 55, a statute forbidding persons to engage in any temporary or transient business for the sale of goods in any town without obtaining a license from the municipal officers was held unconstitutional because it permitted the municipal officers to discriminate between persons. In *State* v. *Hoyt*, 71 Vt. 59, a statute requiring only peddlers of goods manufactured in the State to pay license fees was held unconstitutional, as making an arbitrary classification. The business was the same and carried on under the same conditions wherever the goods were manufactured. In *State* v. *Cadigan*, 73 Vt. 245, a statute requiring licenses of the agents of certain foreign corpora-

tions, but not requiring them of the agents of similar domestic corporations, was held unconstitutional. The classification was arbitrary, not based upon any inherent difference in the business of the two classes. In *State* v. *Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, a statute forbidding persons to practice dentistry without a medical degree or a license from the State Dental Society was held unconstitutional because persons who were practicing dentistry prior to the year 1875 were by the statute exempted from its operation. The court said "the granting of special privileges to some of the persons engaged in the same business under the same circumstances is in contravention of that equal right which all can claim in the enforcement of the laws and in the enjoyment of liberty and the right of acquiring and possessing property." The same principle was affirmed in *State* v. *Pennoyer*, 65 N. H. 113, 5 L. R. A. 709.

In *Brown* v. *Alabama G. S. R. Co.* 87 Ala. 370, a statute giving a justice court jurisdiction of an action of tort against a railroad company for a greater sum than in similar actions against other parties, was held to be an arbitrary and hence unconstitutional discrimination against railroad companies. In *State* v. *Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 41 L. R. A. 689, the first section of the statute required an examination and licensing of every plumber whether master plumber or journeyman; but the second section provided in effect that when one member of a firm, or the manager of a corporation, was so examined and licensed, the other members of the firm or the corporation should be exempt from the requirement. This was held to be an inequality of burden, arbitrarily created and hence destructive of the statute. In *Noel* v. *People*, 187 Ill. 587, 79 Am. St. Rep. 238, the statute forbade any person practicing pharmacy without a license from the State Board of Pharmacy, but empowered that board to grant or withhold such licenses at its discretion. This was held unconstitutional as authorizing a possible arbitrary discrimination between persons. In *Bessette* v. *The People*, 193 Ill. 334, the legislature undertook to divide towns into three classes according to their population only, and then to enact that the statute, (concerning licensing horse-shoers) should be operative in one class of towns, inoperative in another class, and optional with the

third class. This was held to be an arbitrary discrimination not based on any real differences, and hence unconstitutional.

Recurring now, without further citation, to the concluding clause of the fourth section above quoted from the statute under consideration, it must be apparent that its differentiation of persons who are, from those who are not, to pay license fees is not a discrimination based upon inherent differences in the nature of the business carried on, or the kind of property owned, or dealt in. Whether the person be a resident of the town or not, whether his stock in trade be large or small, whether the tax on his stock be more or less than twenty-five dollars, the business is the same. Those required to pay the license fee and those exempted in the clause quoted may expose for sale the same kind of goods and in the same localities, and they would encounter the same business conditions.

Ignoring at this time other discriminations sought to be made in the statute, it must be apparent that the discrimination between residents paying a tax of twenty-five dollars and those paying a tax of twenty-four dollars upon their stock in trade is purely arbitrary. There is no reason why the resident with the smaller or less valuable stock in trade should be required to pay license fees from which his co-resident engaged in the same business of peddling but owning a larger or more valuable stock in trade is exempt. A fortiori there is no reason for drawing the line at twenty-five dollars rather than at twenty-four or twenty-six dollars. But the inequality thus created is manifest.

Whatever the difference in personal powers, attributes, possessions or conditions, the Constitution guarantees to every person an equality of right with all other persons to pursue a lawful occupation under an equal regulation and protection by the law. Inasmuch as by the concluding clause of the fourth section of the statute in question that equality of right and equality of protection are sought to be made unequal, the statute, so far as it requires payment of license fees, must be adjudged to be in conflict with the fundamental laws and hence of no force.

It may be suggested that, even if the clause cited be unconstitutional, the rest of the statute may not be and that, the attempted

exemption being of no force, all persons, including all those persons described in that clause as well as the defendant, are equally liable to pay the license fees. It is true that in some cases one section or provision of a statute may be held unconstitutional without invalidating the whole statute, but that cannot be done when it would violate the legislative intent. In this case it evidently was the clear intent of the legislature that the persons described in the clause cited should not pay license fees in any event. That clause is more than a matter of detail. It is an integral part of the Statute and affecting all that part requiring the payment of license fees. To hold that because of the invalidity of that section the persons the legislature therein enacted should not pay license fees, must nevertheless pay such fees, is to violate a clearly expressed legislative intent; is to impose burdens the legislature explicitly declared should not be imposed.

It is further suggested that the defendant is not being prosecuted for not paying fees but for peddling without a license, and that he may never have applied for a license. It is true the prosecution is in terms for peddling without a license, but the very Statute requiring the license of this defendant imposes an unconstitutional condition of obtaining a license, viz; the payment of a license fee. The Secretary of State is not permitted to issue the license without the performance of that unlawful condition, a condition made unlawful by an arbitrary discrimination in violation of constitutional equal right.

The terms of the constitution are to be read into the statute. Without the payment of the fees the statute thus enlarged is made by its own terms inoperative as to licenses at least. Hence there is nothing left to support this prosecution. *State* v. *Montgomery*, 94 Maine, 192, 80 Am. St. Rep. 386; *Connolly* v. *Union Sewer Pipe Co.*, *supra*, (*U. S. S. C.*)

Exceptions sustained. Demurrer sustained.
Judgment for defendant.

CHARLES W. MORSE

vs.

CANADIAN PACIFIC RAILWAY COMPANY.

Penobscot. Opinion December 9, 1902.

Railroads. Common Carrier. Limitation of Liability. Evidence.

1. In this State a common carrier may by agreement limit his common law liability for loss or damage of goods, though not his liability for the consequences of his own negligence.
2. An agreement in a contract of carriage that the carrier shall not be responsible for loss or damage resulting from one of certain specified causes (other than his own negligence) is valid.
3. When the evidence prima facie indicates that the loss or damage of goods during carriage resulted from any of the excepted causes, the burden of proof is on the shipper to show that the loss or damage actually resulted from the carrier's negligence.
4. *Held;* that the evidence prima facie indicates that the death of the plaintiff's horses resulted from causes excepted by agreement in the contract of carriage, and the plaintiff has not shown that the death was caused by any negligence of the carrier.

On report. Plaintiff nonsuit.

Case to recover the value of two horses belonging to the plaintiff which died while being transported over the defendant's railway between Montreal and Brownville Junction.

It was alleged in the writ and admitted by the defendant that the horses when they left Montreal were apparently in good order and condition, and no question was raised that they died. The plaintiff averred that the injury and death to his horses were caused solely by the gross carelessness of the defendant company.

Other facts appear in the opinion.

P. H. Gillin and T. B. Towle, for plaintiff.

C. F. Woodard, for defendant.

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

EMERY, J. The Wabash Railroad Company received from the plaintiff's agent at Chicago twenty horses for transportation over its own and connecting railroads to Bangor. In the course of that transportation these horses were received alive and apparently in good condition at Montreal by the Canadian Pacific Railway Company, the defendant, but when the car containing them was delivered by the defendant company to the Bangor and Aroostook Railroad Company at Brownville Junction, two of the horses were found dead in the car. This action is to recover the value of these two horses, and the plaintiff in his declaration has counted upon the common law liability of the defendant company as a common carrier.

The defendant, however, pleaded and put in evidence a special written contract made between the plaintiff and the Wabash Railroad Company, for itself and connecting railroads, to govern the transportation of the twenty horses. In this written contract among other stipulations were these:—(1) that the plaintiff should load and unload the horses and take care of them while being transported at his own risk and expense;—(2) that he should feed, water and take care of his horses at his own expense and risk and to assume all risk of injury and damage that the horses might do to themselves or each other, or which might arise from delay of trains;—(3) that he would not hold the Wabash Company or any connecting railroad company responsible for any loss, damage or injury which might happen to the horses or be sustained by them while being loaded, forwarded, or unloaded, or from suffocation while in the cars, or from any injury caused by over-loading cars, or from fright of animals, or from crowding upon one another. These stipulations were made upon sufficient consideration, and their reasonableness and consequent validity are not questioned; nor is it questioned that the defendant company, operating a connecting railroad, is entitled to the benefit of them.

The first question is whether the evidence shows, prima facie at least, that the death of the two horses was the result of some of the

acts, or omissions or events for which the plaintiff had assumed the responsibility and risk.

We think it does. All the twenty horses had been loaded loose in one car. The plaintiff, himself, testified that the dead horses were badly trampled about the head and neck. The veterinary testified that the bruises and wounds upon them resulted from being trampled upon by another horse; that they were trampled upon while alive. Another witness testified that the dead horses looked as if they had been pounded and trampled to death. There was no other evidence as to the cause of the death. So far as appears, the death resulted from the plaintiff putting too many horses in one car, or from his leaving them loose in the car, or from some fright of the horses, or from their crowding upon one another; all of which events the plaintiff stipulated should be at his own risk.

In consequence of the above stipulations and evidence, the plaintiff cannot recover unless he shows by evidence that the death of the two horses was in fact caused by the negligence or other fault of the defendant company. This he has so far failed to do. He suggests in argument that the horses were probably thrown down by some collision of cars,—or the too quick starting or stopping of the car, or by some other concussion. There is no evidence, however, of any such event.

The plaintiff further argues that in the absence of evidence upon this point, the causative fault of the defendant company should be presumed, for the reason that the defendant company as common carrier has the burden of proving affirmatively its freedom from such fault. It is well settled, however, that when the common law liability of a common carrier is limited by valid exclusionary stipulations and the loss apparently results from some cause excluded by the stipulations, the burden is then upon the shipper to affirmatively prove that, nevertheless, the loss or damage was in fact caused by the fault of the carrier. For the want of such evidence in this case the plaintiff must be nonsuited.

Plaintiff nonsuit.

STATE *vs.* WILLIAM MCLEOD.

Penobscot. Opinion December 9, 1902.

Officer. Rescuing Prisoner. R. S., c. 122, § 16; c. 133, § 4.

In the trial of the respondent upon an indictment for forcibly rescuing a prisoner lawfully detained for a criminal offense, it is not necessary for the government to prove that the rescued prisoner had been subsequently convicted of the offense for which he was under arrest. It is sufficient for the government to show by any competent evidence that the prisoner was lawfully detained for a criminal offense.

The forcible rescue of a prisoner may be accomplished without the exercise of physical force, if by threats, menaces or demonstrations, the officer having the prisoner under arrest is compelled to yield thereto and to let his prisoner go.

The presiding justice gave the jury the following instruction in regard to the meaning of the word "forcible" in its connection in the statute under which the indictment was found: "Any force, whether physical or mental, or any kind of force that tends to drive or compel or force the officer to let the man go, and the officer yields to that force and lets the man go, not because he thinks it is right to let him go, but because he yields to the force, that is forcible. It is enough that the officer be made to understand that if he does not let that man go there will be force used, and there will be a breach of the peace, impelling the officer to let the man go."

Held; that this instruction is correct.

Exceptions by defendant. Overruled.

The case appears in the opinion.

B. L. Smith, County Attorney, for State.

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

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

WISWELL, C. J. The respondent was indicted under R. S., c. 122, § 16, for forcibly rescuing a prisoner lawfully detained for a criminal offense. The prisoner, alleged to have been rescued, had been arrested by a deputy sheriff, without a warrant, for the offense

of being found intoxicated in a public place. The defendant's counsel, claiming that the government had not shown that the prisoner was lawfully detained for a criminal offense, seasonably requested that the following instruction be given to the jury:

"When an officer arrests a person for an alleged offense not amounting to a felony, that is, a misdemeanor, without any warrant, before a person can be convicted of forcibly rescuing the prisoner from said arrest, the government must show that the person thus arrested has been convicted, because if the person thus arrested is afterwards on his trial for said alleged offense acquitted, it would show conclusively that the alleged offense had not been committed."

The respondent's first exception is to the refusal of the presiding justice to give this instruction. The requested instruction was properly refused. It was, of course, one of the essential elements of the offense for the government to prove that the person alleged to have been rescued was lawfully detained for a criminal offense. If such prisoner was found by the deputy sheriff violating any law of the State, it was his duty to arrest and detain him until a warrant could be obtained. R. S., c. 133, § 4; *Palmer* v. *Maine Central Railroad Co.*, 92 Maine, 399. Any competent evidence showing that this prisoner had been found by the deputy sheriff who arrested him, violating any law of the State was sufficient, and it was not necessary to show his subsequent conviction of the offense for which he had been arrested.

The respondent's remaining exception is as to the court's instruction as to the meaning of the word "forcible" in the statute above referred to. The presiding justice first explained to the jury what would constitute a rescue of the prisoner; he then explained the meaning of the word "forcible" in its connection in this statute, saying that the word did not necessarily mean physical force. Finally he gave this instruction: "That any force, whether physical or mental or any kind of force that tends to drive, or compel or force the officer to let the man go, and the officer yields to that force and lets the man go, not because he thinks it is right to let him go, but because he yields to the force, that is forcible. It is enough that the officer be made to understand that if he does not let that man go

there will be force used, and there will be a breach of the peace, impelling the officer to let the man go."

We think that this instruction was correct and gave an accurate definition of the word as used in this statute. It was sufficient to make clear to the jury the distinction between such arguments, inducements, statements and promises, upon the one hand, as might be properly made for the purpose of obtaining the release of a prisoner; and, upon the other, that force, which might and did compel the officer to let the prisoner go, "not because he thinks it is right to let him go, but because he yields to the force." A forcible rescue of a prisoner may be accomplished without the exercise of physical force, if by threats, menaces or demonstrations an officer is compelled to yield thereto and to let his prisoner go. Such has been the construction of the word in somewhat analogous cases. See the cases cited under the title of "Forcible" in 13 A. & E. Encycl. of L., 2nd Ed. 740.

Exceptions overruled.

WILLIE L. HILL, Appellant from decree of Judge of Probate.

Androscoggin. Opinion December 9, 1902.

Probate. Adoption. Decree. R. S., c. 67, § 34.

Where a judge of probate signs a memorandum upon a petition for leave to adopt a child, as follows: "On the foregoing petition, the facts stated having been maturely considered by me, it is decreed that the prayer of the petition be granted;" and at the same term of the Probate Court, but probably subsequently, causes to be made and signed a formal decree under the seal of the court and attested by the register, which latter decree is in all respects in accordance with the requirements of the statute, and shows an adjudication by the judge of all the facts which the statute requires him to pass upon, and which sets forth the facts as required by the statute, the latter must be regarded as the decree of the court.

On report. Decree of Probate Court affirmed.

This was an appeal from a decision of the judge of probate, for

Androscoggin County, dismissing a petition to have the record of the adoption of the petitioner changed.

The case appears in the opinion.

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

Tascus Atwood, for appellee.

SITTING: WISWELL, C. J., STROUT, SAVAGE, PEABODY, SPEAR, JJ.

WISWELL, C. J. On September 8, 1883, one Samuel Hill, of Auburn, filed a petition in the Probate Court for Androscoggin County, for leave to adopt the present petitioner, then a child under fourteen years of age. The petition for leave to adopt contained no reference to the matter of the right of inheritance by the adopted child. Written consent to such adoption was given by the mother of the child, and by a person appointed by the judge of probate as his next friend. The father, although living, was alleged in the petition to be hopelessly intemperate.

At the October term of the Probate Court, the judge signed a memorandum as follows on the petition: "On the foregoing petition, the facts stated having been maturely considered by me, it is decreed that the prayer of the petitioner be granted." And at the same term, as shown by the records of the Probate Court, he made the following decree:

"State of Maine.

Androscoggin ss. Probate Court.

To Samuel Hill of Auburn in the County of Androscoggin and State of Maine, Greeting:

Whereas, you have duly presented a petition to our said Court for leave to adopt Scott Evans, a child not your own by birth—and to change its name, and the written consent required by law having been given thereto, having duly considered the same and being satisfied of the identity and relation of the parties, of your ability to bring up and educate said child properly, having reference to the degree and condition of its parents, and of the fitness and propriety of such adoption, I do therefore decree and declare that from this day said child

is to all intents and purposes, except inheritance, your child and its legal name is and shall hereafter be, Willie L. Hill.

In Testimony Whereof, I have hereunto set my hand and official seal at a Probate Court held at Auburn within and for said County on the 2nd Tuesday of October A. D. 1883."

This decree was duly signed by the judge and attested by the register.

By the statute in force at the time this decree of adoption was made, the person adopted became the child of the adopters to all intents and purposes, and a decree of adoption gave the child adopted the right of inheritance from its adopters, "where not otherwise expressly provided in the decree of adoption." It will be noticed that the memorandum upon the petition signed by the judge contains no reference to the right of inheritance by the adopted child, while in the formal decree above quoted this language is used:

"I do therefore decree and declare that from this day said child is to all intents and purposes, except inheritance, your child," etc.

Samuel Hill having died intestate in April 1901, leaving some estate, the child adopted by him by virtue of the proceedings above referred to, filed his petition in the Probate Court for Androscoggin County, setting out the foregoing facts, claiming that the memorandum made by the judge upon the original petition was the decree, and asking the court to correct the record so that it should be in accordance with this memorandum. That court denied the prayer of the petition, and the petitioner appealed to the Supreme Court of Probate. The case comes to the law court on report.

The contention of the petitioner is that the memorandum made and signed by the probate judge upon the petition was made first, that this was a full and final decree, and that when he had made one decree his power in the matter had been exhausted, that thereafter he could not make another decree different from and inconsistent with the one first made. The question therefore is, which of these two papers signed by judge of probate must be considered as the decree of the court.

The statutes then and now in force provide for an adjudication

of certain facts by the judge in such cases, and for the form of the decree to be made by him, as follows: "Thereupon if the judge is satisfied of the identity and relations of the parties, of the ability of the petitioners to bring up and educate the child properly, having reference to the degree and condition of his parents, and of the fitness and propriety of such adoption, he shall make a decree, setting forth the facts, and declaring from that date such child is the child of the petitioners, and that his name is thereby changed, without requiring public notice thereof." R. S., c. 67, § 34.

The formal decree under the seal of the court and attested by the register shows that there was an adjudication upon these matters, that the judge was satisfied "of the identity and relation of the parties" of the petitioner's ability "to bring up and educate said child properly, having reference to the degree and condition of its parents," and "of the fitness and propriety of such adoption." In this decree he used appropriate language for the purpose of "setting forth the facts," as required by statute, and in all respects this decree complies with the section of the statute above quoted. This is not true of the memorandum upon the petition. That memorandum contains no statement of facts as required by this section, and even by reference to the facts set forth in the petition is not a sufficient compliance with the statute.

Under these circumstances, we are forced to the conclusion that the decree which shows an adjudication by the judge of probate of all the facts which the statute required him to pass upon, and which decree is made in precise conformity to the statute, must be regarded as the decree of the court.

Again, it is easy to understand how such an informal memorandum might be made upon the original petition for the purpose of reference in subsequently making the formal decree required by statute, but if this had been made as and for the final decree, we can perceive of no reason why another decree should be subsequently made.

Decree of Probate Court affirmed, with costs against the petitioner.

ADELINE S. SHEPARD, Executrix, *vs.* ALLISON PARKER.

Franklin. Opinion December 9, 1902.

Bills and Notes. Witness. Stat. of Limitations. Husband and Wife. R. S., c. 82, § 93.

The only requirement as to the competency of an attesting witness to the signature of the maker of a promissory note is, that such witness, at the time of the attestation must be one who is competent to testify in court in regard to the subject matter thereof.

Since by statute the husband or wife of a party to an action may be a witness in such action, the wife of the payee of a promissory note may be a witness to the signature of the maker, so that the statutory limitation of six years will not apply to an action on such note.

Exceptions by defendant. Overruled.

Action on a promissory note to which the defendant pleaded that the statute of limitations was a bar after six years—although the note appeared to have been witnessed by the wife of the payee.

B. Emery Pratt, for plaintiff.

H. L. Whitcomb, for defendant.

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

WISWELL, C. J. The only question presented by the exceptions is, whether the wife of the payee of a promissory note may be an attesting witness to the signature of the maker, so that the statutory limitation of six years will not apply to an action on such note.

We think that the only requirement as to the competency of such an attesting witness is, that the witness must be one who at the time of the attestation, is competent to testify in court in regard to the subject matter thereof. By R. S., c. 82, § 93, the husband or wife of a party to an action may be a witness in court in such action. The statute has remained in its present form since 1873, and before

that the husband or wife of a party was allowed to testify with the consent of the other.

The case does not show the date of the note in suit, but as it comes here on the defendant's exceptions, we must assume that the note was made since the statutes of this State have allowed a wife to testify in an action wherein her husband was a party. She was therefore competent to be an attesting witness at the time of the attestation. *Jenkins* v. *Dawes*, 115 Mass. 599.

Exceptions overruled.

BENJAMIN H. PAUL *vs.* WILLIAM H. THORNDIKE.

Knox. Opinion December 9, 1902.

Real Action. Judgment. Estoppel.

When it appears that the defendant in a real action, has previously recovered a judgment for the same premises that are here demanded, in an action wherein the plaintiff was one of the defendants, *held;* that the former judgment, so long as it remains unreversed, is conclusive against the plaintiff.

In the former action the present plaintiff had an opportunity to set up in defense the facts now relied upon by him. It was his duty in that case to make his whole defense. If he had shown a better title than did the plaintiff in that case, he would have been entitled to a judgment in his favor. The facts now relied upon by him in this new action cannot be shown for the purpose of impeaching the validity of the judgment recovered by this defendant in the former action.

The doctrine of estoppel by judgment is applicable although the judgment relied upon was one as of mortgage, and although the present plaintiff was one of several defendants in that suit.

On report. Judgment for defendant.

Real action in which the facts appear in the opinion.

J. H. Montgomery, for plaintiff.

C. E. and A. S. Littlefield; J. S. Foster, for defendant.

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

WISWELL, C. J. Real action. The case comes to the law court upon report. The plaintiff claims under a warranty deed dated December 30, 1886, duly recorded, from his father, Benjamin P. Paul, who admittedly had the title to and possession of the demanded premises at the time of his deed to the plaintiff. This would of course make out a prima facie case for the plaintiff.

But the following facts are further disclosed by the record: Upon the day of the conveyance to the plaintiff, he mortgaged the demanded premises, together with other real estate, to the Camden Savings Bank to secure a loan of $800, of which $300 only was ever drawn by the mortgagor; on July 6, 1887, the mortgage was assigned by the savings bank to Benjamin P. Paul; and on August 3, 1891, the latter mortgaged the demanded premises to the defendant to secure a loan of $250; at the September Term of this court for Knox County, this defendant entered a real action to recover the same premises that are now demanded, against this plaintiff and five others, all heirs of Benjamin P. Paul, who had deceased prior to the commencement of that suit; the defendants in that suit appeared by counsel and the case was continued; at the December Term 1897, Benjamin H. Paul filed a motion that the action be dismissed, but no sufficient reason therefor was assigned in the motion and it was consequently overruled; at the same term, the plaintiff in that action, upon his motion, recovered judgment as of mortgage for the premises demanded in that action, being the same described in the writ in this suit; a writ of possession was duly issued, properly served, returned and recorded and the defendant has since had possession of the premises. The defendant relies upon the jndgment recovered in this suit wherein he was plaintiff, and this plaintiff and others were defendants, and in which the demanded premises were the same as in this.

The plaintiff contends that at the time of the mortgage to the defendant from Benjamin P. Paul, the latter had no title to or interest in the premises, except as the holder of the mortgage to the

savings bank which had been assigned to him, and which, the case shows, had never been foreclosed; that the mortgage to the defendant, therefore, conveyed no title to him, and was not even sufficient to make him even an equitable assignee of the savings bank mortgage.

But, assuming this to be all true, it cannot affect the validity of the judgment relied upon by the defendant as an estoppel. The plaintiff in this suit was a party to the one in which the judgment was rendered. If he had any defense to that suit he had an opportunity to make it at that time. He could then have shown, if true, that Benjamin P. Paul had no title to convey to this defendant in mortgage or otherwise, and that consequently that action could not be maintained. It is of no consequence that the facts now relied upon were not set up in defense in the former suit. It was the present plaintiff's duty, in defense to that suit, to make his whole defense. If he had a better title than did the plaintiff in that suit, he could have shown it and would have been entitled to a judgment in his favor.

The judgment in the former action, in which the parties and the subject matter were the same as in this, must be regarded, so long as it remains unreversed, as conclusive upon the plaintiff in this action. The validity of that judgment cannot be attacked in this collateral proceeding. These principals are thoroughly established by the authorities. *Fuller* v. *Eastman*, 81 Maine, 284; *Toothaker* v. *Greer*, 92 Maine, 546.

A judgment as of mortgage in such an action is equally as conclusive as a judgment at common law. Nor is it of any consequence that the judgment relied upon by the defendant was rendered in an action wherein there were other defendants, in addition to the present plaintiff. In a real action judgment may be rendered in favor of some defendants and against others. *Hotchkiss* v. *Hunt*, 56 Maine, 252. This plaintiff, therefore, as defendant in that suit, notwithstanding that there were other defendants, had ample opportunity to make any individual defense that he had. The defendant is consequently entitled to a judgment in his favor, and such will be the entry.

Judgment for defendant.

STATE *vs.* GEORGE A. WISEMAN.

Androscoggin. Opinion December 9, 1902.

Nuisances. Intox. Liquors. Owner of Building. Pleading. R. S., c. 17, § 4.

In an indictment under R. S., c. 17, § 4, which makes it a misdemeanor for any person who is the owner or who has the control of any building or tenement, to knowingly permit the same "or any part thereof" to be used for any of the purposes named in the first section of that chapter, an averment which alleges that the respondent knowingly permitted "a certain shop in a building" to be used for such purposes, is sufficient.

On exceptions by defendant. Overruled.

Indictment charging the defendant for knowingly permitting a certain shop, in a building owned by him, to be used for a liquor nuisance contrary to R. S., c. 17, § 4.

The defendant's demurrer having been overruled, he was allowed exceptions to the ruling.

W. B. Skelton, County Attorney, for State.

G. C. Wing, for defendant.

SITTING: WISWELL, C. J., SAVAGE, POWERS, PEABODY, SPEAR, JJ.

WISWELL, C. J. The indictment in this case, under R. S., c. 17, § 4, alleges that the respondent knowingly permitted a certain shop in a building owned by him to be used for the illegal sale and illegal keeping of intoxicating liquors. The case comes to the law court upon exceptions to the overruling of a demurrer to the indictment. The objection urged is to the use of the words "a certain shop in a building," it being claimed that the language in this particular was not sufficient to set out an offense under the statute referred to.

But the statute makes it a misdemeanor for any person who is the owner or who has the control of any building or tenement, to knowingly permit the same "or any part thereof" to be used for any of the purposes named in the first section of that chapter, that is, among

other purposes, for the illegal sale or illegal keeping of intoxicating liquors. A certain shop in a building is necessarily a part of such building. The indictment sufficiently sets out an offense under this section.

If the respondent was given the right to plead over, before filing his demurrer, as appears possible from the record, that right will be reserved for him at nisi prius.

Exceptions overruled.

CHARLES E. MESERVEY, Judge of Probate,

vs.

BRADFORD K. KALLOCH, and others.

Knox. Opinion December 9, 1902.

Probate. Admr. de bonis non. Suit on Bond. R. S., c. 72, §§ 10, 16.

In this State, it is well settled, in the absence of a statute to the contrary, in accordance with the common law rule, that only the unadministered property of the intestate vests in the administrator de bonis non, that is, the goods, effects and credits which were the property of the intestate at the time of his decease, and which remain in specie, unaltered or unconverted by any act of the administrator, or the proceeds received by him from the sale of any such property, which have been kept intact and which have not been commingled with the administrator's own money.

As only such unadministered property of the intestate, and the unconverted proceeds of property sold vest in an administrator de bonis non, he can institute a suit against his predecessor and his sureties only in respect to such property. Except as to the unadministered estate, he is not a "person interested personally, or in any official capacity" within the meaning of R. S., c. 72, § 10, which authorizes such a person to maintain a suit upon a probate bond after his interest has been specifically ascertained by a decree of the judge of probate; nor a "party interested" within the meaning of § 16 of the same chapter, which provides that the judge of probate may authorize such a party to commence suit on the probate bond.

As there is no claim in this case that any of the property of the intestate remains in specie in the possession of the former administrator, or that the balance of the proceeds received by him from the sale of real estate has been kept in his hands by itself, uncommingled with his own or other money, the action cannot be maintained.

But the persons legally interested, within the meaning of the two sections above referred to, as creditor, widow, next of kin or otherwise, are not without ample remedy. Being so interested such persons can maintain an action upon the probate bond by proceeding in the manner provided by statute.

On report. Judgment for defendants.

Debt by the judge of probate of Knox County, on the application of the administrator de bonis non, against the principal and sureties on the bond given September 20, 1898, by the original administrator, for license to make sale of real estate. Besides the general issue, there was, by leave of court, a special plea in bar of full performance of the conditions of the bond.

The defendant B. K. Kalloch was appointed administrator of the estate of Alden Gay late of Thomaston, deceased, June 18, 1895. There was real estate appraised at $3150 and some personal estate. All of the personal estate was afterwards decreed to the widow as an allowance, which she received. On September 20, 1898, license was granted on petition to sell real estate at private sale and the bond, which is now in suit, was then given in the usual form. The administrator afterwards sold all the real estate at private sale for $1700; and on July 28, 1899, settled his first account, showing a balance in his hands of $1061.99. On December 19, 1899, Kalloch was removed as administrator, and on February 20, 1900, D. N. Mortland, Esq., was appointed and qualified as administrator de bonis non. Kalloch never settled any other or further account of his administration and the said sum of $1061.99 was still in his hands at the commencement of this suit. There were two disputed claims of creditors amounting to $408.97, which were allowed by commissioners, and remained unpaid at the date of suit. There were also several heirs who were entitled to distributive shares in the estate. The administrator de bonis non, on November 20, 1900, filed a petition to the Probate Court for leave to bring this suit, on which decree was entered authorizing it. This suit was commenced Novem-

ber 26, 1900. The plaintiff's term as judge of probate expired and that of his successor began January 1, 1901. It appeared by the report that the defendant denied the sufficiency of the decree, authorizing this suit.

D. N. Mortland, for plaintiff.

By the admission that a bond in usual form was given and that this is the one in suit, the defense on the general issue is abandoned.

The undisputed facts in the case show that there was a balance of $1061.99 in the hands of the original administrator at the time authority was given to commence this suit on the bond, hence he and his bondsmen are not to be allowed to go free without valid reason, which the pleadings and evidence in the case wholly fail to show as existing.

Revised Statutes, c. 72, § 16, provides that "The judge of probate may expressly authorize any party interested, to commence a suit on a probate bond for the benefit of the estate, and such authority shall be alleged in the process; and when it appears, in any such suit against an administrator, that he has been cited by the judge to account, upon oath, for such personal property of the deceased as he has received, and has not done so, execution shall be awarded against him for the full value thereof, without any allowance for charges of administration or debts paid."

Now the case shows that he "was removed as administrator for legal causes," among which, as the evidence shows, was a failure to give new bond or to settle his final account as ordered, all of which occurred a long time prior to the application for permission to bring this suit.

Besides commenting on the various statutes relating to the case, counsel cited: *Potter* v. *Webb*, 2 Maine, 257; *McLean* v. *Weeks*, 65 Maine, 411; *Decker* v. *Decker*, 74 Maine, 465; *Clark* v. *Pishon*, 31 Maine, 503; *Judge of Probate* v. *Quimby*, 89 Maine, 574; R. S., c. 71, § 4, par. 11; *Groton* v. *Tallman*, 27 Maine, 68, 74; *Williams* v. *Esty*, 36 Maine, 243, 244; *Waterman* v. *Dockray*, 78 Maine, 139; R. S., c. 72, § 10; *Bennett* v. *Overing*, 16 Gray, 267.

J. E. Moore, for defendant.

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

WISWELL, C. J. This action is brought by an administrator de bonis non, in the name of the judge of probate, against a former administrator of the estate, and his sureties upon a bond given to obtain a license to sell the real estate of the intestate. The former administrator, after selling the real estate under license, settled an account in the Probate Court which showed a balance of the proceeds of such sale in his hands, due the estate, of $1061.99. He was subsequently removed from his trust "for statute reasons" as said in the report. The suit is to recover this balance.

In this State, it is well settled, in the absence of a statute to the contrary, in accordance with the common law rule, that only the unadministered property of the intestate vests in the administrator de bonis non, that is, the goods, effects and credits which were the property of the intestate at the time of his decease, and which remain in specie, unaltered or unconverted by any act of the administrator, or the proceeds received by him from the sale of any such property, which have been kept intact, and which have not been commingled with the administrator's own money.

As only such unadministered property of the intestate, and the unconverted proceeds of property sold, vest in an administrator de bonis non, he can institute a suit against his predecessor and his sureties only in respect to such property. Except as to the unadministered estate, he is not a "person interested personally, or in any official capacity" within the meaning of R. S., c. 72, § 10, which authorizes such a person to maintain a suit upon a probate bond after his "interest has been specifically ascertained by a decree of the judge of probate;" nor a "party interested" within the meaning of § 16 of the same chapter, which provides that the judge of probate may authorize such a party to commence suit on a probate bond. These principles have been fully established in this State in the cases of *Waterman* v. *Dockray*, 78 Maine, 141, and *Hodge* v. *Hodge*, 90 Maine, 505. If it should be thought advisable that the law should be changed in this respect so that an administrator de

bonis non may maintain an action against his predecessor upon a probate bond to recover any money in his possession due the estate, it must be done by legislative action.

In this case there is no claim that any of the property of the intestate remains in specie in the possession of the former administrator, and there is neither claim nor proof that the balance of the proceeds from the sale of real estate has been kept in his hands by itself, uncommingled with the former administrator's own money. The action therefore cannot be maintained. But the persons legally interested, within the meaning of the two sections above referred to, as creditor, widow, next of kin or otherwise, are not without ample remedy. Being so interested such persons can maintain an action upon the probate bond by proceeding in the manner provided by statute.

Judgment for defendants.

VICTOR A. CLEMENT *vs.* CITY OF LEWISTON.

Androscoggin. Opinion December 10, 1902.

Physician—Compensation. Board of Health. Municipal Officers. Evidence. Auditing. Stat. 1887, c. 123, § 5.

Where the plaintiff made a claim for services as a physician attending small-pox patients, and was so employed by the defendant's board of health, but no specific compensation was agreed upon, the presiding justice instructed the jury that if the municipal officers "failed to make any regulation or auditing of his (plaintiff's) account at the time, and there being, when these services were performed, no regulations touching the fees and charges to which this plaintiff might be entitled, then the plaintiff is entitled to recover a reasonable compensation." *Held;* that this ruling was correct.

The action of the municipal officers after plaintiff's services were rendered in attempting to fix the compensation, is not admissible in evidence in such a case.

Also an offer to prove amounts previously paid to others for similar services would be rightly excluded. Such payments may have been made under express contracts, or been the result of a compromise, or rendered under peculiar and exceptional circumstances. They cannot be regarded as a criterion for the compensation to which plaintiff is entitled in this action.

Held; that the secretary of the board of health had authority under their rules and regulations to employ the plaintiff.

On exceptions by defendant. Overruled.

This was an action of assumpsit by the plaintiff to recover for professional services, as a physician, in attendance upon small-pox patients, under employment by the board of health of the city of Lewiston, in June and July, 1901.

The writ contained a common count, for fifty-one day's services from June 2, to July 22, both inclusive, at thirty dollars per day, amounting to $1530; and a quantum meruit for the same amount.

Upon trial the jury returned a verdict for the plaintiff in the sum of $1212. It was not denied that these services were performed by the plaintiff and that he was employed by the local board of health, with the knowledge of the municipal officers. But the defendant contended that it was incumbent upon the plaintiff, under chap. 123, § 5, of the Stat. of Maine, 1887, to show as a condition precedent to his recovery, that either the municipal officers had neglected or refused to regulate and audit plaintiff's fees and charges prior to the rendition of said services, or that their action in so doing had been corrupt.

Upon objection of the defendant, the court ruled and so instructed the jury, in substance, that the municipal officers had the power to make a schedule of fees prior to the rendition of said services and that if so done this would limit the fees recoverable by the plaintiff; but, that if they failed so to do, there being no regulation touching said fees, the plaintiff would be entitled to recover a reasonable compensation.

Chapter 123 of the Stat. of 1887 provides for local boards of health throughout the State. Section 7, clause 5, of that chapter provides that the local board has the power "to make, alter or amend such orders and by-laws, as they shall think necessary and proper for the preservation of life and health and the successful operation of the

health laws of the State, subject to the approval of any justice of the Supreme Judicial Court." In conformity to this law the local board of health for the City of Lewiston was organized and thereupon adopted by-laws approved by a member of the Supreme Court.

The relevant section of these by-laws is as follows: "Sec. 13, The board of health or the secretary thereof, may employ and hire such help, as is necessary for carrying into effect any of the orders or regulations of said board." Under the various provisions of statute and in conformity to the by-laws of the board of health, the plaintiff was hired by the secretary of the board, with the consent of the local board of health and the knowledge of the municipal officers of the city of Lewiston, to attend small-pox patients for the defendant, in June and July, 1901.

The other facts appear in the opinion.

F. N. Belleau and D. S. Williams; W. H. Newell and W. B. Skelton, for plaintiff.

D. J. McGillicuddy and F. A. Morey; A. T. L'Heureux, City Solicitor, for defendant.

SITTING: WISWELL, C. J., STROUT, POWERS, PEABODY, SPEAR, JJ.

STROUT, J. The plaintiff claims to recover for professional services as a physician in attendance upon small-pox patients in June and July, 1901. No specific sum was agreed upon for his compensation. He was employed by the secretary of the board of health of Lewiston.

Chapter 123, § 5, of the laws of 1887, provides that the municipal officers "shall regulate and audit all fees and charges of persons employed by each board of health, in the execution of the health laws and of their regulations." Defendant claims that it was a condition precedent to plaintiff's right to maintain the action, that the municipal officers had discharged this duty, or to show an attempt upon his part to have them do so.

The presiding justice instructed the jury that if the municipal officers "failed to make any regulation or auditing of his (plaintiff's) account at the time, and there being, when these services were per-

formed, no regulations touching the fees and charges to which this plaintiff might be entitled, then the plaintiff is entitled to recover a reasonable compensation." Exception is taken to this instruction.

The ruling was correct. The municipal officers could have fixed the fees before the services were rendered—and if they had done so, and it was known to the plaintiff, his renditition of services after that would be regarded as an acceptance of the terms made by the municipal officers, and his right to recover would be limited to that. In the absence of such action by them, for any services rendered by the plaintiff under a legal employment, the city impliedly promised payment therefor of a reasonable sum.

The right to "regulate" fees should be exercised, if at all, before the services are rendered. To "audit" charges, in bills rendered, does not mean to determine their amount in the sense of binding the other party. To audit is—"an examination in general"; "an examination of accounts"; "compare the charges with the vouchers." Webster. Upon such auditing the bill would be approved or rejected. If rejected, it would not preclude recovery if plaintiff had a meritorious cause of action. Such auditing cannot be regarded as a condition precedent to recovery. Plaintiff's rights did not depend upon approval of the municipal officers. The cases cited by defendant do not apply. In them the terms of the contract required certain things to be done before action brought; they were made conditions precedent. This statute gives certain authority to municipal officers, and imposes a duty upon them—but it is directory. It does not make it the duty of the plaintiff to procure their action before enforcing his claim.

The offered evidence of the action of the municipal officers after plaintiff's services were rendered, in attempting to fix the amount of his compensation, was rightly excluded. One party to a contract, after performance by the other, cannot determine the amount of compensation without the consent of the latter.

The authority of the secretary of the board of health to employ the plaintiff is expressly conferred by their rules and regulations contained in the ordinances of Lewiston, which were duly approved by a justice of this court, as required by law.

The offer to prove amounts paid by the city for similar services in previous years, to other physicians, was rightly refused. Such payments might have been upon express contracts, or been the result of a controversy or compromise, or have been rendered by physicians of small experience, or limited skill or reputation, or under peculiar and exceptional conditions. It would be unsafe and might be unjust to adopt them as a criterion for the compensation to which plaintiff is entitled.

Exceptions overruled.

CHARLES A. HANSON

vs.

NEWS PUBLISHING COMPANY, and another.

Cumberland. Opinion December 10, 1902.

Lien. Landlord. Lessee. Temporary Alterations. R. S., c. 91.

The statute giving a lien for labor and materials in erecting, altering, moving or repairing a house, building or appurtenances was evidently intended to apply to repairs or alterations which become fixtures, not removable by the tenant. To create a lien, the materials must be used for erecting, altering or repairing the building; must be so applied as to constitute a part of the building. It will not be sufficient that they are placed in it for its more convenient use.

Temporary alterations made by the lessee for his own convenience, not affixed to the building in a manner to become a part of the realty, subject to removal by the tenant, and not essential to the use and purpose for which the building was designed by its owner, and which were in fact removed by the lessee, leaving no trace of them in existence, except a few nail holes in the floor and screw holes in the wall, create no lien upon the building.

The plaintiff claimed a lien upon the Falmouth Hotel building, owned by the P. H. & J. M. Brown Company, for alterations and additions to a store in that building leased to the News Publishing Co. The principal charges were for partitions put in by the lessee for its own convenience, and not permanently attached to the building. They were removable by the ten-

ant, and were in fact removed by it. The landlord had no control over them, nor could he object to the work thus done by the tenant. *Held;* that no lien attached therefor to the building.

Some small repairs were made which were permanent in character, but of these the Brown Company had no knowledge, and in no sense consented thereto. Besides, they were so inextricably mixed with the other charges, that it is impossible to separate them.

Held; that no lien exists therefor.

On report. Judgment for owners of building on which plaintiff claimed a lien for alterations and additions.

Case reported from the Superior Court for Cumberland County.

From the reported evidence it appeared that the plaintiff, a carpenter and builder, claimed a lien upon the Falmouth Hotel building and lot of land on which it stands in Portland, owned by the defendant, P. H. & J. M. Brown Company, to satisfy his demand against the defendant News Publishing Company, a corporation in said Portland, for labor by him performed and materials by him furnished for altering and repairing the store number 208 Middle Street, a part of the Falmouth Hotel building, by virtue of a contract made by said plaintiff with said News Publishing Company, the latter a tenant in possession of said store.

The News Publishing Company was lessee of the store under the Falmouth Hotel, under a written lease from P. H. & J. M. Brown Company, the owners thereof, for a period of three years from the first day of July, 1901.

The lease was in the common form, with the usual covenants as to use and occupation, payment of rent as stipulated therein, and agreement to surrender the premises at the end of the term in good order, with a provision exonerating the lessor from any damage caused by overflow of water pipes, etc.

The lease contained no agreement as to repairs or alterations.

The premises included in the lease were an empty store comprising the ground floor and basement of a portion of the Falmouth Hotel building, which had been used for store purposes for years, by various tenants; and at the time possession was taken by News Publishing Company, contained no partitions, furniture or fixtures, except some shelving.

When leased to News Publishing Company, the store was in good repair, with a steel ceiling, and a comparatively new hard wood floor.

Having obtained possession of the premises, the defendant News Publishing Company made a verbal contract with plaintiff to divide up the store into offices by partitions made of wood and glass, with doors, and a cashier's office with a glass front and paneled work; and in addition thereto, the plaintiff made some other alterations and minor repairs all under the direction of News Publishing Company.

Other facts appear in the opinion.

The claim for the lien was recorded Sept. 10, 1901.

Wilford G. Chapman, for plaintiff.

Harry R. Virgin and Franklin C. Payson, for owners of building.

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

STROUT, J. Plaintiff claims a lien upon the Falmouth Hotel building, for labor and materials used in a store in that building, leased to the Publishing Company, under an employment by that company, upon the ground that the owners of the building consented thereto. The lease was in the usual form, and contained no provision in regard to alterations or repairs.

The P. H. & J. M. Brown Company leased to the News Publishing Company for three years "the store numbered two hundred and eight" under the Falmouth Hotel. The News Publishing Company, as such lessee, for its own convenience, put certain partitions into the store, nailed to the floor and screwed to the walls, but not nailed or otherwise fastened to the ceiling overhead. A runner was put down and lightly nailed to the floor, and the partitions studded from that. When leased, the store was "one large open room" with shelving. The News Publishing Company took out this shelving. The partitions were so put up that they could be removed without injury to the building, and were in fact removed by the lessees. They were not necessary or useful to the store, as a store, for which it was constructed and was intended to be and theretofore had been used by the owners. Mr. Brown, the treasurer and general manager of the Brown Company, was about the premises and saw these parti-

tions being put in, but gave no express consent, nor made any objection, except that they should not be nailed to the steel ceiling overhead.

The statute giving a lien for labor and materials "in erecting, altering, moving or repairing a house, building or appurtenances," was evidently intended to apply to repairs or alterations which became fixtures, not removable by the tenant. "To create a lien, the materials must be used for erecting, altering, or repairing the building; must be so applied as to constitute a part of the building. It will not be sufficient that they be placed in it for its more convenient use." *Lambard* v. *Pike*, 33 Maine, 144. As said by this court in *Baker* v. *Fessenden*, 71 Maine, 293,—"it must affirmatively appear that this machinery for which the labor was furnished, was so connected with and attached to the building, so adapted to and necessary for the use for which it was erected, as to lead to the conclusion that it was intended to be permanently a part of it, and in this action a part of the realty." A lien is given upon the ground that the work has been a benefit to the realty, and has enhanced its value.

These partitions were evidently temporary in their character and so designed by the tenant. He had a right to put them in for his convenience, and the lessor could not prevent. During the tenancy the tenant had the right to remove them, which right he exercised. They were of no service to the store, for which the tenement was designed and fitted by the owners. They were not of the character to impose a lien upon the building.

While the lien statute is to be construed somewhat liberally to accomplish its beneficent purpose, the rights of the owner should be fairly protected.

For such temporary alterations made by the lessee for his own convenience, not affixed to the building in a manner to become a part of the realty, subject to removal by the tenant, and not essential to the use and purpose for which the building was designed by its owner, and which were in fact removed by the lessee, leaving no trace of them in existence, except a few nail holes in the floor and screw holes in the wall, no lien upon the building can be founded.

Nor does the case show such consent by the owner as is required

to afford foundation for a lien. "Consent, within the meaning of the statute, is held to mean something more than acquiescence. It implies an agreement to that which could not exist without such consent." Jones on Liens, § 1253.

In *Shaw* v. *Young*, 87 Maine, 271, the building was a hotel in need of repairs inside and out, which were necessary for the preservation of the building, and to keep up its earning powers as a hotel. The owners saw and knew the repairs were being made, and themselves advised more or less with the workmen about the work, and made no objection. Under such circumstances, consent might well be implied.

In the present case, no such necessity existed. The fact that Mr. Brown knew the lessees were putting in the partitions, which were of no service to him or to the store, and to which he had no right to object consistently with the rights of the lessee, does not authorize the inference that he consented, in the sense of the statute. *Huntley* v. *Holt*, 58 Conn. 449, 9 L. R. A. 111; *Francis* v. *Sayles*, 101 Mass. 438.

The evidence shows some other small repairs, which might be regarded as fixtures. Mr. Brown says he had no knowledge of these, and there is no evidence that he had, nor that in any way he consented to them. Whatever small amount of labor and materials entered into these is so inextricably intermingled with the larger and more important work, that neither the items nor their amounts can be separated and ascertained. No lien can therefore attach for them.

Judgment for the P. H. & J. M. Brown Company.

ALBERT TORREY, Administrator, Appellant,

vs.

CLARENCE W. PEABODY, Executor.

Cumberland. Opinion December 10, 1902.

Will. Partial Intestacy. Remainder. Widow.

The only bequest or devise in a will was as follows:—

"I give the use and income of all the estate of which I shall die possessed, both real and personal, and wherever situated, to my wife, Harriet F. Torrey, during her life; and if in her own judgment the income thereof shall not be sufficient for her comfortable support, I hereby authorize and empower her, without application to the probate court for said county, to sell so much of said estate, either real or personal, as she may deem necessary therefor." *Held;* that the remainder of the estate, subject to the life estate, was intestate property, and being such was to be distributed under the statute of distribution, the widow taking one half absolutely.

In construing a will, the intention of the testator is the test of interpretation, but that intent is to be sought in the will as expressed, and the intention is to govern only so far as it has been expressed. Silence cannot be allowed to take the place of expression, so as to create a bequest, when the will itself is silent.

Exceptions by appellant. Overruled.

The appellant is the administrator, de bonis non with the will annexed, of the estate of David Torrey, deceased, and in that capacity he took an appeal from a decree in the Probate Court, which with the other facts of the case, appears in the opinion.

L. B. Dennett, for appellant.

Clarence W. Peabody, for appellee.

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

SAVAGE, J. David Torrey died testate, leaving a widow, but no issue. His will consisted of two paragraphs. The first one was as follows: "I give the use and income of all the estate of which I shall

die possessed, both real and personal, and wherever situated, to my wife, Harriet F. Torrey, during her life; and if in her own judgment, the income thereof shall not be sufficient for her comfortable support, I hereby authorize and empower her, without application to the Probate Court for said county, to sell so much of said estate, either real or personal, as she may deem necessary therefor."

By the second paragraph he appointed his wife executrix of the will. He made no other disposition of his estate.

Mrs. Torrey in her life-time settled no account as executrix, but after her death, her administrator presented an account of her doings as such, which was allowed by the judge of probate. The appellant appealed, and in his reasons of appeal he objected specifically to the allowance of the following item in the account:— "Turned over to Harriet F. Torrey in her own right, to-wit, life interest under terms of will and remainder as widow, under statute of distribution of intestate estates, one half residue of personal estate, $1811.35." In the Supreme Court of Probate the decree of the judge of probate was affirmed. The presiding justice ruled "that notwithstanding said will the personal estate remaining after the termination of the life estate was intestate property not controlled by said will; that the acceptance by said Harriet F. Torrey of the provisions of said will did not affect her right to said remainder as intestate estate;" and that the allowance of the item referred to above, and the allowance "of all other items of the account based upon a partial intestacy of said estate were correct." The appellant excepted to these rulings. The question, in short, is this. If a man die without issue, leaving his widow, by will, the use and income of all his personal estate for life, and make no disposition whatever of the residue or remainder of the personal estate, will she be limited to the life estate specifically created by the will, or will she be entitled, in addition, to one-half of his distributive personal estate under the statute of distribution? The ruling complained of assumed the latter proposition to be the correct one.

To change the form of the question, it is whether the residue or remainder of the personal estate, subject to the life estate, is to be regarded as intestate estate or testate. It must be the one or the

other. If it is intestate, then it is to be distributed under the statute of distribution, the widow taking one-half absolutely. For the will in no way affects distribution of the intestate estate. It is to be distributed as if there were no will. Now can this remainder be regarded as testate estate? If so, the will has made it so, and the legatees will take because of the will, and not as statutory distributees. What disposition has the will made of it? To whom and in what proportions has it been bequeathed? The will is silent in its terms. It names neither legacies nor legatees. But the appellant contends that from the very fact that the testator gave a life estate in all his personal estate to his widow, one of the distributees of his estate, a reasonable implication arises that he intended her to have no larger estate in any of it, and that, inasmuch as he made no further disposition of it, he intended the remainder of the personal estate to go to his heirs, the other distributees. We do not think so. We think no such implication arises.

In construing a will, it is true that the intent of the testator is the pole star of interpretation. But that intent is to be sought in the will as expressed, and the intention is to govern only so far as it has been expressed. *Nash* v. *Simpson*, 78 Maine, 142. The court cannot let silence take the place of expression. The question always is what did the testator intend by what he said, not by that which he did not say. We cannot create bequests and legatees where the testator has made none. If the expression of the testator is of doubtful meaning, if it is crude and even imperfect, interpretation may aid in ascertaining the intent, and for that purpose will roam over the entire instrument, and collate and compare all the expressions within its four corners. It may even alter a word. But, as was said in *Robinson* v. *Adams*, 4 Dall. XVII, such alteration of words may be made not "to discover the intention of testators, but only to express it properly when discovered."

It might be supposed that the omission of a residuary bequest was inadvertent. If so, we cannot remedy it. Or it might be supposed that the testator, having made it certain that his entire estate would be available for the support and comfort of his wife at her discretion during her lifetime, was content to let the law do what it would

with the remainder. This seems as reasonable as to suppose that he intended persons not named nor referred to, to be his legatees by implication.

The same question arose in *Nickerson* v. *Bowly*, 8 Met. 424, and it was claimed there that, in the absence of all expression of the testator's intentions, the will should be construed as creating a gift to his heirs by implication.

Answering this proposition, Chief Justice Shaw said: "A gift by implication must be founded upon some expressions in the will, from which such intention can be inferred. It cannot be inferred from an absolute silence on the subject. It may be admitted in a popular sense, that when a deceased person has given a part of his property to one object of his bounty, he had no intention that such person should take another portion. But we think the true answer is, that the intention of the testator is to govern, so far only as he has communicated that intention, by his will, either in terms, or by implication; but if he has left undevised property, the disposition of it is not governed by his will, but by another rule, having its origin in another source, in the application of which the intent of the testator is not the governing rule, and can have no influence. It operates in the same manner, as if the deceased had left no other property and made no will. If, therefore, the intent of the testator, not to give the remainder to the same person, could reasonably be inferred from a gift of personal property to one for life, in terms, it could have no effect in regulating the disposition of intestate property." This case has been followed in Massachusetts by later ones to the same effect. *Dole* v. *Johnson*, 3 Allen, 364; *Johnson* v. *Goss*, 132 Mass. 274.

We think the rulings of the presiding justice below were correct.

Exceptions overruled.

MINNIE E. H. THORNTON, Admx.,

vs.

MAINE STATE AGRICULTURAL SOCIETY.

Franklin. Opinion December 11, 1902.

Agricultural Society. Fairs. Negligence—Fire-Arms. Public Safety. Shooting Gallery. Death by Wrongful Act. Stat. 1891, c. 124.

1. It is the duty of an agricultural society giving an exhibition or "fair" to which the public are invited, and for admission to which a fee is charged, to use reasonable care to keep its grounds and the usual approaches to them, so far as the approaches are under its control, safe for all who attend the "fair" by its invitation.
2. So it is its duty to use reasonable care to see that there is no firing of dangerous fire-arms upon its grounds, at such a place and under such conditions as to jeopardize the life or limb of any of those whom it has invited to its fair, whether they are for the time being within the grounds, or properly within the usual approaches thereto, outside of the grounds.
3. The "fair" to which the public were invited in this case must be regarded as consisting not only of the exhibits and performances more particularly under the defendant's own direction, but also, of all the shows, exhibits and attractions of all kinds, recognized by the defendant and permitted to have space upon its grounds.
4. It was the duty of this defendant to use reasonable care, in making allotments of space for exhibits, shows and other features, and in their subsequent inspection and supervision, to see that the safety of the invited public was not endangered.
5. It is immaterial whether the occupant of space so allotted was technically a lessee, or a licensee. As between the defendant and the invited public, the duty still remained upon the former of using reasonable care to see that all of the exhibition grounds were safe; and this duty would be particularly urgent in case of an exhibition or sport which might, unless properly conducted, be attended with danger, such as would be the use of fire-arms.
6. In this case the defendant society was giving a "fair." It had let space upon its grounds for a shooting gallery. It is satisfactorily shown that a bullet fired by a patron of the shooting gallery, while at target practice, missed the target, passed through the fence enclosing the exhibition grounds, and struck and killed the plaintiff's intestate, who was then standing upon the railroad platform outside of the grounds.

7. While this platform was neither owned nor controlled by the defendant, it was one of the usual approaches to its grounds; and it is the opinion of the court, that there was sufficient evidence to justify the jury in finding that the deceased, at the time when and place where he was killed, was within the scope of the defendant's invitation to the public to attend the fair and therefore that the defendant owed him the duty of using reasonable care for his safety as before stated.

On motion by defendant. Overruled.

Action under Stat. 1891, c. 124, by the plaintiff, who is the widow of George W. Thornton, to recover damages suffered by the death of her husband which she alleged was caused by the wrongful act and neglect of the defendant.

The jury gave a verdict of $2500 for the plaintiff and the defendant filed the usual motion for a new trial.

The case appears in the opinion.

E. E. Richards; W. H. Newell and W. B. Skelton, for plaintiff.

G. C. Wing, for defendant.

SITTING: EMERY, STROUT, SAVAGE, POWERS, PEABODY, SPEAR, JJ.

SAVAGE, J. This is an action brought by an administratrix, for the benefit of the widow, under Stat. 1891, c. 124, which provides for the recovery of damages for the death of a person when caused by the wrongful act, neglect or default of another. The plaintiff recovered a verdict, which the defendant now seeks to have set aside, upon the usual grounds.

The following facts appear to be either undisputed, or proved by so much weight of evidence that a jury would unquestionably be warranted in believing them to be true. The defendant society was holding its annual "fair" at Lewiston, during the first week in September, 1901. There were many exhibits of stock, agricultural products, and other articles. There was a track and racing upon it. There were sports and shows of many kinds and descriptions. There was a "Midway" and a "Fakirs' Field." And all were upon the exhibition grounds of the defendant, and within a high enclosing fence. To gain admission to the grounds, a fee had to be paid, and these admis-

sion fees furnished a portion of the defendant's income. It also derived an income from the letting of space upon the grounds to the various exhibitors and showmen. Alongside the grounds of the defendant, on one side were the tracks of the Maine Central Railroad. Between the railroad tracks and the fence before referred to, was a wide platform for the accommodation of passengers who should arrive or depart by the railroad trains. This platform appears to have been upon railroad land, and outside of the defendant's grounds, and it would seem that it was not built by the defendant nor under its control. Gates opened from the platform to the exhibition grounds.

On Tuesday, September 2, 1901, the defendant let to one Harvey Slauenwhite, or White, a space of ground, part of lot No. 4, twelve and one-half feet by thirty, for use as a shooting gallery during the fair. It was situated on the "Fakirs' Field," and faced on one of the streets that went down through the "Midway." The defendant gave White a receipt in the following language:—

"MAINE STATE FAIR. No. 4, lower. Renters' Receipt. Received of H. White six and 25-100 dollars for privilege of shooting gallery and dolls. Total rent $12.50; due $6.25.

C. B. Bailey for the society."

It should be said that along the fence by the railroad platform, the defendant, in letting space, reserved a passage-way six feet wide. The space thus let to White butted upon this passage-way, so that the end of White's lot towards the railroad platform was six feet distant from the fence and platform. The fence at that point was about eleven and one-half feet high, and the platform was about four feet from the ground. The fence boards were a little less than one inch thick.

After White contracted for this space, he set up, and thereafter operated, a shooting gallery on the lot. The shooting bench was placed thirty-three feet from the fence; and twenty-five feet from the shooting bench, towards the fence, two targets were so placed that in shooting from the bench towards the targets, the gun would be aimed in the direction of the fence and railroad platform. One target was circular, and about twelve to fifteen inches in diameter.

The size of the other, which was the figure of a woman, is not given. The top of the targets was five feet and three inches from the ground. Back of the targets, that is, between them and the fence and platform, was an oak "shield," five feet long horizontally, and three feet and six inches wide, and so fastened that its top was six feet and two inches from the ground. The thickness of the shield is not given, nor is it material in this case.

On Thursday, September 4, at about one o'clock in the afternoon, the plaintiff's intestate was standing on the railroad platform, outside of defendant's grounds, about ten feet from the fence. He was not in the rear of White's shooting gallery, nor in the direct range from the shooting bench to the targets. He stood a few feet, probably from five to ten feet, southerly of such a range. The report of the discharge of a gun or rifle on the inside was heard, and he fell, shot through the aorta. Death was immediate. A freshly made hole, eight feet from the ground, was found in the fence in a direct line between the point where the deceased fell and the shooting bench of White's gallery. An examination of the evidence leaves no doubt in the minds of the court that the bullet which caused his death came from that gallery, and that in its course it passed diagonally from the bench to the fence, several inches higher than the shield and several feet to the left of it. Just before the shooting, two or three women were seen shooting there, one of whom, at least, attracted attention by her inexperience in firing, or carelessness, or both. After the shooting, a thorough examination of the shooting gallery was made, and there were found there two Winchester Magazine rifles, and no other guns or rifles. There were also found a number of boxes of the Union Metallic Cartridge Company's 22 caliber short cartridges, and no other ammunition. Tests afterwards made with these rifles and cartridges showed that a bullet discharged from one rifle at a distance of thirty-three feet penetrated through three pine boards, each seven-eighths of an inch thick, one pine board three-quarters of an inch thick, one spruce board an inch thick, and struck the wall beyond, while a bullet from the other rifle penetrated through the first four of the above mentioned boards and was embedded in the fifth. It must be regarded, therefore, that at the time in question, White was using

in his shooting gallery deadly weapons, loaded with cartridges easily capable of producing a fatal result, and that he was then using no others; and that in consequence of such use, plaintiff's intestate was killed. That such a proceeding was extremely dangerous to life and limb, and highly culpable on the part of White, is self-evident.

The defendant, however, disclaims any responsibility for the conduct or misconduct of White. It does so on two grounds. First, that the relation between itself and White was that of landlord and tenant; and secondly, that it exercised reasonable care, all that the law in any event required, in keeping its grounds, including the space occupied by White, safe. Under the first ground, it invokes the familiar rule that a landlord is not responsible for negligent or tortious acts committed without his consent, upon the leased premises, by a tenant.

The defendant says that shooting galleries are among the usual concomitants of fairs everywhere, and that as such they are entirely proper; that, as usually conducted, they are not dangerous; that the bullets ordinarily used, known as "B. B.'s" and "C. B.'s" are manufactured especially for shooting gallery purposes, of light weight, and in cartridges containing only a small quantity of powder or other explosive substance; that for such bullets, the protection afforded by the shield at White's gallery was ample; that by its contract with White, it only consented impliedly that the gallery should be operated in the usual manner and with the usual ammunition; and that it did not know of, or have the means of knowledge, and did not consent to the manner in which the gallery was being used on the day in question. It claims that it was under no duty to the plaintiff "to warn him of hidden dangers, which defendant had no means of knowing, and that it was not obliged to see if there were any such dangers." In short, it claims that "the accident resulted solely from the wilful, unauthorized and unexpected use of dangerous and improperly constructed cartridges on the part of its lessee, without knowledge of the defendant and beyond its duty to prevent." In determining the soundness of the defendant's position generally, in regard to its duty to those whom it invited to attend its fairs, we do not think it is necessary to decide whether White was a tenant or a

licensee for a specific purpose. The defendant's duties to the invited public were the same in either case.

The defendant was giving a great exhibition, to which the public, far and near, were invited. The "fair" to which the public were invited consisted not only of the racing of horses and of the exhibition of live stock and agricultural and manufactured products and machinery or implements, which it may be supposed were more directly the objects of the society in holding the fair, but also of all the shows, exhibits, and attractions of all kinds, recognized by the defendant and permitted by it to have space upon its grounds. The fair was undoubtedly intended to be, in the matter of attractiveness, all things to all men. Some visitors would be attracted by one feature, others by another. All of these attractions tended to draw visitors to the fair, and to increase the income of the defendant, which took gate-money from all. These attractions, no less than the defendant's own exhibits, constituted a part of the fair to which the public were invited.

It is too well settled to need the citation of authorities, that if the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition, so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended.

Therefore, having invited the public to its fair, it was the duty of the defendant to use reasonable care to keep its grounds and the usual approaches to them, so far as the approaches were under its control, in a safe condition, safe for all who were invited. It was its duty to use reasonable care that there should be no traps or pitfalls into which the invited might fall, and that there should be no dangerous plays, or sports, or exhibitions, by which the invited might be injured. In short, to reach this case, it was its duty to use reasonable care that there should be no firing of dangerous fire-arms upon its grounds, so as to jeopardize the life or limb of any of those whom it had invited to its fair, whether they were at the time within the grounds, or properly within the usual approaches to the grounds, as, for instance, upon the railroad platform.

The defendant would not be relieved from this duty by leasing portions of its grounds to the proprietors of shows and attractions, and becoming their landlord. As between it and the invited public, the duty still remained of using reasonable care to see that all of the exhibition grounds were safe. It was its duty so to do both in the original letting of space, and in the subsequent inspection and supervision of the show thus permitted to give its exhibition, or of the shooting gallery thus permitted to operate as a part of the fair. And this duty would be particularly strong and urgent in case of an exhibition or sport which might, unless properly conducted, be attended with danger, such as the use of fire-arms.

These views are well supported by authority. The court in *Sebeck* v. *Plattdeutsche Volksfest Verein*, 64 N. J. L. 624, 81 Am. St. Rep. 512, 50 L. R. A. 199, speaking of the duties of the proprietor of a park to which the public had been invited and for entering which an admission fee was charged, said: "Having invited the public to its park, it was chargeable with the duty of using reasonable care to see that the premises were kept in a safe condition for the use of its guests; and if the exhibition, although given by an independent contractor, was of a character to jeopardize the safety of those who were present on the defendant's invitation, the duty was cast on the latter of taking due precautions to guard against injury." *Hart* v. *Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298, 29 L. R. A. 492; *Dunn* v. *Brown County Agricultural Soc.*, 46 Ohio St. 93, 15 Am. St. Rep. 556, 1 L. R. A. 754; *Lane* v. *Minn. State Agricultural Society*, 62 Minn. 175, 29 L. R. A. 708; *Schofield* v. *Wood*, 170 Mass. 415; *Mastad* v. *Swedish Brethren*, 83 Minn. 40; *Herrick* v. *Wixom*, 121 Mich. 384; *Windeler* v. *Fair Association*, (Ind.) 59 N. E. Rep. 209; *Fox* v. *Buffalo Park*, 21 N. Y. App. Div. 321, affirmed in 163 N. Y. 559. In *Richmond & Manchester Ry. Co.* v. *Moore*, 94 Va. 493, 37 L. R. A. 258, the court held "that the fact that a balloon ascension in a park owned by a street car company to which the public were invited and given by an independent contractor did not relieve the owner of the park from liability for failure to use due care that persons visiting it should not be injured by the dangerous character of the apparatus connected with the inflation

of the balloon." In *Thompson* v. *Lowell, etc., Street R. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345, it was held "that the fact that an exhibition," given at grounds provided by the defendant, a street car company, for the free entertainment of its patrons, "was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm." *Conradt* v. *Clauve*, 93 Ind. 476, 47 Am. Rep. 388, was a case very much like the one at bar. The defendants, who were the proprietors and managers of a public fair, had allotted part of the grounds for practice in shooting with a target gun. The plaintiff was a patron of the fair, and his horse, hitched near the ground allotted for target shooting, was killed by a ball fired from the target gun. The court in affirming judgment for the plaintiff said:—"The practice in target shooting appears to have been a part of the entertainment carried on at the fair, and as the defendants were the owners of the premises, and the managers and controllers of the fair, the practice in target shooting was a part of their exhibition, and under their supervision and control as much as any other part of the fair. And those having charge of the practice, as well as those engaged in it, while perhaps not strictly agents or servants of the defendants, were acting under the license and permission of the defendants; and such a relation existed between them as will hold the defendants liable for injuries resulting from their negligence in not properly controlling the conduct and management of this part of their exhibition."

Some of the cases cited are those where the injuries resulted from the negligence of independent contractors, and not lessees. But we can perceive no tenable distinction in a case like this. In either case, the offending thing is where it is by the license and permission of the owners of the premises, and upon ground which the owners, by virtue of their invitation to the public, hold out as safe. This is the ground of their liability. By inviting patrons to their fair, they make themselves bound to use reasonable care to see that the fair in all its parts is safe and is conducted safely, whether the various parts of the fair are conducted and managed by the owners them-

selves, or with their permission, by licensees, independent contractors or lessees. Such is the conclusion which rests upon good sense, and which seems to be clearly established by all the authorities upon the subject.

The only questions remaining for consideration then are whether the plaintiff's intestate at the time he was killed was within the protection of the defendant's invitation, and whether the defendant had exercised that reasonable care which was required of it, with respect to the allotment of space to White for a shooting gallery, and the subsequent inspection and control of it. In regard to the first question, not strongly urged, though not conceded by the defendant, we perceive no real difficulty. It is necessary to state only one phase of the case. The deceased had attended the fair the two previous days. On the morning of the day in question, he left his wife in Auburn, at the house where they were staying, with the expressed purpose of going to the fair, and with an arrangement to meet his wife later in the day at the gate of the fair. From some cause they seem to have missed each other, and he did not meet her when she arrived, nor did she see him again alive. As already stated, he was standing on the railroad platform, where passengers from Auburn by railway train were naturally expected to alight, and from which platform there were gates into the fair grounds. The jury certainly might reasonably infer that he was where he was in connection with his agreement to meet his wife at the gate on her arrival from Auburn. And to be there at such a time and for such a purpose, would be within the scope of the defendant's invitation. And although he was outside of the defendant's grounds, under such circumstances, it would be the duty of the defendant to use reasonable care to prevent his being shot from a shooting gallery on the inside.

But the defendant urges that it did use reasonable care. The testimony relied upon by the defendant comes from two witnesses, the superintendent of the grounds and the chief of the State Fair police. The latter seems to have been, so far as it is important in this case, the servant or agent of the defendant. The defendant claims the benefit of his acts. Fairly epitomized, their testimony on this point is as follows:—The superintendent, who let the space to

White, being asked if any restrictions or regulations were made with White as to the manner of conducting the business, said, "I asked him, I says, 'of course your gallery is safe, is it not?' He says, 'yes, I run at Canton' and I was thinking he said Livermore—named one or two places; and he said, 'you can find out all about me up there at Livermore, or Livermore Falls.'" He further testified that he did not make any restrictions or regulations. He said he examined the shield "on the second day of the fair. It might have been the first;" that he then looked to see if everything was all right.

"Int. Did you look to see what kind of ammunition White was using?

Ans. No sir, I did not.

Int. Did you look to see what kind of a rifle he was using?

Ans. I saw he was using a regular shooting gallery rifle, I couldn't tell you exactly the make or anything of that kind.

Int. Could you tell by your examination of the rifle what kind of cartridges he was using?

Ans. Well, I could tell he was using a shooting gallery cartridge."

The witness said he knew a shooting gallery cartridge when he saw one, that it was a very small cartridge, with a very little lead projection, and that he knows that was the kind that White was using that first day he went down there, because they were displayed right there. He further said that he did not look to see if White was using any other kind.

The chief of the State Fair police testified that his duties took him all over the grounds, that he was probably by the White gallery many times a day, but he testified as to only two instances. He said that he visited the gallery the day before the shooting, and two days before, that on one of these visits,—he was unable to tell which,—he examined the cartridges, and that White was then using "B. B.'s" "little small cartridges," strictly shooting gallery cartridges. He said he saw the rifles discharged while he was there examining the cartridges. A box of B. B. cartridges was produced at the trial, and the witness, on cross-examination, said he thought they were of the

same size as White was using the day he visited him, but that he was not positive about that. He said, however, that he was positive that they were not the same kind of cartridges as found at the gallery after the shooting. He further said that he made no particular investigation to see what they were using, that he had no instructions to investigate, or to impose restrictions upon the gallery.

"Q. You had no instructions to take any charge or supervision over the shooting galleries, except simply to preserve order on the fair grounds.

Ans. That is right."

He said that the "B. B.'s" are as big as the "22 caliber shot," but not as long; that he saw no 22s there the day he visited the place; that the box of cartridges he saw sat right on top of the bench, but that he did not know what was in the drawers. He is sure White was using the same rifles that day as he was the day the deceased was killed.

This is all the material testimony which the case discloses upon the question of defendant's exercise of care. And the question now is whether the jury, taking the testimony as it stood, and giving to each part of it such weight as they lawfully might, were justified in their conclusion that the defendant failed to exercise ordinary care in the premises. What is ordinary care is peculiarly a question addressed to the sound judgment of juries, upon the evidence. Their conclusions should stand, unless shown to be clearly wrong. After a careful consideration of the facts in this case, concerning all of which there is little or no dispute, we are not convinced that the verdict should be disturbed. It is obvious that the ordinary operation of the shooting gallery required careful attention and some safeguards. Balls of lead, not very large perhaps, were fired at the targets. The fact that an oak "shield" was placed behind the targets is significant. The defendant seems to have made no investigation or examination of White's gallery at the time of the letting. It asked White if it was safe, and he said it was. But there was no investigation. That, however, is not important, if it made sufficient examination or supervision afterwards.

Again, the gallery was located so that the firing was towards the

railroad platform, thirty-three feet distant, along which thousands of the defendant's patrons might be expected to pass each day. It should have been anticipated by the defendant, we think, that inexperienced, unskilful, and even careless persons might patronize the gallery, who would fail to hit the target, and might fire wide of the mark, and it was its duty to take that consideration into account. Was a shield, five feet by three and a half feet, the top of which was only a little more than six feet from the ground, a sufficient protection against such shooting as should have been anticipated? We think a jury might reasonably conclude it was not. And a jury also might reasonably have concluded that the defendant was careless in placing a shooting gallery in such a place as this one was in. It must be remembered, however, that the plaintiff's intestate was outside of the fence, and the case must be decided with reference to the duty which the defendant owed to him there. It is claimed, and we think with much reason, that whatever the hazard might be to persons within the grounds, from the operation of the shooting gallery, the fence, which was higher than men's heads, was a sufficient protection to persons on the platform against any firing with the ordinary shooting gallery cartridges, and it is argued accordingly that the failure of the defendant to afford the deceased, standing where he was, further protection against such firing, should not be regarded as a want of ordinary care. It is not want of ordinary care in such case to fail to provide for the happening of contingencies which there is no reason whatever to expect.

So we come to the remaining ground. Could the defendant properly be held responsible with respect to the 22 caliber bullet which was actually fired? At the very outside, only twice in three days was anything like an inspection of the gallery made, once by the superintendent who "looked to see if everything was all right," and once by the chief of the police. Neither is able to fix the time positively, and for anything which appears in the case, both inspections may have been had the first day of the fair, or two days before the fatal shooting. The inspection of the superintendent seems to have been limited to noticing that shooting gallery rifles, as he called them, were then being used, from which he inferred that shooting gallery

cartridges were also being used. He says he did not look to see what kind of ammunition White was using. Neither seems to have made any particular investigation. The officer says he did not, though he testified that they were using shooting gallery cartridges, and that no others were in sight. As to these things, however, it may be that the jury relied less upon the memory of this witness than they otherwise would have done, for it appeared that he testified before the coroner's inquest, and there said, in answer to the question whether he examined the ammunition they were using, that he "didn't until after the accident."

It is undisputed that the rifles, from one of which the bullet was fired, were being used when the officer inspected the gallery. It was testified to and not disputed, that while a B. B. bullet may be fired from a Winchester Magazine rifle, such as these were, by pushing them in as in a single shot breach loader, yet that such bullets are not suitable for such a rifle, not suitable for use in a magazine. If the jury believed this, we think they might reasonably have thought that the very fact that it was known to the defendant or its officers and agents that such rifles were being used should have arrested the attention of the inspecting officers, and led to a more careful investigation of the ammunition being used, and that the investigations should have been more frequent. The jury might reasonably have thought that by the exercise of such care the fatal hazard might have been prevented. We do not forget that the superintendent says they were using the regular shooting gallery rifles. In view of the testimony that the rifles actually used were not suitable for shooting gallery cartridges, it was open to the jury to say which was correct. They may have believed that the superintendent was mistaken.

Upon the whole, we think the verdict is sustainable within the rules of law which imposed upon the defendant the duty of using reasonable care to furnish the plaintiff's intestate safe exhibition grounds to visit, and safe approaches thereto.

The defendant claims that the verdict of twenty-five hundred dollars is excessive. While it may be large, we do not think it was so unwarrantably large as to justify our interference. The deceased, at the time of his death, was thirty-three years old, and his widow was

twenty-three. Nothing appears but that he was industrious and temperate. He was a farmer, and in addition to carrying on his farm, at the time of his death he was earning, it is said, thirty-five dollars a month on the average, "collecting cream." It is not unreasonable to conclude that the loss of such a husband at such an age may be a great pecuniary injury to the widow.

Motion overruled.

SARAH E. STEVENS *vs.* COUNTY COMMISSIONERS.

Somerset. Opinion December 10, 1902.

Certiorari. Record. Evidence. Petition. Relationship.

The following facts appeared upon a petition for a writ of certiorari to quash the proceedings of the county commissioners of Somerset County in laying out a winter road:—

A hearing was had upon the petition, before a justice of the Supreme Judicial Court, asking for a writ of certiorari to quash the proceedings of the county commissioners in laying out a winter road, upon the ground that the commissioners had no jurisdiction over the case, as it was presented to them, one of the members of the board being related to several of the petitioners within the degree of second cousin. The writ was granted and the case then reported to the law court for its decision. The record of the proceedings of the county commissioners was sent up, as the writ required, but in the records neither the error of which the petitioner complained nor any other error appeared. An inspection of the record sent up showed complete jurisdiction on the part of the court of commissioners and that their proceedings were without error or defect. *Held;* that the record was conclusive upon all matters contained in it, and that no evidence dehors the record could be admitted upon the writ.

It further appeared, from an inspection of the record sent up, that the petitioner, in her petition, did not allege that she did not know, at the inception of the proceedings, of the relationship of which she complained, nor that, if she did not so know, she could not by the exercise of reasonable diligence have ascertained the fact.

Held; that the petitioner should have alleged, in her petition, that she did not have such knowledge and that, by the exercise of reasonable diligence, she could not have ascertained it.

On report. Writ of certiorari quashed.

This was a hearing on a writ of certiorari commanding the county commissioners of Somerset County "to send and bring and have before our said justices of our said court . . . . the full record of their proceedings upon said petition of the said Sarah E. Stevens with all things touching the same fully and entirely, as the same remain before them, by whatever names the parties are therein called," that the court might determine whether the record should be quashed for the second reason set out in the writ, the first having been abandoned.

That reason is alleged to be "because Alonzo Smith, one of the board of county commissioners, who took part in the adjudication upon said petition and appeal therefrom, was related to three of the signers of said petition, within the sixth degree by marriage or consanguinity."

Forrest Goodwin, for petitioner.

Geo. W. Gower, for respondent.

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

SPEAR, J. Certiorari to quash the proceedings of the county commissioners of Somerset County in laying out a winter road. All the proceedings, from the petition to selectmen to the judgment of the commissioners, were regular and in proper form.

The selectmen, upon proper petition, laid out the road, as prayed for, over the land of the petitioner. The petitioner appealed from their decision to the court of county commissioners. The county commissioners, upon proper notice and hearing, confirmed and adopted the action of the selectmen.

The petitioner then appealed from the decision of the county commissioners to the Supreme Judicial Court, for Somerset County. At the March term of court, 1901, the appeal was dismissed and the decree of the county commissioners affirmed.

After all these proceedings, admitted to be regular, the petitioner asks to have the proceedings of the commissioners annulled, "Because

Alonzo Smith, one of the board of county commissioners, who took part in the adjudication upon said petition and appeal therefrom, was related to three of the signers of said petition within the sixth degree of marriage or consanguinity; which errors are in proceedings that are not according to the course of the common law and should be quashed." The above alleged error does not appear in any of the proceedings or the record thereof.

We do not think the writ of certiorari will reach the difficulty. No evidence dehors the record can be admitted, upon the writ, to show irregularities and errors in the proceedings.

An inspection of the record alone must determine the sufficiency of the proceedings.

Emery v. *Brann*, 67 Maine, 39, was a petition for certiorari to require justices of the peace and of the quorum to certify up the record of their proceedings in taking the disclosure of a debtor under R. S., c. 113. In this case it was held, not only that the error complained of must appear by an inspection of the record, but that the error should be alleged in the petition. On page 44 the court say: "But it is not alleged in the petition that the irregularities and errors specified appear by the record of the justices, which they seek to have quashed. The petition should contain such an allegation."

It also appears from that case that the alleged error in the proceedings was, that it did not appear by the citation that the debtor was arrested and gave bond in the County of Somerset, and therefore the justices had no jurisdiction, and the court expressly says that, if the debtor was not arrested in that county, the proceedings were unauthorized, and that the facts, if allowed to be proved, would show a want of jurisdiction on the part of the court making the record. Yet the court held that no evidence was admissible, even the original papers in the case, to show error, fraud, want of jurisdiction, injustice or any other fact by testimony dehors the record. In giving expression to the opinion of the court, Mr. Justice LIBBEY quoted *Pike* v. *Harriman*, 39 Maine, 52, in which it was said, "The petitioner offered to prove certain facts dehors the record, but the evidence was held inadmissible." "The court say: 'A writ of certiorari can

present only a record of their proceedings, but no testimony can be received from the petitioner to affect the record or to prove other facts not appearing in it,' citing *Commonwealth* v. *Bluehill Turnpike*, 5 Mass. 420. The same rule is affirmed in *Ross* v. *Ellsworth*, 49 Maine, 417."

In *Emery* v. *Brann*, supra, certain original papers were offered propounding certain questions tending to contradict the record. But the court say: "By the record it appears that no such question was put to the debtor by the attorney for the creditors. The evidence offered is not admissible to show error in the record. Nor is it admissible to prove fraud. Upon this point it is sufficient to say that the petition alleges no fraud in the record. If there was fraud in the proceedings, a writ of certiorari is not the proper remedy to correct it. Nor is the evidence admissible to show that injustice was done by the justices, for the reasons stated in the case above cited."

In the case at bar "it is not alleged in the petition that the irregularities and errors specified appear by the record," nor could it be so alleged, nor does the error in fact appear of record, for the error was in no way presented to the attention of the commissioners, and could not be of record even by way of correction or amendment.

The above case would seem to be decisive of the case at bar, but there are many other cases, decided by our own court, to the same effect.

"The writ prayed for can present only the records of the proceedings by the tribunal. Nothing dehors the record can be proved by the petitioner." *Foss* v. *Ellsworth*, 49 Maine, 418.

"Moreover it was held in *Pike* v. *Harriman*, supra, that the writ prayed for can present the record only and nothing dehors the record can be proved by the petitioner." *McPheters* v. *Morrill*, 66 Maine, 125.

"When the writ issues the court can act only on the record as produced. No evidence aliunde is receivable. The record is conclusive, and if error exists the proceeding is quashed." *White* v. *Commissioners*, 70 Maine, 326.

"For when the writ issued, the sufficiency of the record returned

in answer to the writ, must be determined from an inspection of it." *Hewitt* v. *County Commissioners*, 85 Maine, 309.

"Whether the proceeding by certiorari is regarded as one merely to set aside proceedings in excess of the jurisdiction of the inferior tribunal, or as including the power to review errors committed in the exercise of existing jurisdiction, the attack thereby must be supported solely by the record which is brought before the Superior Court, and the parties cannot go beyond it to show either the existence of alleged errors, or that the judgment sought to be annulled is in excess of the jurisdiction of the court, or was entered in a case in which it had no jurisdiction whatever over the subject matter or of the parties against whom the judgment was rendered." *Morrill* v. *Morrill*, 20 Oregon, 96, 23 Am. St. Rep. note, page 108, and cases cited.

The petitioner in her brief cites certain cases which assert in a general way that, when an inferior court of record acts without jurisdiction, such cases will be quashed upon a writ of certiorari; but it should be observed that every case cited, and also every case we have been able to find, laying down such a general proposition, is based upon the fact that the want of jurisdiction, in every instance, has appeared as a matter of law from the inspection of the record.

She further contends that the quashing of the proceedings should depend, not upon the inspection of the record, but upon the facts proved, at the hearing upon the petition, to determine whether the writ should issue, and points out that it would be an anomalous proceeding for the justice hearing the petition to find sufficient evidence to authorize him to grant the writ, and then, for another justice, at the hearing upon the writ, to hold that no such error appeared of record as would warrant the quashing of the proceedings.

But such has been done and such is the law. Judge VIRGIN in *Levant* v. *County Commissioners*, 67 Maine, 434, in an elaborate opinion, reviewing the cases, and laying down a mode of procedure upon the petition for certiorari says: "An examination of the reported cases in this State shows that the course of procedure has not been so uniform in some respects, as is desirable; and we have found much hesitation and uncertainty in the proceedings at nisi prius. It has been the invariable practice, however, to hear the

whole case upon the petition, and from this fact the judgment upon the petition granting the writ has in some instances been deemed by the parties, 'ipso facto,' a quashing of the record. *State* v. *Madison*, 53 Maine, 546. All the authorities concur in excluding all evidence extrinsic to the record *when it is before the court on the writ.*"

Hewitt v. *County Commissioners*, 85 Maine, 308, also shows that the proceedings upon the petition and the writ are entirely distinct. The court say on page 309: "In this case after hearing upon the petition the court, being in doubt from the answer as to some of the facts set up in defense, the defendants not being at hand to verify a more particular statement of them, and to give progress to the case, ordered the writ to issue, and, without prejudice to the defendant's right to return, in answer thereto, an amended record." The writ had been granted, and the hearing, in this case, was upon the writ. But the court quashed a part of the record and affirmed the rest, saying on page 312: "It is settled law that a record may be affirmed in whole or in part in proceedings of this nature."

Phillips v. *County Commissioners*, 83 Maine, 541, is a case in which one justice granted the writ upon the petition, and, in answer to the writ, the respondents certified the record of their proceedings, and another justice, at the hearing upon the writ, ordered and decreed, "Writ of certiorari quashed with costs. Disposition of writ to be certified to the county commissioners." To this decree exceptions were taken and overruled by the law court.

Thus it would seem that the hearing upon the petition is to enable the court to determine whether, in its discretion, it will issue the writ, directing the Superior Court to determine, by an inspection of the record itself, whether such record is defective or irregular, as alleged in the petition.

After the writ has issued and the record is before the court on certiorari, evidence as extrinsic to the record is inadmissible. Its errors cannot be corrected nor its omissions supplied. The action of the court is on the record as certified. APPLETON, C. J., in *Dresden* v. *Commissioners*, 62 Maine, 368.

The mere granting of a writ of certiorari is not tantamount to

issuing the writ, and quashing the proceedings thereon. No judgment to quash the proceedings of the Commissioners was rendered by grant of leave for the writ to issue. Non constat that judgment to quash would have been rendered if the writ had been issued. A writ of certiorari, like any other writ, is subject to be quashed for cause shown. *State* v. *Madison*, 63 Maine, 550.

If, upon inspection, it is thus defective or irregular, the court will quash the record; but if not, it will quash the writ.

There is another phase of the case which, we think, is fatal to the petitioner's contention. It does not appear by the plaintiff's bill that she did not know, at the very beginning of the proceedings, the relationship of the original petitioners to commissioner Smith. Her petition is entirely silent as to when she made the discovery of the alleged disqualifying relationship.

It would be great error, and unjust, to quash the proceedings by allowing the petitioner to take advantage of her own laches; hence the great necessity resting upon her to allege, not only that she did not know, but that, by the exercise of reasonable diligence, she could not have discovered, the relationship complained of in season to make objection thereto before the case was finally disposed of.

Not having so alleged, we think she must be regarded as guilty of laches, or to have waived any objection she might have offered. This case was contested with vigor and heard three times, and, at the last hearing on the appeal to the Supreme Judicial Court, the whole question of jurisdiction was open to attack upon offering the report of the commissioners for acceptance.

Phillips v. *County Commissioners*, 83 Maine, 541 is decisive on this point. The court say: "When an appeal has been taken from the decision of county commissioners in laying out a highway, all objections to their jurisdiction or their otherwise invalid proceedings may be taken when the report of the committee is offered for acceptance in the Supreme Judicial Court. And if not then taken, no writ of certiorari would be sustained to quash their proceedings."

The above decisions being conclusive, it is unnecessary to consider the other propositions raised in the case.

Writ of certiorari quashed with costs.

NATHANIEL J. HANNA *vs.* GEORGE W. SINGER.

Lincoln. Opinion December 11, 1902.

Libel. Declaration. Newspaper Article. Identification of Plaintiff. Inducement. Innuendo. Officer. Inelegant Language. Demurrer.

Language cannot be regarded as libelous merely because it is inelegant.

Where an article complained of as libelous, itself fails to identify the plaintiff as the person intended, a count in the declaration which contains no words of inducement, colloquium or innuendo connecting the plaintiff with the alleged libel, is clearly defective, on demurrer.

Counts in a writ for libel which neither contain any allegation that plaintiff held office at the date of the publication, nor that the language claimed to be libelous referred to him in his official capacity, can only cover a libel upon him as a private individual.

Exceptions by defendant. Sustained.

Action of libel for the publication of divers newspaper articles claimed to have been published in the Damariscotta Herald of and concerning the plaintiff. Defendant filed a general demurrer to the declaration at the first term. The presiding justice overruled the demurrer, pro forma, and the defendant alleged exceptions.

The case is stated in the opinion.

L. M. Staples, for plaintiff.

W. H. Hilton, for defendant.

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

STROUT, J. Demurrer to a declaration for libel. The first count is clearly defective. It contains no words of inducement, colloquium or innuendo, connecting the plaintiff with the alleged libel. The article itself, so far as libelous matter is concerned, fails to identify the plaintiff as the person intended.

If in the remaining two counts it was intended to charge the matter published to be libelous of the plaintiff in his office of a

deputy sheriff, they are fatally defective, as neither contains an allegation that he was a deputy sheriff at the date of the publication, nor that the language referred to him in his official capacity. A libel upon him as a private individual is all that these counts cover.

In the second count where the article published speaks of a deputy sheriff rummaging in a sleigh, the innuendo is "meaning the said N. J. Hanna," but the language does not authorize this innuendo. This is very clear on reading the article. After detailing the acts of the deputy sheriff referred to, the article says, "but to return to Nat," a clear indication that the previous statement referred to some person other than the plaintiff. The remainder of the article, though inelegant, even if applied to the plaintiff, cannot be regarded as libelous. Searching for violators of the law, by a private citizen, honorably conducted, is not only justifiable but often praiseworthy; that it arouses the wrath of the offender is natural. A statement of that fact is not libelous.

The third count contains neither inducement, colloquium nor innuendo. The statement in the published article refers to N. G. Hanna, while the plaintiff's name is Nathaniel J. Hanna. There is no positive averment that the plaintiff was intended to be referred to, by the name of N. G. Hanna. Even if the matter could be regarded as libelous, which is doubtful, the count fails to connect it with plaintiff by proper allegations, and is therefore bad.

Exceptions sustained. Demurrer sustained.

INHABITANTS OF WINSLOW *vs.* INHABITANTS OF TROY.

Kennebec. Opinion December 22, 1902.

Pauper. Marriage. Annulment. Guardian. Probate. Notice. Void Decree. Jurisdiction. R. S., c. 59, § 2; c. 60, §§ 1, 18; c. 67, §§ 4, 6.

1. Upon marriage, a woman takes the pauper settlement of her husband, if he has any in this State.
2. If the marriage is subsequently annulled on the ground of the mental incapacity of the husband to contract marriage, the woman's pauper settlement must be regarded as not affected by the marriage.
3. The same result follows if it is proved that the husband at the time of its solemnization was mentally incapable of contracting marriage.
4. Such a marriage is absolutely void ab initio, and may be impeached collaterally, without judgment of nullity.
5. The court has no jurisdiction to decree the annulment of a marriage upon the petition of the guardian of one of the parties.
6. The court has no jurisdiction to decree the annulment of a marriage, without notice to the party against whom the proceeding is brought.
7. When want of jurisdiction in such case appears upon the face of the record, the decree is void and may be attacked collaterally.
8. A decree of the probate court, upon application of municipal officers, adjudging a person to be of unsound mind and appointing a guardian for him is void, when it appears that the fourteen days prior notice authorized by statute was not given to him, and no inquisition was had.
9. On such application, without inquisition, the judge of probate can act only when the statutory notice has been given and the person affected is in court. Unless notice has been given, the presence of the person in court and his consent to the proceedings are not sufficient to give jurisdiction.
10. A person of unsound mind is incapable of giving consent, or waiving statutory notice.
11. A void decree of the probate court has no probative force as evidence.
12. When it appears from admitted or indisputable facts, as shown by the evidence, that a verdict is right, and that no other verdict would be sustainable upon the evidence, all other questions of law and fact become immaterial.

13. In this case, it being conceded that a marriage was solemnized between the pauper and one Lorenzo V. Pomeroy, the pauper's settlement, if then in the defendant town, must be regarded as changed thereby to the town where her husband's settlement was, unless it appears that the marriage was void, or that it has been annulled. *Held;* that the decree of annulment was void, and there is no competent evidence in the case that Pomeroy was of unsound mind at the time of the marriage. It therefore appears conclusively, that the verdict for the defendant was the only one which could be sustained in any event, upon the evidence in the case.

Motion and exceptions by plaintiff. Overruled.

Action for pauper supplies brought in the Superior Court for Kennebec County. The jury rendered a verdict for the defendant.

C. F. Johnson, for plaintiff.

R. F. Dunton, J. R. Dunton; W. C. Philbrook, for defendant.

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

SAVAGE, J. Action to recover for pauper supplies furnished to one Berneta Pomeroy, who is alleged to have a pauper settlement in the defendant town. The verdict was for the defendant. The case comes up on the plaintiff's exceptions and motion for a new trial. Several questions are presented, but it will be necessary to consider only one. For if the pauper's settlement was not in the defendant town, it is unimportant here where it was. Assuming that the pauper's derivative settlement was in the defendant town, the defendant contends that that settlement was lost by her residence for five years in an unorganized place in this State, and if not so, then by her marriage to one Lorenzo V. Pomeroy, who had a pauper settlement in the town of Starks. *Eddington* v. *Brewer*, 41 Maine, 462. We consider only the questions relating to the marriage. The solemnization of the marriage is not disputed. But it was open to the plaintiff to show that the marriage was originally void, or that it had been annulled by judicial decree. The plaintiff claims that the marriage was subsequently annulled by a decree of the Supreme Judicial Court of this State. If it was legally annulled, it is claimed, and properly, that the pauper's legal settlement must be regarded as not affected by the marriage. *Reading* v. *Ludlow*, 43 Vt. 628. So,

if the marriage was void. On the other hand, if the marriage was not annulled, and if there is no proof of its invalidity, it must be held that the pauper took and still retains the settlement of her husband, and hence is not chargeable to the defendant town. And in such case, all the other disputed questions become immaterial, whatever may have been the grounds upon which the jury based their verdict. The single question, therefore, is whether, upon the evidence in the case, the marriage was valid, and is still subsisting. If this be answered in the affirmative, the verdict must be sustained.

The record shows that a petition for annulment was presented to the court by Henry S. Doyen, claiming to be the guardian of the husband, who had been decreed to be a person of unsound mind. The petitioner described himself as guardian, and after setting out alleged causes for annulment, prayed the court to annul the marriage. He signed the petition "Henry S. Doyen, guardian of Lorenzo V. Pomeroy." Upon this petition notice was ordered and served upon Lorenzo V. Pomeroy, but so far as appears, no notice was ordered or served upon Berneta Pomeroy the wife.

It is clear that the petition gave the court no jurisdiction in the premises. It was the petition of the guardian, not that of the husband. Revised Statutes, c. 60, § 18, provides that "when the validity of a marriage is doubted, either party may file a libel as for a divorce; and the court shall decree it annulled or affirmed according to the proof." It is unnecessary to decide whether the petition of one of the parties by a guardian would give the court jurisdiction, for that question is not presented. The statute says that "either party may file a libel as for a divorce." Here neither party to the marriage filed libel or petition. The decree was made upon the libel or petition of the guardian only. Upon this ground therefore it appears that the court had no jurisdiction to annul the marriage, and that the decree was void.

Furthermore, if the decree was made without notice to the wife, the result would be the same. It is elemental knowledge that the court has jurisdiction of parties to proceedings in court only after appearance or notice, such notice as is prescribed by law. Notice to parties against whom process is brought lies at the very foundation of

the administration of justice. Without notice to her, the court had no jurisdiction to make a decree affecting the rights or changing the status of the wife.

The want of jurisdiction is apparent upon the face of the record. The decree of nullity was absolutely void. It is well settled that a judgment thus void for want of jurisdiction may be attacked collaterally. In truth, it needs not to be attacked, for it cannot stand alone. *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456. It follows that the settlement of the pauper was not affected by the attempted annulment of the marriage.

This conclusion is decisive of this case, unless it appears from the evidence, that the husband was in fact of unsound mind and incapable of contracting marriage, at the time of the marriage. If he was, the marriage was absolutely void, ab initio. Such is the common law, and such, also, is the statute provision in this State, as to marriages solemnized in this State. *Unity* v. *Belgrade*, 76 Maine, 419. Bishop on Marriage and Divorce, § 187; R. S., c. 59, § 2, c. 60, § 1. Such a marriage may be impeached collaterally. Judgment of nullity is not required. *Unity* v. *Belgrade*, supra. Bishop on Marriage and Divorce, § 187. The marriage in question was solemnized in Massachusetts, but in the absence of proof of any statutory provisions upon the subject, it is to be presumed that the common law of Massachusetts is the same as in this State. *Tlexan* v. *Wilson*, 43 Maine, 186; *McKenzie* v. *Wardwell*, 61 Maine, 136.

It was therefore open to proof in this case that the marriage was void by reason of the husband's unsoundness of mind. When a marriage is proved, it is presumed that the parties to it were capable of giving valid consent. Bishop on Marriage and Divorce, § 184. The burden of showing incapacity was upon the party alleging it, which in this case was the plaintiff. *Hovey* v. *Chase*, 52 Maine, 304, 83 Am. Dec. 514.

The only thing in the case on which any claim can be based, that the marriage was void by reason of the husband's mental incapacity at the time it was solemnized, is the record of a decree of the Probate Court in Somerset County, made prior to the marriage, in which it was decreed that Pomeroy, afterwards the husband, was a person of

unsound mind, and Mr. Doyen was appointed his guardian. This decree is printed in the record, although it does not appear that it was admitted in evidence. If this is not evidence, the case is barren of evidence upon this point. As it appears in the record among the printed exhibits, we give the plaintiff such benefit, if any, as may be derived from its consideration. This decree was made upon the petition of the selectmen of the town of Starks. The statute, R. S., c. 67, § 4, authorizes the appointment of a guardian of a person insane or of unsound mind, upon the application of the selectmen of the town where he resides. In some instances, not material to this discussion, this may be done without inquisition. Section 4, of c. 67, provides that "in all cases where the municipal officers or overseers of the poor are applicants, if they have given at least fourteen days notice to such person by serving him with a copy of their application, the judge may adjudicate thereon without further inquisition, if such person is present, or on such further notice, if any, as he thinks reasonable." Section 6 provides that "in all other cases, the judge shall issue his warrant to the municipal officers of the town where such person resides requiring them to make inquisition into the allegations made in the application, and they shall, upon such evidence as they are able to obtain, decide whether such allegations are true." This court held in *Holman* v. *Holman*, 80 Maine, 139, that it was essential that the selectmen should give notice of the inquisition to the person affected.

In the case now under consideration, no inquisition was made by the selectmen, and none was ordered by the judge of probate. Nor had the selectmen given fourteen days notice of their application to Pomeroy. The judge of probate, as stated in the decree, determined that notice was not necessary, "the said Lorenzo V. Pomeroy being present in court with full knowledge hereof and consenting hereto."

We think this decree is void. It is void upon its face. The preliminary requirements of the statute were not complied with, without which the judge of probate had no authority to make any decree. The requirements of such a statute, affecting most important personal rights, must be strictly complied with. *Coolidge* v. *Allen*, 82 Maine, 23. The fact that Pomeroy was present in court does not obviate

the difficulty. Without an inquisition, the judge of probate can act only when the notice has been given, and in such case, when the person affected is in court. Even if the selectmen had given him the fourteen days notice required, still the judge could not have made the decree without inquisition, unless he was present. But they did not give the notice. Both are essential, so far as this case is concerned.

It only remains to inquire whether Pomeroy's consent was sufficient to give jurisdiction to the Probate Court. Clearly not. Persons of sound mind and sui juris may generally waive statutory provisions in their favor. But how can a person of unsound mind be said to have "full knowledge" and how can he give "consent"? How can a decree of mental unsoundness be based upon the knowledge and consent of the person who for that very reason is incapable of giving consent? Or how can want of notice in such case be excused by the consent of one who lacked mental capacity to excuse it? The mere statement of the proposition affords a perfect answer. The two positions are absolutely incongruous. The decree of the Probate Court therefore was void. Being void, it has no force or effect. It proves nothing. It is not evidence.

Accordingly it must be held, upon the evidence as presented, that the marriage of the pauper with Lorenzo V. Pomeroy was a valid one. If so, her pauper settlement is that of her husband in the town of Starks, and not in the defendant.

Inasmuch as it thus appears, that the defendant is entitled to judgment in any event upon all the evidence which is competent, the exceptions also become immaterial, and need not be considered.

Motion and exceptions overruled.

WILLIAM F. EMERY, Admr., in Equity,

vs.

HENRY W. SWASEY, Guardian, and others.

Cumberland. Opinion December 22, 1902.

Will. Life Estate. Charge upon Estate.

Upon a bill in equity to obtain the construction of a will it appeared that the testator by clause six of his will devised to his sister Harriet and her husband, and to the survivor, his homestead farm, to have and to hold the same to them and to the survivor of them for and during their natural lives and the life of such survivor, subject, however, to the obligation to furnish a comfortable home and maintenance for his sister Eliza during her natural life.

He also gave to his sister Harriet and her husband $5000, in trust for the payment of the taxes of the farm and for keeping the family tomb, and the buildings in repair.

Upon the decease of said survivor, he devised said farm, and also the trust fund of $5000, to be used for the purpose above set forth, to his nephew William, for his life, and, upon his decease to other relatives on the same terms and conditions. But he did not mention the support and maintenance of his sister Eliza, in the devise to his nephew or any of his successors, under the will.

The circumstances of the case show that his sister Eliza was a very old lady, without any home of her own, and that the testator had provided a home for her for some fourteen years before his death; that the homestead farm was the home of his and his sister's childhood; that he had enlarged, improved and adorned it, and made it an attractive summer home, and that he had provided no other home for her.

Held; that the testator clearly intended his sister Eliza to have "a comfortable home and maintenance" on the homestead farm; and that the legacy to her is a charge upon the property and follows the property into the hands of every life tenant who accepts the devise of the homestead.

On report. Bill sustained. Decree according to opinion of the court.

Bill in equity for the construction of the will of the late Mark P. Emery, of Portland.

The case appears in the opinion.

Clarence W. Peabody, for plaintiff.

H. W. Swasey, S. L. Larrabee; H. W. Gage, C. A. Strout and L. Turner, for defendants.

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

SPEAR, J. A bill in equity for the construction of the will of the late Mark P. Emery of Portland, which comes before the law court on bill, answers and agreed statement of facts. Mr. Emery died in 1898, aged 81 years, leaving no widow or children; his next of kin being his sisters Eliza W. Steele, aged 78 years, and Harriet F. B. Dunnell, aged 73 years, and the descendants of two other deceased sisters and of four deceased brothers.

Mr. Emery left an estate of about $100,000, all of which was disposed of under his will by eight distinct clauses. But clause six is the only one which the court is called upon to construe, although some of the other clauses may be alluded to as having a bearing upon the construction of this clause. This clause is divided into several items, and, so far as it is necessary to refer to it, reads as follows:

"I give, devise and bequeath to my sister Harriet F. B. Dunnell and her husband Joseph Dunnell and to the survivor my homestead farm situated in Buxton, Maine, with all the buildings, household furnishings, stock, tools, carriages and appurtenances belonging thereto including the articles of personal property mentioned in the first clause in my will, meaning by the term homestead farm to include the several parcels of land connected with the same at the time of my decease, whether purchased subsequent to this or not, but not including other outlying farms owned by me in said Buxton, to have and to hold the same to them and to the survivor of them for and during their natural lives and the life of such survivor, *subject,* however, to the obligation to furnish a comfortable home and maintenance for my sister Eliza W. Steele during her natural life.

"I also give and bequeath to said Harriet F. B. Dunnell and Joseph Dunnell and to the survivor of them, the sum of $5000, in trust, to

be by them and the survivor of them held and the interest thereof to be used in paying the taxes of said homestead farm and keeping the same in order and keeping in order the family tomb and also all the buildings on said farm in repair.

"And upon the decease of said survivor I give, devise and bequeath said homestead farm and appurtenances, together with the personal property above mentioned, to my nephew William F. Emery to have and to hold the same for and during his natural life.

"And upon the decease of said first named trustee I give and bequeath to said William F. Emery the above named sum of $5000, and any increase thereof in trust to be held by him for the purpose above set forth."

Upon the decease of William F. Emery the testator gives the property devised in the same language to Horatio Emery for life and names him as trustee. Upon his decease he gives it in the same language and upon the same terms to Thomas K. Emery and upon the decease of Thomas K. Emery he gives the remainder to the eldest son then living of William F. Emery and names him as trustee, and further provides against the incident of forfeiture.

The question submitted for the opinion of the court is the construction of this clause, with respect to the provision for the home and maintenance of Eliza W. Steele.

Does it make them a charge upon the property?

It is a well settled rule that the court will seek "to discover and give effect to the intention of the testator as disclosed in the light of any avowed or manifest object of the testator." *Page* v. *Marston*, 94 Maine, 345; *Mace* v. *Mace*, 95 Maine, 283, 285.

"Each case must be decided on its own facts, looking at the language of the instrument and the surrounding circumstances." *Parker* v. *Parker*, 126 Mass. 438.

Was it the intention of the testator that his sister Eliza should have "a comfortable home and maintenance" from and upon the homestead farm? We think it was.

That portion of the statement of facts bearing upon this question is as follows:

Eliza W. Steele was born July 27, 1820.

She first married Washington Kimball and had a son, born September 11, 1837, Thomas Kimball, now living, and whose name was changed to Thomas Kimball Emery.

After the death of her first husband, she married, October 9, 1851, Joseph G. Steele, who died May 22, 1884, without issue.

Eliza W. Steele was a sister of Mark P. Emery. He was born February 11, 1817, and died April 6, 1898.

Harriet F. B. Dunnell, born March 17, 1825, died September 3, 1901.

Joseph Dunnell, husband of said Harriet, died January 21, 1899.

Soon after the death of Joseph G. Steele, Mr. Mark P. Emery assumed the support of Eliza W. Steele and thereafterwards, as long as he lived, provided for her support and comfort, furnishing her with clothing and pin money and paying for medical attendance and care. Most of the time he caused her to be cared for in the family of Thomas K. Emery, although after the death of Mr. Mark P. Emery's wife, Mrs. Steele spent some of her time at his home on Free Street in Portland.

On April 6, 1898, the date of the death of Mark P. Emery, his sister, the said Harriet F. B. Dunnell, aged 76 years, lived at Cumberland Mills, Westbrook, Maine, with her family, consisting of her husband Joseph Dunnell, aged 81 years (who subsequently died January 2, 1899,) of her invalid son George Dunnell, aged about 50 years, her grandchildren, Henry F. Warren aged 14 years and Mildred Warren aged 15 years, and that neither said Harriet nor her husband had any property except a small amount of household furniture; that the entire family was dependent upon the earnings of her husband, which, on account of his age and physical condition were quite small, and that all these facts were well known to said Mark P. Emery, who owned the house where she resided and allowed her to occupy it rent free, and had besides yearly contributed to her support for a long time prior to his decease.

Clause six of the will deals exclusively with reference to the homestead farm.

Viewed in the light of the above agreed facts and the surround-

ing circumstances, it seems to us that the "manifest object of the testator" is clear.

He was an old man. He had achieved success in life. He had retained or gained possession and ownership of the old homestead farm. He had enlarged, improved and adorned it, and made it an attractive summer home. He was interested in the welfare of the community as his bequests to the church show.

Upon this farm he and his sisters were born, and here they spent their early days together. In the evening of life, when childhood days were again upon him, his thoughts naturally turned to the old home, the scenes of his childhood, as a haven of rest and peace to himself, and, as he well knew, of like comfort and solace to his aged sister, to whom would come, from out the past, the same happy and hallowed associations that made the place a cherished spot to him.

His mind turned to his old homestead. The very first clause of his will provided that all his "household goods, furniture, pictures and personal property of every kind," should at his decease, be transferred to the homestead farm."

In clause four, he devised to the church a small piece of land and "eleven horse-sheds" before erected by him, "in trust to be used by my sisters, Mrs. Joseph Dunnell and Mrs. Eliza W. Steele, and my other relations named in my will as entitled to the occupancy in succession of my homestead farm."

At the decease of the testator we find this home, beautified and adorned by the treasures of his own household, capacious and ready for occupancy, and just outside the doors, his dependent sister, destitute and helpless, who had not where to lay her head.

Under these conditions he gave this farm to his other sister for life, with the proviso for Eliza, and then, in succession, to several relations, as stated in the items of the will above cited.

Can it be that he intended, or could intend, that this old lady should either be dependent upon Mrs. Dunnell's private property for a home or be sent about and boarded out, as any of the successive life tenants might will?

It was not money that this old lady needed. And we cannot think that Mr. Emery, who had, for fourteen years, kindly and

cheerfully cared for his sister, intended she should have such a home as the plaintiff in his bill suggests. Would it be a "comfortable home"?

We think not. The words "comfortable home," we believe, meant something more to Mark P. Emery than a shifting abode, with strange faces and strange surroundings.

The very circumstances of this case emphatically declare that Mr. Emery should have provided a home for this old lady, on the ancestral estate, amid the scenes of his and her childhood.

And we think he did do it.

The first item of clause six is the only one which alludes to the support of Mrs. Steele, but this item, we think, in clear terms, defines her rights.

All of this item between the word "farm" in the third line and the word "subject" in the thirteenth line, are clauses and phrases qualifying the nature, extent and terms of the devise, but without any reference whatever to the meaning or construction of the preceding or following clauses. If we omit these intervening clauses the item will then read: I give, devise and bequeath to my sister Harriet F. B. Dunnell, and to the survivor of them, my homestead farm, subject, however, to the obligation to furnish a comfortable home and maintenance for my sister, Eliza W. Steele, during her natural life. What was *subject?* Harriet F. B. Dunnell or the farm?

By the natural, grammatical and ordinary construction of the sentence, "subject," modifies the word "farm".

The meaning of the sentence is also in exact accord with the construction. It is without ambiguity or doubt. It makes the farm "subject" (liable) to furnish a comfortable home for his sister.

The language clearly and explicitly makes the homestead, itself, subject, not to the support, which might leave the place of support open to explanation, but to the *obligation* to furnish a home as well as support.

The sentence uses apt and strong language to secure just what, from all the circumstances in the case, one would expect the testator to do. On the other hand, if the contention of the plaintiff was true, and Mrs. Dunnell had not accepted the devise, this aged sister,

who had been for years, and was at the time the will was made, a source of care and solicitude to the testator, would have derived no benefit whatever from the provisions of clause six, would have been left without any home, and this farm would have passed into the hands of the successive life tenants entirely unincumbered. But Mrs. Dunnell did accept, and the plaintiff's contention now is, that the obligation to furnish a home and support was a personal one, exempting the homestead farm at her decease, and attaching to her own private estate, if she left any.

It would require very strong language in a will, made under the circumstances surrounding this one, to warrant a construction so apparently contrary to the manifest purpose and intention of the testator.

Again, clause four unequivocally sustains the above construction. It gives in trust the horse-sheds at the church "to be used by my sisters, and my other relations named in my will as entitled to the occupancy in succession of my homestead farm."

The testator mentions both sisters by name, as entitled to the occupancy of the farm. But if the contention of the plaintiff is true Eliza might never have occupied it, as her occupancy would have depended upon the will of the life tenants.

This clause clearly shows that he intended for her to occupy the farm, not as a matter of charity, but as a matter of right.

The legacy to Mrs. Steele, being a charge upon the property, follows the property into the hands of every life tenant who accepts the devise of the homestead.

We have no hesitancy in saying that Eliza W. Steele is entitled to "a comfortable home and maintenance" on the homestead farm of the testator as long as she lives, and that William F. Emery, having accepted the property, is bound to furnish it, while he retains possession of the farm.

We do not feel called upon to interpret the meaning of the phrase "comfortable home and maintenance." Mrs. Steele has made no complaint. The words are so self-explanatory, and the duty imposed by them so plain, that, upon all probability no question will ever arise upon this branch of the case.

William F. Emery, the plaintiff, who, we presume, was acquainted with all the circumstances and surroundings of this case, is undoubtedly better able, from his own personal knowledge, than the court can be from cold testimony, to know what kind of a home and maintenance his uncle intended for his sister to have.

Nor have we sufficient data upon which to base a conclusion with respect to the support furnished Mrs. Steele, in the interim, between the death of the testator and the acceptance of the devise by Mrs. Dunnell.

Bill sustained. Decree in accordance with this opinion.

BURNHAM C. TRUWORTHY *vs.* CYRUS W. FRENCH, JR.

Penobscot. Opinion December 22, 1902.

Assumpsit. New Trial. Receipt. Evidence. Parol Testimony.

The finding of a jury on an issue purely of fact which has been fairly presented, and clearly explained to them by the presiding justice in his charge, will not be set aside.

It is no violation of the rule excluding parol testimony to vary, modify or contradict a writing to admit evidence to show that a receipt was given without consideration and is a duplicate of a former receipt.

Motion and exceptions by defendant. Overruled.

Assumpsit on the account annexed for various items of hardware used by defendant in the construction of two buildings; for plumber's work in one of said buildings done under contract; and on an order for $36.05 payable to plaintiff, drawn by one A. S. Wing upon, and accepted by the defendant.

The case is stated in the opinion.

J. M. Sanborn, for plaintiff.

W. S. Townsend, for defendant.

Counsel contended that a receipt is evidence of the most satisfactory kind, and to do away with its force the testimony should be clear

and convincing. *Harris* v. *Hay*, 111 Pa. St. 562; *Gleason* v. *Sawyer*, 22 N. H. 85; *Gibbon* v. *Potter*, 30 N. J. Eq. 204; *Danziger* v. *Hoyt*, 120 N. Y. 190.

On the question of burden of proof counsel cited: *Guyette* v. *Bolton*, 46 Vt. 228; *Moore* v. *Korty*, 11 Ind. 341; *Borden* v. *Hope*, 21 La. An. 581; *Neal* v. *Handley*, 116 Ill. 418, 56 Am. Rep. 784.

Counsel also cited: Greenl. on Ev. Vol. 1, § 279; *Goss* v. *Ellison*, 136 Mass. 503; *Fay* v. *Gray*, 124 Mass. 500; *Langdon* v. *Langdon*, 4 Gray, 186; *Leddy* v. *Barney*, 139 Mass. 394; *Stone* v. *Vance*, 6 Ohio, 246; *Carperter* v. *Jamison*, 75 Mo. 285; *Stapleton* v. *King*, 33 Iowa, 28, 11 Am. Rep. 109; *Henry* v. *Henry*, 11 Ind. 236, 71 Am. Dec. 354; *McKernan* v. *Mayhew*, 21 Ind. 291; *Krutz* v. *Craig*, 53 Ind. 561; *Alcom* v. *Morgan*, 77 Ind. 184; *Morris* v. *St. Paul & Chicago Railroad Co.*, 21 Minn. 91; Greenl. on Ev. Vol. 1, § 305; Taylor on Ev. Vol. 2, § 1037.

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

SPEAR, J. This is an action of assumpsit to recover a balance due on account and comes up on motion and exceptions.

The whole controversy of fact is over the two following exhibits.

Deft. 8. (Wing Order)

"Newport, Maine, Oct. 18, 1900.

C. W. French, Jr., please to pay to the order of B. C. Truworthy the sum of $36.05 thirty-six .05 dollars, the amount due him for stock issued on the Chas. Emerson job printing.

S. A. Wing."

"Paid in to $50 recd.
B. C. Truworthy."

Deft. Exhibit 9.

"Oct. 29, 1900.

Received of C. W. French, Jr., fifty dollars on acct.

B. C. Truworthy."

The defendant claims that when he paid the order of $36.05, he added enough to it to make $50, and that the entry upon the order "$50 recd." is correct and in accordance with the fact. He further claims that defendant's exhibit 9, a receipt for $50, dated Oct. 29, 1900, is also in accordance with the fact, and that he, on that day actually paid $50. The plaintiff, on the other hand, claims that the the receipt for $50, dated Oct. 29, 1900, was for the same $50 entered upon the order, defendant's exhibit 8, and that he received only $50 upon both receipts. This issue was carefully presented to the jury and carefully and clearly explained to them by the presiding justice in his charge, and the jury found for the plaintiff. The question at issue was purely a matter of fact for the jury. While honest and intelligent men might differ as to the result, we do not think the evidence shows that the verdict was so clearly wrong as to warrant the court in setting it aside. It is admitted by both parties that when the defendant paid the order of $36.05 he paid $13.95 additional, which made the whole payment, at that time, the sum of $50.

The plaintiff offered testimony, which was admitted, to show that the entry upon the order "$50 recd.," and the receipt of Oct. 29, 1900, for $50 covered one and the same payment.

The defendant seasonably objected to the offer of this testimony and excepted to its admission.

The testimony was clearly admissible. It in no way varied, modified or contradicted the order, or the receipt thereon. It was not offered to explain the order or receipt. It could not be. The case would not admit it. There was no controversy over the payment of $50 on the order, or the correctness of the entry "$50 recd."

The only controversy, therefore, that the case would admit was, whether the defendant actually paid the plaintiff $50 on the receipt of Oct. 29, the payment of the other $50 on the order being admitted; or whether that receipt was a duplicate of the first one, and given without any consideration.

The evidence admitted simply tended to prove or disprove this proposition. Such evidence would be admitted to prove that even a deed, under seal and acknowledging the receipt of a consideration, was actually delivered without any consideration having been paid;

a fortiori, would it be admitted to show that a receipt was given without consideration.

The testimony offered did not vary or modify the terms of the last receipt. It simply tended to show that it was a duplicate and given without consideration.

Motion and exceptions overruled.

IRA W. DAVIS *vs.* CHARLES L. FERRIN.

Penobscot. Opinion December 22, 1902.

Attorney. Client. Disclosure Commissioner. Stat. 1887, c. 137.

There is no legal principle by which one person can deprive another of his property and convey a good title thereto without the owner's consent, or some act equivalent thereto, or by the right of eminent domain.

In an action of trover to recover the value of a watch, the title to which was claimed by both the plaintiff and the defendant, it appeared that the plaintiff was a disclosure commissioner, before whom a debtor disclosed a watch, which was appraised at five dollars by the commissioner and assigned in writing to the creditors, the petitioners, and delivered to their attorney.

The commissioner's fees were $5.19, for the payment of which the petitioners had made no deposit with their attorney. The attorney, on request of the commissioner for his fees, sold to him the watch in payment thereof. One of the petitioners subsequently obtained possession of the watch and refused, on demand, to deliver it to the plaintiff. *Held;* that the watch, by the assignment and delivery to the attorney, became the absolute property of the petitioners, and that the attorney had no right, by virtue of his agency as attorney, to sell the watch to the plaintiff in payment of his fees.

Exceptions by defendant. Sustained.

Trover for a watch.

The case appears in the opinion.

Ira W. Davis, for plaintiff.

W. R. Pattangall and D. B. Young, for defendant.

SITTING: WHITEHOUSE, STROUT, SAVAGE, POWERS, PEABODY, SPEAR, JJ.

SPEAR, J. This was an action of trover brought to recover the value of a watch, the title of which was claimed by both plaintiff and defendant. This defendant and his copartner, Luther Ferrin, were on July 14, 1900, judgment creditors of one Harnden; Harnden was cited to disclose before the plaintiff, a disclosure commissioner, and disclosed, together with other property, the watch in question, which was appraised at five dollars, and set off to the creditors. The debtor then executed a bill of sale of the property disclosed, conveying the title in the same to the creditors, and delivered the property, including the watch, to the creditor's attorney. Neither of the creditors was present; but they were represented by D. B. Young, an attorney at law.

After the disclosure was concluded the commissioner requested of the attorney the payment of his fees, which amounted to five dollars and nineteen cents. The attorney replied that no deposit had been made with him by the creditors for the payment of the fees; whereupon, in their absence and without their consent, he sold and delivered the watch to the commissioner in payment thereof. The only question here involved is the title to the watch.

Ferrin later gained possession of the watch and refused, on demand, to re-deliver it to the plaintiff, and he brought this action to recover its value.

The court ruled that, upon the above statement of facts, the plaintiff received a good title to the watch, through the sale and delivery by the creditor's attorney, and was entitled to recover its value, to which the defendant excepted. We think the exception should be sustained.

The watch, by the bill of sale of the debtor and delivery to the creditors, through their attorney, had become the vested property of the creditors. Their title to it was as perfect, when it was delivered into the hands of their attorney, under the circumstances in this case, as it would have been, if one of the creditors had taken the watch from his own pocket and delivered it to the attorney as a loan or for

safe keeping. Could they be deprived of it against their will and without due process of law?

It is a fundamental principle that no person shall be deprived of his life, liberty, property, or privileges, but by a judgment of his peers or by the law of the land.

This clause, or one of similar import, has come down to us from Magna Charta, and is found in the Federal Constitution and that of every state in the Union. By our own decisions, life, liberty and property are classed in the same category. "It will be noticed that the same protection is afforded to property as to life or liberty." *Dunn* v. *Burleigh*, 62 Maine, 36.

This being true, we know of no legal principle by which one person can deprive another of his property and convey a good title thereto, without the owner's consent, or some act equivalent thereto, or by the exercise of the right of eminent domain.

The plaintiff, in his brief, does not claim that there is any statute or decision, directly authorizing the creditor's attorney to sell the watch to him without their consent, but that such authority may be implied from the language of section 9 of the public laws of 1887, c. 137, and amendments thereto:—

"When from such disclosure, it appears that the debtor possesses, or has under his control, any bank bills, notes, accounts, bonds or other contracts of property, not exempted by statute from attachment, which cannot be come at to be attached, and the petitioner and debtor cannot agree to apply the same towards the debt, the magistrate hearing the disclosure shall appraise and set off enough of such property to satisfy the debt, costs and charges; and the petitioner or his attorney, if present, may select the property to be appraised."

The plaintiff claims that the phrase "to satisfy the debt, costs and charges," includes the costs and charges of the disclosure proceedings, and that there is, in this phrase, implied authority on the part of the attorney to sell to the commissioner sufficient of the property to pay his "costs and charges".

Undoubtedly the debtor's property, if sufficient is disclosed, must pay all the legitimate costs and charges of disclosure, but such costs

and charges do not belong to the commissioner nor the petitioner's attorney. They belong to the petitioner, himself, as much as any part of the debt, and consequently any property disclosed, representing such costs and charges, would be the property of the petitioner.

There is, therefore no authority implied from the statute authorizing the sale of the watch by the attorney, to pay the costs and charges, over which, neither the commissioner nor the attorney had any control, express or implied.

There is, however, express provision by statute for the payment of the disclosure fees and the disposal of the "costs and charges". Section 23, of c. 137, supra, which provides for the fees in disclosure proceedings, declares that "the above fee shall be paid by the petitioner, and in case the oath named in section 8 is administered, shall be added to the costs on the judgment and execution and taxed in detail thereon by the magistrate. In case said oath is not administered to the debtor, the petitioner shall recover his cost and said fees, as in actions before a trial justice, and the magistrate shall issue a separate execution therefor." In either case the costs and charges become the absolute property of the creditor.

Hence there seems to be no authority whatever, by statute or the common law, either express or implied, whereby the attorney could sell, and the commissioner receive, a good title to the watch.

Nor can we assent to the plaintiff's proposition that the petitioner's attorney, by virtue of his agency as attorney, had any authority to sell the watch in question without the owner's consent. We can find no case conferring such authority.

On the other hand, we find such authority expressly denied. "Ordinarily, there is no implied power vested in an attorney to bind his client by contract, and a general retainer does not authorize an attorney to bid and purchase for his client, or to enter into an agreement regarding his client's property. 4 Cyc. of Law and Procedure, 943 B. "Without express instructions an attorney is not authorized to dispose of his client's money in any other way than by turning it over to the client. The attorney has no greater power to deal with the property of his client other than money, and it has been held that he cannot sell or assign the claim of his client. It has also been held

that he cannot sell or assign a note put into his hands for collection." 4 Cyc. of Law and Procedure, 944, 2 C., and cases cited.

It is well settled that an attorney has a lien upon a judgment for his costs and disbursements, taxed and included in the execution, which he can pursue to property disclosed or to real estate sold upon levy.

But the principle upon which he can thus proceed is based upon the ground that he is the equitable owner of the judgment to the extent of his costs and disbursements.

The attorney's lien resembles an assignment of a chose in action. He therefore would have a right to the property disclosed, as the owner of the judgment, to the extent of the lien. *Newbert* v. *Cunningham*, 50 Maine, 231, 79 Am. Dec. 612.

But in the case at bar no facts appear to show that the attorney who acted at the disclosure was even the attorney who procured the judgment. If it should be so assumed, there is no suggestion that he was not paid for his costs and disbursements.

We cannot, therefore, take into consideration at all the attorney's right or authority over the property disclosed, as a lien claimant for his costs and disbursements, in obtaining the judgment and execution, upon which the disclosure was proceeding. We find no precedent which sustains the contention of the plaintiff in this case.

Exceptions sustained.

ARTHUR CHAPIN, Mayor of the City of Bangor, Petitioner,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion December 23, 1902.

Railroad Crossing. Highway. Street. Prescription. Navigable Rivers. Railroad Commissioners. R. S., c. 18, § 29; c. 51, §§ 31, 33; Stat. 1883, c. 167, § 1; Spec. Laws, 1868, c. 459; Mass. R. S., c. 111, § 148.

A prescriptive right to cross a railroad track by virtue of an adverse public use cannot be acquired under the existing laws of this state.

The purpose of all the legislation in this state since 1883, relating to the regulation of railroad crossings, has been to place the entire subject under the jurisdiction and control of the railroad commissioners.

On the hearing of a petition under R. S., c. 51, § 31, asking for the establishing of a safe and convenient railroad crossing, evidence concerning a question not presented by the petition is irrelevant and inadmissible.

It is a familiar principle of law that a public way cannot be laid out across a navigable river without the consent of the legislature, for the reason that it would destroy an existing highway, the river itself, in which all citizens have an interest.

It is well settled in this state that in case of the acceptance of a dedicated way only nominal damages are allowable to abutting owners.

The act of a city in laying out an extension of a street under legislative authority therefor, cannot be deemed the acceptance of a way previously dedicated, where the alleged way by dedication is not identical with that actually laid out and where substantial damages are awarded to the owners of the abutting land and other circumstances show a new and original street was to be established.

On report. Petition denied.

Petition under R. S., c. 51, § 31, asking that the Maine Central Railroad Company be ordered to make a safe and convenient crossing for public travel over its tracks at the foot of Exchange Street in the City of Bangor. Upon the filing of the petition an order was made directing the respondent railroad company to appear and show cause against the petition. On the hearing in this court below after the

evidence was taken out, the case was reported for determination on so much of the evidence as is legally admissible.

The case appears in the opinion.

T. D. Bailey, City Solicitor, for petitioner.

It is the duty of railroad companies to maintain crossings within the location of public ways. *Portland & Rochester Railroad Co.* v. *Deering,* 78 Maine, 61, 57 Am. Rep. 784.

Counsel argued, in the first place, that, leaving out the special act of the Legislature altogether, the Railroad Company are bound to keep this crossing in repair and well guarded. This street was dedicated in 1801 to Penobscot River. It seems that from the report of this case that the dedicated streets on the plan were accepted by the town soon after the dedication. Here was a dedicated way which we show by our evidence was used as a landing place or slip as early as 1847, and probably was used as early as the dedication. Here was a highway by dedication and immemorial use, and the Railroad Company were as much bound to keep the railroad crossing safe and convenient for public travel as if there had been a location by the County Commissioners or the municipal officers. *Webb* v. *Portland & Kennebec Railroad Co.,* 57 Maine, 117; *Kelley* v. *Southern Minnesota Railroad Co.,* 28 Minn. 98.

The public had always used the "City slip," as Mr. Small calls it, and they had a right to use it. So as a matter of law, the railroad company were bound to keep the crossing in repair and safe and convenient, whether the city laid out and established a street or not.

There is very grave doubt whether the proviso in this special act is constitutional. At the time the act was passed by the legislature there had existed for over twenty years a highway by dedication, accepted by the town and used by the public, to the Penobscot River at all stages of the tide. The abutting owners of land on this highway had a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway so far as it was necessary for affording them certain incidental easements and servitudes, and a convenient outlet to other streets; and this right neither the legislature nor the municipality can deprive them of without consent

or a just compensation in money. *Gargan* v. *Louisville, etc., Railway Co.*, 89 Ky. 212, 6 L. R. A. 340, or 12 S. W. Rep. 259; *Fulton* v. *Short Route Railway Transfer Co.*, 85 Ky. 640, 7 Am. St. Rep. 619.

An abutting owner's easement in the street in front of its full width for purposes of access and light and air is property which cannot be taken from him for public use without compensation. *Reining* v. *New York L. & W. R. Co.*, 128 N. Y. 157, 14 L. R. A. 133; *Kane* v. *New York Elev. R. Co.*, 125 N. Y. 164, 11 L. R. A. 640; *Galway* v. *Metropolitan Elev. Railroad Co.*, 128 N. Y. 132, 13 L. R. A. 788; *Lamm* v. *Chicago St. P. M. & O. R. Railroad Co.*, 45 Minn. 71, 10 L. R. A. 268; *Adams* v. *Chicago B. & M. Railroad Co.*, 39 Minn. 86, 1 L. R. A. 493; *Providence Steam Engine Co.* v. *Providence & Stonington Steamship Co.*, 12 R. I. 348, 34 Am. Rep. 652.

In this case is a special act of the legislature, which says in effect that there shall be no public way over a railroad without their consent when there had been one before the location of the railroad for over half a century. The first use of a street is for the ordinary travel over it; the right of a railroad company to operate its trains across it is subordinate to the use of the general public. *Houston & T. C. Railway Co.* v. *Carson*, 66 Tex. 345, or 1 S. W. Rep. 107; *Dubach* v. *Hannibal & St. J. Railroad Co.*, 89 Mo. 483, 1 S. W. Rep. 86; *Hopkins* v. *Baltimore, etc., Railroad Co.*, 6 Mackey, (D. C.) 311.

The interpretation put upon the statute by the defendant company makes it take away the rights of the abutting owners below the railroad track and all the other owners on the street.

Again, if the foregoing contentions cannot stand, the city contends that the condition in the special act of the legislature is one which the railroad company cannot take advantage of, for in the face of this condition precedent the city went ahead and laid out and established a way over the tracks of the European and North American Railway Company, they making no objection as shown by the report of the city engineers, and in 1872 the railroad company recognized the laying out of the street by their petition to the city to fill in and wharf up a part of the street so laid out.

If, as matter of law, this was not a waiving altogether of the con-

dition, it, at least, converted the condition precedent into a condition subsequent. *Thompson* v. *Bright*, 1 Cush. 420; *Hooper* v. *Cummings*, 45 Maine, 359; *Willard* v. *Henry*, 2 N. H. 120.

It is well established law that a person or corporation can waive a condition or a statute provision in their favor or even a constitutional right. *Sheridan* v. *Salem*, 148 Mass. 196; *Sharon Iron Co.* v. *Erie*, 41 Pa. St. 351; *Ludlow* v. *New York & Harlem R. R. Co.*, 12 Barb. 445.

That the public or a private individual can gain a prescriptive right to cross a railroad track is well settled. *Fitchburg Railroad Co.* v. *Page*, 131 Mass. 391; *Weld* v. *Brooks*, 152 Mass. 297; *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57; *Sprow* v. *Boston & Albany Railroad*, 163 Mass. 330; *Bagley* v. *New York, New Haven & Hartford Railroad Co.*, 165 Mass. 160; *Easley* v. *Missouri Pacific Railroad Co.*, 113 Mo. 236.

Though the use of a road was begun by permission, if the use continues under a claim of right for a term of years equal to the period of the statute of limitations, a prescriptive right to the road is acquired. *McAllister* v. *Pickup*, (Iowa,) 50 N. W. Rep. 556.

The heirs of Samuel Veazie and their grantees are estopped to deny the validity of the laying out of the street. *Fernald* v. *Palmer*, 83 Maine, 244; *Sherman* v. *McKeen*, 38 N. Y. 266; *Hunt* v. *Card*, 94 Maine, 386, 389.

Official acts, done in pursuance of authority and duty, are presumed to be legal. After a lapse of thirty years such acts may be conclusively presumed to be legal. *Treat* v. *Orono*, 26 Maine, 217; *Prentiss* v. *Davis*, 83 Maine, 364, 368; *Bassett* v. *Porter*, 4 Cush. 487.

Counsel also cited: Stat. 1874, c. 214; *Boston & Albany Railroad Co.* v. *Boston*, 140 Mass. 87; *Dwelly* v. *Dwelly*, 46 Maine, 377; *Wing* v. *Hussey*, 71 Maine, 185; *Salem Turnpike & Chelsea Bridge Corporation* v. *Solomon Hayes*, 5 Cush. 458; Mass. R. S., 1902, c. 111, §§ 130, 148; *Fisher* v. *New York & New England Railroad Co.*, 135 Mass. 107.

C. F. Woodard, for respondent.

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

WHITEHOUSE, J. The question presented for the determination of the court in this case arises from a written application made by the mayor, as one of the municipal officers of Bangor, to one of the justices of this court, asking that the defendant railroad company be compelled to make and maintain a safe and convenient grade crossing at the foot of Exchange Street in the City of Bangor. The petition is based on the provisions of § 31 of c. 51 of the Revised Statutes, and comes to the law court on a report of the evidence.

Section one of chap. 459, of the Private and Special Acts of 1868, is as follows:

"The City of Bangor is hereby authorized and empowered to lay out, establish, make and maintain a street or public way from the present southerly terminus of Exchange Street in said city to low water mark in Penobscot River not exceeding sixty-eight feet in width; *provided,* said street shall not be laid out over and across the track of the European and North American Railway Company without the consent of said company."

Section second of the act provides that the damages sustained by any person by reason of the laying out of this street shall be estimated and the benefits apportioned and assessed in conformity with the city charter and chap. 18 of the Revised Statutes.

The written application in this case represents that in accordance with an order of the city council of Bangor passed May 4, 1868, the board of street engineers of the city, on the fifth day of October, 1868, laid out an extension of Exchange Street from its easterly terminus, sixty feet southerly from Washington Street, across the location of the European and North American Railway Company, 68 feet in width for a distance of 228 feet and 4 inches, and 50 feet in width for a further distance of 193 feet and 11 inches, to low water mark. It is further represented that on the tenth day of October, of the same year, the street engineers made a report to the city council of their proceedings in laying out this extension, and

that on the 19th day of October, their report was duly accepted by the council and the street thereby established.

It is also alleged that this extension of Exchange Street crossed at grade the railroad then operated by the European and North American Railway, and now controlled and operated by the defendant company, and that the defendant is now bound by law to maintain a safe and convenient crossing for public travel over its tracks at Exchange Street.

Although it is thus explicity represented in this petition that the southerly terminus of Exchange Street prior to October, 1868, was sixty feet southerly from Washington Street, and that the alleged extension of Exchange Street across the railroad track was laid out in October, 1868, the petitioner introduced in evidence a copy of a plan said to have been made by Charles Bulfinch in 1801, for the owners of the land on which a dedicated street then known as Poplar Street, but afterwards changed to Exchange Street, was represented as extending to Penobscot River at low water mark; and he now contends in argument that the street in question is shown by undisputed evidence in the case to have been accepted by the town soon after its dedication and used as a landing place or slip as early as 1847. Thereupon he further contends that the legislative act of 1868, authorizing the extension above described, did not abridge any right which the public had acquired in this street by "use and dedication" and that the defendant company would have been bound to maintain a safe and convenient crossing at the point in question if the extension had not been formally laid out by virtue of the act of 1868. But the case is "reported to the law court for determination upon so much of the evidence as is legally admissible." The petition before the court definitely states the time when the way alleged to have been obstructed by the defendant company was laid out and established. It contains no intimation of the existence of any other way at the point in question except that laid out in 1868, and no allusion whatever to any rights claimed to have been acquired by dedication or prescription or any other means, except the action of the city council in laying out the extension in 1868, therein described by metes and bounds. It is on account of the failure of the defendant company to

make a safe and convenient crossing over the way thus alleged to have been established in 1868, that this petition was presented to a justice of this court. It gave the defendant company no information that evidence would be offered to prove the existence of any other street, or the establishment of this street at other time or in any other manner, than that specifically described. It is unnecessary to inquire whether or not the evidence upon which the plaintiff now relies is undisputed. The petition gave no notice that an issue would be raised respecting the existence of a way by dedication or prescription, and the evidence concerning a question not presented by the petition is irrelevant and inadmissible. Whether a general averment in such a petition of the legal existence of a public way would be sufficient to give the court jurisdiction, it is unnecessary to determine. In this case the language of the petition effectually gave notice to the defendant that the petitioner had elected to rest his case on the existence of the street alleged to have been established in 1868 as therein described, and under familiar rules of pleading and procedure in both law and equity, the evidence should be confined to the issue thus presented.

But assuming that a dedication of the street in question to low water mark in 1801, is shown by the plan and other evidence introduced by the petitioner, that fact alone is insufficient to prove the existence of a legal "highway or town way" over which a crossing must be maintained under § 31, of chap. 51. A way by dedication is not constituted by the act of dedication alone; it must also be proved that there was an acceptance of the way by the public or by the town in behalf of the public. *State* v. *Wilson*, 42 Maine, 9; *Bangor House* v. *Brown*, 33 Maine, 309. And a careful examination of the report in this case fails to disclose sufficient evidence to warrant the conclusion that the way in question was ever accepted by the public or by the town in behalf of the public. For obvious reasons the act of the city in laying out the extension under the act of 1868, cannot be deemed the acceptance of a way previously dedicated. In the first place, the way alleged to have existed by dedication is not identical with that represented in the petition to have been laid out in 1868. The former was only fifty feet in width, while the latter for a distance of 228 feet, comprising that portion traversed by the rail-

road was sixty-eight feet wide. Again, it is settled law in this State that in case of the acceptance of a dedicated way only nominal damages are allowable to abutting owners; but when the extension in this case was laid out by the city council in 1868, the substantial sum of $200 was awarded and paid to the owners of the land abutting on the way on the northerly line of the railroad. The provision of the legislative act requiring the estimation of damages, the proceedings of the city council in conformity with the act and the language of the report of the street engineers expressly recognizing the former terminus of Exchange Street, tend conclusively to show that by the common understanding of all persons and corporations, to be affected by it, a new and original street was then to be established. The locus in question had not acquired a legal existence as a public way by user; for it clearly appears from the testimony of the city engineer introduced by the petitioner, and other undisputed evidence in the case, that the portion of Exchange Street extended in 1868, was all south of the original shore line of the river and hence below high water mark. In such a case the use of the shore below high water mark as a way for public travel upon the waters of the river is but the exercise of a right, and "no one is presumed to have granted an easement in the right of passage to the public over his land when that right is in the public to the fullest extent." *State* v. *Wilson*, 42 Maine, 9; *Stetson* v. *Bangor*, 60 Maine, 321.

It is a familiar principle of law that a public way cannot be laid out across a navigable river without consent of the legislature, for the reason that it would destroy an existing highway, the river itself, in which all the citizens have an interest. *Kean* v. *Stetson*, 5 Pick. 492: *State* v. *Wilson*, 42 Maine, 9. It was exclusively within the province of the legislature to determine whether public convenience and necessity required the extension of Exchange Street to low water mark, and if so, to specify the terms and conditions upon which it should be so extended. If it could not be extended across the defendant's railroad to low water mark without permission from the legislature, it was competent for the legislature to grant a qualified permission that it might be so extended with the consent of the railroad company. It has been seen that the act of 1868 provided in explicit

terms that the street should not be laid out across the railroad track without the consent of the railroad company.

It is not in controversy that thereupon the city council proceeded to lay out the extension across the railroad track to low water mark, and to estimate the damages sustained by the abutting land owners. The question now presented for the determination of the court is whether the City of Bangor, in exercising the authority thus conferred by the act of the legislature, complied with the important condition therein imposed by obtaining the consent of the European and North American Railway Company to extend the street across its track.

It was incumbent on the city to obtain the consent of the railroad corporation, and for the purpose of giving its consent the corporation could only be legally represented by its stockholders or board of directors. But there is no evidence in the case that such consent was ever expressly given either orally or in writing, by action of the stockholders, by the board of directors, or any individual member of the board, or by the president of the company. It is conceded that no record can be found on the books of the railroad company either explicitly showing such consent or in any way indicating that the question had ever been presented for the consideration of the board of directors. There is no evidence of any conference whatever between the representatives of the city and any official of the railroad in relation to the subject.

On the other hand, there is no direct evidence in the case that the railway company ever entered any protest against the action of the city in laying out the street across its tracks, or made any positive objection, prior to 1900, to the travel over the crossing by such portion of the public as had occasion to drive to the southerly side of the railroad track. It is not in controversy that after the extension was laid out, planking was maintained at the crossing to render it suitable for teams to drive across.

The city contends that this was done to accommodate the public as well as those who used it for purposes connected with the business of the railroad, and that trains were sometimes moved and broken apart to prevent the interruption of public travel. The petitioner further

argues that the railroad company recognized the new location as a valid and binding one in 1872, by presenting a petition to the city government asking for permission to construct a log wharf for the purpose of filling up a portion of the "city slip or dock". It is accordingly contended that all these facts and circumstances aided by the probability that the city council would not lay out a street in defiance of the provisions of the act, are sufficient to "prove an implied consent" on the part of the railroad company.

On the other hand, it is earnestly contended in behalf of the defendant company that these circumstances, when critically examined in the light of the defendant's evidence, have no necessary tendency to prove actual consent on the part of the company and are wholly insufficient to warrant the conclusion that the company ever intentionally acquiesced in, or ratified the action of the city.

There is no direct evidence in the case that the railroad company ever had any actual knowledge of the laying out of this street across its tracks. The fact that none of its officials appeared at any hearing before the city council on the report of the street engineers, tends to show that it had no such knowledge. The change made by the city in the street after the action of the city council, if any material change was made, was not so marked as to attract the special attention of the company. It was not calculated to inform the company that a legal location of a public way was claimed by the city. There is evidence tending to show that after the extension was surveyed by the city engineer, the lower part of it continued to be used as a dumping place for the deposit of refuse material from the streets, but there is no testimony from the street commissioners or other city officials showing that any systematic work was ever done in the making of a street below the railroad tracks. No proof is presented that the city ever expended a single dollar in the actual construction of the street surveyed. Mr. Cram, who was station agent from 1870 to 1875, and subsequently superintendent of the E. & N. A. Railway was continuously at this station from 1870 to 1885. He testifies that he never heard that the city claimed to have extended Exchange Street across the railroad tracks, that he never knew that a street was actually constructed below the tracks and never saw any indica-

tion of the building of a street there. It is not in controversy that the whole property on both sides of this alleged street, and all the wharves there, were the property of the defendant company and under its control. In the conduct of its business it set cars on the tracks on the river side of the crossing for the purpose of loading and unloading, and the planked crossings were maintained to meet the requirements of the company in its own business. Such planking was maintained at other points where there was no pretense of a street crossing. Mr. Cram also states that there was substantially no travel across these tracks except in connection with railroad business, including that on the wharves under control of the company. Mr. Cram's testimony is corroborated by that of Mr. Weeks, who had charge of the company's property. He states that not one-half of one per cent of all the travel over the railroad tracks was for any other purpose than that connected with the business of the railroad.

It appears that in 1872, the E. & N. A. Railway Company presented a petition to the city government for leave to fill up "a portion of the dock at the river end of Exchange Street," with a log wharf, expressing its willingness "to pay therefor such sum as would protect the rights of the city in said dock." It appears from other evidence that this dock was uniformly mentioned as the "city slip" or "city dock" and there is no intimation in this petition that the railroad company understood the dock to be a part of Exchange Street. A contrary inference is fairly to be drawn from the result of this petition. The city council proposed to grant the permission, provided the wharf built by the company should be considered and maintained as a part of Exchange Street; but there is no proof in the case that the company ever accepted this proposition of the city council or acquiesced in the conditions thereby imposed. On the contrary, the inference is irresistible that the company refused to accede to the proposition, for the log wharf was not built and that part of the "city dock" has not been filled.

Furthermore, § 33, of chap. 51, R. S., declares that a board with the words "Railroad Crossing" painted upon it, shall be placed on a post or other structure on the side of a way where it is crossed by a railroad. But no such sign was ever maintained or erected at this

crossing, and the case fails to show that any complaint was ever made, by anybody, that the absence of it was an omission to observe the requirement of the law. This fact the defendant argues has a very strong tendency to show that the railroad company never understood that there was a public street crossing there, but only a crossing established by the railroad in the conduct of its own business.

The crossing of a railroad track by a highway at grade has always been deemed a place of danger. The crossing in question was over lands occupied for station purposes at one of the most important stations on the road. It was provided by § 1, of chap. 167 of the laws of 1883, (R. S., c. 18, § 29), that such a public crossing should not be established "unless after notice and hearing the railroad commissioners adjudge that public convenience and necessity require it." As there was no such provision in existence in 1868, the legislature, recognizing the perils of such a crossing, sought by the special act of 1868, to guard against the probable danger to public travel incident to the crossing in question. It possessed the exclusive authority to permit a location below high water mark, and the sole power, at that time, to impose such conditions as would tend to protect the public against the dangers involved in it. There should be clear and convincing evidence that these requirements of the legislature were strictly observed. It appears from the plan and other evidence in the case that five railroad tracks are now used at this crossing to afford the required train service of five different railroad systems. It is the principal terminal station for freight trains on all eastern business, and switching engines are almost continually running over this crossing in moving freight cars and making up freight trains. It was on account of this frequent passage of more numerous trains and engines at this station and the multiplied dangers connected with the use of the crossing, that in 1900, the defendant company removed the planking and abolished the crossing in connection with its own business. It is obviously impracticable to establish any other than a grade crossing at this station, and in view of the inconsiderable extent of public travel at this point apart from the business of the railroad, and the importance of the question in its relation to the safety of public travel by rail as well as by teams, it is the opinion of the

court that more conclusive circumstantial evidence should be presented to warrant the inference that the railroad company actually consented to the location of the street across its tracks. The entire history of the matter suggests rather the probability that the action of the city council was taken in the expectation of obtaining the consent of the railroad company, but that the parties disagreed upon the terms and conditions of crossing and no definite result was ever reached.

But the petitioner finally contends, that if it be assumed that the consent of the railroad company was never obtained and the action of the city council was unauthorized, the public, since 1868, have gained a right by prescription to pass over the tracks of the defendant company. The defendant insists that there is no evidence in the case to justify this conclusion as a matter of fact, and furthermore, denies that under the laws of this State, as they have existed since 1883, a public way crossing a railroad can be established by prescription.

Attention has already been called to the provision of chapter 167 of the laws of 1883. Section 2 of the same act further declares that when any way is laid out across a railroad, the railroad commissioners "shall determine the manner and conditions of crossing such railroad." And a review of all the legislation upon the subject of railroad crossings in this State from 1878, to the present time, clearly shows a progressive tendency of legislative opinion in harmony with the judgment of this court as expressed *In re Railroad Commissioners*, 83 Maine, 273, that "public safety requires the intersection of railroad tracks and roads to be under the control of the railroad commissioners." See, also, *In re Railroad Commissioners*, 87 Maine, 247, and *Goding* v. *B. & A. Railroad Co.*, 94 Maine, 542. It was further provided by chap. 282 of the laws of 1889, that a "way may be laid out across, over or under any railroad track," "except that before such way shall be constructed, the railroad commissioners shall determine whether the way shall be permitted to cross at grade or not, and the manner and condition of crossing." Indeed, it has been the avowed policy of the State to place the entire subject matter under the jurisdiction and control of the railroad commissioners. To hold that a prescriptive right to cross a railroad track can be acquired by

an adverse public use during the existence of these statutes, would be wholly incompatible with the manifest spirit and purpose of this legislation and contrary to the settled policy of the State. By § 148, of chap. 111, of the Revised Statutes of Massachusetts, the legislature of that State, ex majore cautela, declared in terms that no right of way by prescription can be gained over a railroad location or land used for railroad purposes. But this explicit declaration was not required to show that such was the necessary and legitimate effect of the legislation upon the same subject in this State. No action was ever taken by the railroad commissioners in regard to this crossing.

But it may be further remarked that the evidence reported, which has already been considered under the proposition of implied consent, is not sufficient to warrant the conclusion that after the legislative enactments above cited, a public way across the defendant's tracks was established by prescription. To prove this it was incumbent on the plaintiff not merely to show an adverse public use under a claim of right, continued for twenty years, but also that during that period the defendant acquiesced in such use. "And acquiescence implies that the defendant knew, or had reason to believe, that there was such an adverse use." *Sprow* v. *B. & A. Railroad,* 163 Mass. 341.

This does not satisfactorily appear from the evidence in the case.

It is, accordingly, the opinion of the court, that upon the case reported the defendant ought not to be required to maintain a public crossing at Exchange Street in Bangor.

Petition denied.

SOUTH GARDINER LUMBER COMPANY

vs.

FREDERICK T. BRADSTREET, and others.

Kennebec. Opinion December 26, 1902.

Contracts. Sales. Market Price. Damages. Non-Delivery.

In the absence of a definite agreement, the market price of goods to be delivered is the price prevailing at the time and place of delivery; but if there is no market price at the place of delivery, the value of the goods should be determined at the nearest place where they have a market price by the addition or deduction of the difference in the cost of delivery.

Notice from the seller that he will not deliver the goods is no breach until the time of delivery is past. Anticipated injury is not the ground of legal recovery.

The general rule of damages for the non-delivery of goods excludes the elements of profits and losses.

Where it appears that both parties understand that special circumstances existed, which would affect the subject matter of the contract, and reasonably contemplate the damages which would result from its breach, gains prevented thereby may be recovered as damages. But the damages must be such as may fairly be supposed to have been in the contemplation of the parties at the time when they made the contract.

Held; that the facts before the court do not bring this case within the foregoing rule for special damages, and none are allowed.

By a contract between the parties, the defendants agreed to sell to the plaintiff corporation and to deliver to it at the Hallowell boom 6,000,000 feet of logs in the season of 1899, at the "market price." The plaintiff agreed to pay and did pay $2.00 a thousand, or $12,000, March 15, 1899, in advance of delivery. It was agreed that the plaintiff should be entitled to a discount of two per cent on the balance, if paid in cash at delivery. The defendants delivered 1,043,490 feet of logs, and, unjustifiably refused to deliver the remainder. The date of this breach of the contract was August 29, 1899, the day on which the Hallowell boom was closed. In an action brought to recover damages for non-delivery of logs, to recover the balance of the $12,000 after payment for the logs delivered, and for special damages, *held;* that under the evidence, the contract price, which in the contract

was called the "market price," must be deemed to be the market price at the place of delivery in the "months of February and March," 1899. And as there were no sales of logs at Hallowell boom at that time so as to establish a market price, it is considered that, under the circumstances of this case, the market price of logs at Moosehead Lake dam, with the cost added of delivering them into the Hallowell boom, should be regarded as the contract price, being $10.90 a thousand. The value of the logs at Hallowell boom at the time when they should have been delivered was $11.50 a thousand. The difference between the contract price and the price at Hallowell boom at the time when the logs should have been delivered is the measure of damages for non-delivery. But to reduce both elements to the same cash basis, two per cent is deducted from the contract price less the $2.00 a thousand advanced, and also from the market price at time and place of delivery. Applying these principles, the damages, under the first count in plaintiff's writ, for non-delivery, amounted to $2716.17 to which interest is to be added from the date of the breach of contract.

The plaintiff advanced $12,000, March 15, 1899, as already stated. Of this sum $2087 was the advanced payment of $2.00 per thousand on the logs delivered. On the balance, interest is to be allowed from the date of payment until there was a delivery of logs. Against this balance with interest is to be credited the amount remaining due for logs delivered, less a deduction of two per cent for cash. The remainder is $965.18. And this sum, with interest from the date of the breach, is the amount the plaintiff is entitled to recover under the third count.

On report. Judgment for plaintiff.

Special assumpsit for the failure to deliver logs sold according to agreement. The writ contained three counts. The plea was the general issue. The case is stated in the opinion.

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

Counsel cited among other cases: *Parsons* v. *Sutton*, 66 N. Y. 92; *Leigh* v. *Paterson*, 8 Taunt. 540; *Ripley* v. *McClure*, 4 Ex. 359; Benjamin on Sales, Vol. 2, 1118; *Stanford* v. *Magill*, (N. D.) 38 L. R. A. 760; *Hochster* v. *De La Tour*, 2 El. & Bl. 678; *Johnston* v. *Milling*, 16 Q. B. D. 460; *Brown* v. *Muller*, L. R. 7 Ex. 319; *Paul* v. *Meservey*, 58 Maine, 419, 421; *Lovelock* v. *Franklyn*, 8 Q. B. 371; *Curtis* v. *Blair*, 26 Miss. 309, 59 Am. Dec. 257; *Wells* v. *Smith*, 31 Am. Dec. 274; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Equitable Gas Light Co.* v. *Baltimore Coal Tar Co.*, 65 Md. 73; Sedgwick on Damages, 742; Sutherland on Damages, Vol. 1, 113; *Smeed* v. *Foord*, 1 E. & E. 602, S. C. 102, E. C. L. 600; *Fletcher* v. *Tayleur*, 17 C. B. 21, S. C. 84 E. C. L. 20; Sedgwick on Damages, 8th Ed. Vol. 1,

558; *Borries* v. *Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 443; *Halstead Lumber Co.* v. *Sutton*, 46 Kan. 192; *Culin* v. *Woodbury Glass Works*, 108 Pa. 220; *Vickery* v. *McCormick*, 117 Ind. 594; *Ramsey* v. *Tully*, 12 Ill. App. 463; *Loescher* v. *Deisterburg*, 26 Ill. App. 520; *Prettyman* v. *Railroad Co.*, 13 Ore. 341; *McKay* v. *Riley*, 65 Cal. 623; *Smith* v. *W. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Leonard* v. *The New York, Albany, and Buffalo Electro-Magnetic Tel. Co.*, 41 N. Y. 544, 566, 1 Am. Rep. 446; *Mississippi & R. R. Boom Co.* v. *Prince*, 34 Minn. 71; *Horne* v. *Midland Railway Company*, L. R. 3, C. P. 131, 42 L. J. C. P. 59, 28 L. T. 312, 21 W. R. 481; *France* v. *Gaudet*, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121, 19 W. R. 622; *Elbinger Actien-Gesellschaft* v. *Armstrong*, L. R. 9 Q. B. 473, 43 L. J. Q. B. 211; 30 L. T. 871, 23 W. R. 127; *Hinde* v. *Liddell*, L. R. 10 Q. B. 265, 44 L. J. Q. B. 105, 34 L. T. 449, 23 W. R. 650; *Grebert-Borgnis* v. *Nugent*, 15 Q. B. D. 85, 54 L. J. Q. B. 511; *Hammond* v. *Bussey*, 20 Q. B. D. 79, 57 L. J. Q. B. 58; *James* v. *Adams*, 8 W. Va. 568; *Wolcott* v. *Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Cockburn* v. *Ashland Lumber Co.* 54 Wis. 619; *McHose* v. *Fulmer*, 73 Penn. 365; *Bank* v. *Montgomery*, 2 Casey, 143; *Richardson* v. *Chynoweth*, 26 Wis. 656; *Plummer* v. *Penobscot Lumbering Association*, 67 Maine, 363; *Louisville, etc., R. Co.* v. *Sumner*, 106 Ind. 55, 55 Am. Rep. 719; *Chicago, etc., R. Co.* v. *Ward*, 16 Ill. 522.

O. D. Baker, for defendants.

Counsel cited among other cases: *Blood* v. *Drummond*, 67 Maine, 478, 479; *Washington Ice Co.* v. *Webster*, 68 Maine, 449; *Thompson* v. *Smiley*, 50 Maine, 71; *McKenney* v. *Haines*, 63 Maine, 74; *Marsh* v. *McPherson*, 105 U. S. 717; *Miller* v. *Mariner's Church*, 7 Maine, 51.

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

PEABODY, J. This is an action of assumpsit for breach of contract for the sale and delivery of mill logs. The original agreement, upon which the suit is based, is in writing and is as follows:

"This memorandum of agreement made this twenty-eighth day of February, A. D. 1895, by and between J. S. & F. T. Bradstreet, of Gardiner, Me., party of the first part, and the South Gardiner Lumber Company, of South Gardiner, Maine, party of the second part.

Witnesseth:—Said party of the first part hereby agrees to sell to said party of the second part, and said party of the second part agrees to buy of said party of the first part, at the market price during the four ensuing logging seasons, beginning with the season of 1895–6, from six to eight millions feet spruce mill logs each year; said party of the second part hereby agreeing to notify said party of the first part on or before September first of each year of the amount desired between the limits above specified.

Said party of the second part hereby further agrees to advance to said party of the first part, on or before the fifteenth of March of each year, beginning with March, 1896, toward the purchase price of said season's cut, the sum of two dollars ($2.00) per thousand feet on the estimated amount cut.

In case of the death of said F. T. Bradstreet, or the destruction of the mill owned by said party of the second part, or of other unavoidable accident, this agreement shall be void and of no effect.

Witness our hands the day the date first above mentioned.

J. S. & F. T. BRADSTREET,

SOUTH GARDINER LUMBER CO.

Charles Lawrence, President."

The negotiation was made in behalf of the plaintiff corporation by its president, Charles Lawrence, and in behalf of the defendant partnership by one of its members, Frederick T. Bradstreet.

It is conceded that, under this agreement, by the custom prevailing among lumber men on the Kennebec River, it would be understood that the logs were to be delivered over Moosehead Lake dam, at woods scale, and that the market price would be that ruling at the time and place of delivery.

This contract, however, was subsequently modified by a parol agreement, made by the same parties before any transactions under it com-

menced, by which the logs were to be delivered at re-scale in the Hallowell boom, and at market prices to be fixed in February and March of each year "when all the logs were being sold" or "in the early spring before the new logs came to market."

No controversy exists as to the place of delivery under the modified agreement; it was to be the Hallowell boom. But the parties are at issue upon the construction of the contract as to the time when the market value of the logs to be delivered in the year 1899 was to be determined.

The quantity to be furnished by the defendants during this season, in accordance with the notice of the plaintiff, was 6,000,000 feet; the quantity delivered was 1,043,490 feet, and the balance called for by the contract was 4,956,510 feet.

By the terms of the agreement, the plaintiff was to pay, in advance, on or before March 15th, in each year, two dollars a thousand on the quantity of logs designated by its previous notice; and at the request of the defendants the plaintiff, on the 15th day of March, 1899, paid on account of the logs to be delivered twelve thousand dollars. The claim for damages is set out in the plaintiff's writ in three counts:

1. The difference between the contract price of the logs and the market price at the place of delivery in the months of February and March.

2. Special damages for the loss of profits occasioned by breach of the contract.

3. Balance of $12,000, money advanced under the contract after payment for the logs delivered and interest.

The deliveries of logs made in the season of 1899 to the plaintiff by the defendants, at the Hallowell boom, were as follows:

June	19,	1899,	281,230	feet.
"	21,	"	231,860	"
"	23,	"	204,550	"
"	26,	"	290,810	"
August	30,	"	35,040	"
	Total,		1,043.490	feet.
	Undelivered logs,		4,956,510	feet.

The parties had no conference for the purpose of fixing the market price for this season, but shortly after the delivery of logs on the 26th of June, the defendants' attorney sought an interview with James W. Parker, then the president and manager of the plaintiff company, which resulted in a material disagreement. From the letter of the defendants' attorney of June 30, 1899, and the reply of the president of the plaintiff company of July 5, 1899, it appears that the defendants' claim was that the market price of the logs for this season of 1899 should be "the actual market price at the place and time of delivery, namely, the Hallowell boom," while that of the plaintiff was that it should be "the contract price under the rules stated by you" (defendants) "in court and in your two writs."

Under the conditions existing in the seasons of 1897 and 1898, the latter rule of construction had, in two suits, been adjudicated as determining their rights under the same contract. There had been at the Hallowell boom, during these seasons, no sales of logs, and the market price at the Moosehead Lake dam in February and March, at woods scale, was the basis upon which the price at the Hallowell boom, at re-scale, was ascertained by the addition of the customary elements of expense and loss in delivery, amounting to $1.50 per thousand.

In the absence of a definite agreement the market price of goods to be delivered would be the price prevailing at the time and place of delivery; but if there is no market price at the place of delivery, the value of the goods should be determined at the nearest place where they have a market value by the addition or deduction of the difference in the cost of delivery. *Berry* v. *Durinel*, 44 Maine, 255; *McGregor* v. *McDowell*, 8 Wend. 435. And if no sales at the precise time, then reference should be had to sales nearest the time. *Dana* v. *Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. There were sales in 1899, at the Hallowell boom, at the time the logs were deliverable, and the market price of the logs to be delivered would be thereby fixed, unless the general rule is controlled by an express agreement of the parties.

In terms quite as definite as those specifying the place of delivery, the parties, by a parol agreement, fixed the time which was to govern in determining the market price at the place of delivery, namely,

"February or March," or "the early spring, or before the new logs came to market."

The defendants' counsel attaches importance to the words used by Mr. Bradstreet in connection with this new arrangement: "When all the logs were being sold." He testifies: "I asked Mr. Lawrence if he had any objection to fixing it in February or March, while all the logs were being sold, and he said that would suit him." And the plaintiff's counsel also attaches significance to the words, "Before new logs came to market," used by Mr. Lawrence, who testifies: "The substance of that conversation was that the price on these logs should be established and agreed upon in the early spring or before new logs came to market." These words were indicative of the convenience recognized by both parties of fixing the time in those months. The agreement was so made, and remained unchanged. It could not be changed simply by new conditions, unless of a character which made its observance impossible or at least impracticable. By reason of more numerous sales in the previous fall and winter months there had been a lessening of the sales at Moosehead Lake dam in the months of February and March. From thirteen sales in 1898, aggregating 14,000,000 feet, they had fallen to seven sales in 1899, aggregating 6,000,000 feet. But this was no insignificant quantity, sufficient as it must be considered for a standard of price in these months to measure, with proper additions for cost and loss in delivery, the market price at Hallowell boom, where no sales had then been made. However desirable it might be for the parties to have reached an understanding as to the price before the end of the season, there was no necessity or justification for the defendants' refusal or omission to deliver the full complement of logs. They had been paid on account of each thousand the sum of two dollars, and there is no intimation that the plaintiff was not financially responsible. There was even a tender of security if it should be required.

After full performance by the plaintiff of its agreement, it had until the close of the season the right to demand of the defendants, fulfilment of their agreement. The defendants constructively broke the contract on the eleventh day of August, by parting with title to such a quantity of logs as made it impossible for them to furnish the

stipulated amount; but the plaintiff could and did waive the breach on that particular day by subsequently accepting an instalment of logs, and the date when the Hallowell boom closed, August 29, 1899, must be taken as the time when the breach of the contract was made by the defendants, which gave full right of action to the plaintiff. *Curtis* v. *Howell*, 39 N. Y. 211; *Dingley* v. *Oler*, 117 U. S. 490.

Notice from the seller that he will not deliver the goods is no breach until the time for delivery is past. Anticipated injury is not the ground of legal recovery. *Phillpotts* v. *Evans*, 5 Mees. & W. 475; *Daniels* v. *Newton*, 114 Mass. 530, 19 Am. Rep. 384; Benjamin on Sales, § 759.

The rule of damages in the first count is simple in statement and application. The plaintiff is entitled as damages to the difference between the contract price and the market price in February and March, at the Hallowell boom. There being no sales in these months at the place of delivery, the market price of spruce mill logs of ordinary quality at the Moosehead Lake dam, the nearest market, is to be ascertained, and to that price the customary additions are to be made rendering it equivalent to a market price for such logs at the Hallowell boom. Benjamin on Sales, § 882a.

A tabulation of sales, aggregating 6,244,216 feet, made in February and March, at the Moosehead Lake dam, shows approximately an average price of $8.90. To this is to be added $1.50 for increased expense and loss in delivery at Hallowell boom, under re-scale, and the average market price at that place is found to be $10.40 per thousand. It is claimed, and we think fairly, that the logs embraced in this contract were of superior quality, by reason of the unusual care that was exercised in culling them. We allow fifty cents a thousand on this account, making the market price all told of these logs, in February and March, $10.90 per thousand. The plaintiff was to pay two dollars per thousand in advance and be entitled to a discount of two per cent on the balance, if paid in cash. The quantity of logs which the defendants failed to deliver was 4,956,510 feet. The cash payment of $2.00 per thousand on these logs would amount to $9,913.02 and the balance of the purchase

money, at $8.90 per thousand had all the logs been delivered would have been $44,112.94. Two per cent discount on this sum would be $882.26 leaving the balance, if paid in cash, $43,230.68. Adding the advance payment of $9,913.02 we have the cash price which the defendants would have been entitled to receive, viz: $53,143.70.

The plaintiff is entitled to recover as damages for the non-delivery of these logs, the difference between $53,143.70 and their market price at the Hallowell boom, where they should have been delivered, at the date of the breach. The evidence shows that that market price was $11.50 per thousand, or $56,999.86 for all the undelivered logs. But because the element of credit enters into the last market price, we think it would be just to deduct two per cent also from the sum of $56,999.86, reducing the price to a cash basis, and making the cash value $55,859.87. The difference between this sum and $53,143.70, the contract price, is $2,716.17; and this sum, with interest added from the date of the breach to the date of judgment, is what the plaintiff is entitled to recover under the first count.

The claim for special damages in the second count implies a duty on the part of the plaintiff "to improve all reasonable and proper opportunities to lessen the injury," and if it had been able to procure in the market a supply of logs, it could recover of the defendants only general damages measured by the difference in market prices. *Sutherland* v. *Wyer*, 67 Maine, 64. In anticipation of the possible failure of the defendants to fulfil their contract, it seasonably took measures to purchase a supply, and found available only the logs held by the defendants and which they offered to it at the market price prevailing at the time. Before actual breach of the contract the plaintiff could not purchase of the defendants upon these terms without waiving its right of action for the non-delivery of the logs. *Havemeyer* v. *Cunningham*, 35 Barb. 522; *Consumers Cotton Oil Co.* v. *Ashburn*, (C. C. A.) 81 F. R. 331. The offer made was in the nature of a tender, and its acceptance would operate as a bar, and by declining it and demanding of the defendants a fulfilment of the contract the plaintiff's rights could not be prejudiced.

The general rule of damages for the non-delivery of goods

excludes the elements of profits and losses. Prospective gains, ascertained by subsequent events, could not more properly increase the plaintiff's damages than could such losses diminish them. *Berry* v. *Dwinel*, 44 Maine, 255; *True* v. *Inter. Telegraph Co.*, 60 Maine, 9, 11 Am. Rep. 156.

There are cases where both parties understand that special circumstances exist which affect the subject matter of the contract and reasonably contemplate the damages which would result from the breach of such a contract, and gains prevented and losses sustained thereby may be recovered. *Hadley* v. *Baxendale*, 9 Exch. 341; *Griffin* v. *Colver*, 16 N. Y. 489, 69 Am. Dec. 718, are the leading English and American cases. Benjamin on Sales, 6th Am. ed. § 870, 875; Mayne on Damages, Am. ed. § 13; Sedgwick on Damages, § 76; *U. S.* v. *Behan*, 110 U. S. 338; *Cohn* v. *Norton*, 57 Conn. 480, 5 L. R. A. 572; *Grand Tower Mining, etc., Co* v. *Phillips*, 23 Wall. 471.

But the general doctrine of these authorities is limited by conditions which prevent its application to this case. "The damages must be such as may fairly be supposed to have been in the contemplation of the parties at the time when they made the contract." Benjamin on Sales, § 882a.

In the very general terms of the original contract and as modified by parol, no agreement is expressed or can be necessarily implied in reference to the special uses intended by the plaintiff in the purchase of the logs. In his testimony Bradstreet denies all knowledge of any special purpose of the plaintiff in making the contract, and the defendants sold to others for the same price they demanded of the plaintiff. Although the unusual demand for lumber and the exhaustion of the supply of logs on the Kennebec River at the close of the season of 1889, show that the failure of the defendants to complete the delivery of the quantity stipulated, probably prevented the plaintiff from realizing large gains from manufacture and re-sale in the usual course of business, this local condition at the date of the breach of the contract and the unprecedented rise of prices in the general lumber market immediately thereafter, could not have been foreseen by the parties. This is clearly shown by the fact that the market value, as indicated by large sales of logs at and in the vicinity of the

Hallowell boom as late as October 4th, did not exceed $11.50 per thousand. The general rule and its exceptions exclude the special damages claimed under this count as too remote and speculative.

The failure of the defendants to deliver the full quantity of logs, as agreed, gives the plaintiff a right of action to recover, under the third count, such balance of the $12,000 advanced according to the contract as remains after payment for the logs received. Of this sum $2,087 was the advanced payment of two dollars per thousand on the 1,043,499 feet of logs delivered by the defendants. Upon the balance, $9,913, the plaintiff is entitled to interest from the date of its payment, March 15, 1899, until there was a delivery of logs. This amounts to $153.56. The balance of payment with interest added is $10,066.58. Against this is to be credited the amount remaining due for logs delivered, less a deduction of two per cent for cash. 1,043,499 feet at $8.90 per thousand amounts to $9,287.14. Deducting two per cent leaves $9,101.40. The difference between this sum and $10,066.58 is $965.18, and this sum, with interest from the date of the breach, is the amount which the plaintiff is entitled to recover under the third count.

Judgment for the plaintiff for $3,681.35, with interest from August 29, 1899, to the date of judgment.

FRED B. JEFFREY, Exor.,

vs.

UNITED ORDER OF THE GOLDEN CROSS.

Androscoggin. Opinion December 27, 1902.

Life Insurance. Warranties. Representations.

1. When payment of a policy of life insurance is resisted solely on the ground that the statements of the insured made in his application for insurance, as to his bodily health, were not true, it is immaterial whether the statements be regarded as warranties or as representations.
2. If regarded as representations only, it still follows that such statements must be substantially true, or the policy will be avoided.
3. Substantially true does not mean partly true on the one hand, nor does it mean true in every possible and immaterial respect, on the other. It means true, without qualification, in all respects material to the risk.
4. The answers of an applicant for life insurance, as to his present and past condition of health, are material to the insurance risk proposed and must be true.
5. In this case, the applicant, in answer to questions, stated that she had had dyspepsia "in light form," that to her knowledge and belief there was not then existing any disorder or infirmity or weakness, tending to impair her constitution, and that her health was then good. The evidence clearly disclosed that the applicant for more than twenty years had chronic dyspepsia, which continued to the date of her application, that it did not yield easily to remedies, and that at times it was severe and distressing. It further appears that the dyspepsia was accompanied by chronic constipation to an extent which made it necessary for a great many years to resort to artificial means to produce an evacuation of the bowels. At the same time it appears that she was able, until a few weeks before her death, to work, generally did most of the housework for a small family, was an active member of a "club," and made and received visits as women ordinarily do.
6. In view of these facts, the answers before referred to cannot be regarded as true.
7. The fair implication of the answer that she had dyspepsia in "light form" is that she had it only in light form, which is contrary to the evidence.
8. The statement in an application for life insurance, that the applicant is in good health, does not call for a perfect physical condition, an entire

freedom from ills, but it does mean that the applicant is free from sensible disease or symptoms of disease, and from any apparent derangement of the functions by which health may be tested. The term is to be construed in its ordinary sense, that is, as people ordinarily understand the term good health.

9. Construing the evidence as liberally and as charitably as possible for the insured, the court is of opinion that it is a contradiction of terms to say of a woman afflicted as this woman was, and for so many years, that she was in good health at the time she applied for membership in the defendant society.

10. The facts are not greatly in dispute, but the deductions drawn from them by the jury are so clearly erroneous, that justice requires the verdict to be set aside.

On motion by defendant. Motion sustained. Verdict set aside.

This was an action of debt on a certificate of insurance issued by the defendant society to Lizzie M. Jeffrey, on November 17, 1899, for the sum of two thousand dollars. The deceased died November 19, 1900, from cancer of the stomach, as alleged by the defendant. The case was tried at the January term, 1902. The jury returned a verdict for two thousand one hundred forty-three dollars and sixty-two cents.

The case appears in the opinion.

Geo. C. Wing, for plaintiff.

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

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

SAVAGE, J. The defendant is a fraternal benefit society, doing among other things, a life insurance business. *Bolton* v. *Bolton*, 73 Maine, 299. On October 30, 1899, Lizzie M. Jeffrey made written application for membership in the defendant society, and for a life insurance therein. In the application she stated generally that she was "in sound bodily health," and she made answers to certain questions as follows:—

"Have you ever had or been predisposed to any of the following diseases? Dyspepsia?" Ans. "In slight form." "Piles?" Ans. "In slight form."

"Is there to your knowledge or belief, now existing any disorder, or infirmity, or weakness, tending to impair your constitution?" Ans. "No."

"Is your health at this time good?" Ans. "Yes."

"Has any material fact, bearing upon your physical or mental condition and family history, been omitted in the foregoing questions? If so, what?" Ans. "No."

In the application it was stated that "the questions and answers constituting the application form a portion of the contract in case a benefit certificate be issued thereon." The application also contained the following statement signed by Mrs. Jeffrey:—

"It is hereby agreed by the undersigned that if there be in any of the answers herein made any untrue or evasive statements, misrepresentations or concealment of facts, then all claims on the Benefit Fund of the United Order of the Golden Cross shall be forfeited and lost by me."

Upon this application the defendant, on November 17, 1899, issued, under seal, a Benefit Certificate or policy of insurance to Mrs. Jeffrey, describing her as a member of a subordinate "commandery." In the Benefit Certificate it was expressly stipulated that it was issued "upon condition that the statements made by her in her application for membership in said commandery, and the statements certified by her to the Medical Examiner, both of which are filed in the office of the Supreme Keeper of Records, be made a part of this contract."

Mrs. Jeffrey died November 19, 1900, of cancer of the stomach, having complied, after she became a member, with all requirements necessary to keep her in good standing in the defendant society. Suit has been brought upon the Benefit Certificate, by her executor, for the benefit of her son, who is the beneficiary named therein. The defendant resists payment solely on the ground that the statements made in her application, as to her bodily health, and which we have already quoted, were not true, and that such false statements avoided the Benefit Certificate, and that consequently neither she nor her beneficiary obtained any rights under it.

It will not be necessary in this case to decide or to discuss whether under the language of the application and policy, the answers of Mrs. Jeffrey which are under consideration were to be regarded as warranties or representations. For it is immaterial which they were. Taking the view which would ordinarily be most favorable to the plaintiff, that they were technically representations, it would still follow that the answers must be substantially true, or the policy might be avoided. *Maine Benefit Association* v. *Parks*, 81 Maine, 79, 10 Am. St. Rep. 240; *Phoenix Mutual Life Ins. Co.* v. *Raddin*, 120 U. S. 183; *Vose* v. *Eagle Life & Health Insurance Co.*, 6 Cush. 42. Substantially true does not mean somewhat true, partially true, on the one hand, nor does it mean true in every possible and immaterial respect, on the other. It means true without qualification, in all respects material to the risk. *France* v. *Ætna Life Ins. Co.*, 9 Fed. Cases, 657, affirmed in *Ætna Life Ins. Co.* v. *Campbell & New England Mut. Life Ins. Co.*, 98 Mass. 381; 1 May on Insurance, § 186. The answers of an applicant for life insurance, as to his present and past condition of health, are unquestionably material to the insurance risk proposed. The policy, if issued at all, will be issued on the faith that they are true. These answers afford in part the test by which it is determined whether to issue a policy at all or not. Hence it follows that such answers are material and must be true. If they were warranties, of course the same result would follow.

The only remaining inquiry is whether the answers in this application were true. The verdict of the jury is to the effect that they were. Is this conclusion so clearly wrong as to require this court to interfere? If it is, it is clearly the duty of the court to set the verdict aside. If not, the verdict must stand.

Some of the objections may be disposed of briefly. The applicant stated that she had had piles "in a slight form." Of course, admitting that she had had them, and undertaking to describe how serious they were, she was bound to speak truly concerning them. In the form in which she made the answer, and in which the defendant society accepted it, it was an expression of opinion as to the seriousness of the trouble, and, if truthfully made, is to be regarded as such.

We think the jury were warranted in finding that the answer was true.

The applicant was asked, at the end, if any material fact bearing upon her physical or mental condition and family history had been omitted in the preceding questions, and answered "no." The defendant contends that at the date of her application she was afflicted with the disease of which she afterwards died, namely, cancer of the stomach. It will be noticed that this question was limited to matters previously omitted. In answer to a previous inquiry, she had already answered that she never had had, nor been predisposed to "cancer or tumor." Furthermore, waiving the question whether an inquiry in that form called for any more than an honest statement of matters within the applicant's knowledge, we are of the opinion that it was fairly open to the jury upon the evidence to answer either way the question whether or not cancer in the stomach was an existing disease in the applicant at the date of the application.

The remaining answers present more serious obstacles to a recovery by the plaintiff. Mrs. Jeffrey, in answer to questions, stated that she had had dyspepsia "in light form," that to her knowledge or belief there was not then existing any disorder or infirmity, or weakness, tending to impair her constitution, and that her health was then good. As it is claimed that these answers were all untrue in one and the same particular, we may consider them together. Now what were the facts? The evidence discloses but little dispute as to the essentials. That offered by the defendant, considered by itself, shows clearly, we think, that the deceased for more than twenty years had chronic dyspepsia, which continued to the date of her application. So far as the evidence shows, it did not yield easily to remedies, though she suffered less from it at some times than at others. It was severe and distressing at times. It was accompanied by chronic constipation, to the extent that she had to use enemas or other artificial means to produce an evacuation of the bowels. She stated to one witness, eight or ten years before her death, that "the state of her stomach and bowels was so inactive that she was unable to have a natural discharge without resorting to artificial means," and that she had been obliged to resort to artificial means for a

great many years. And it does not appear that there was any improvement afterwards, in this particular. At the same time she was able, until a few weeks before her death, to work, generally did most of the housework for a small family, was an active member of a womens' "Club," made and received calls and visits, as women ordinarily do. The testimony of the defendant as to her physical condition, as would naturally be expected, is limited to such as might be elicited from neighbors, acquaintances and servants in and about the house. Such witnesses testified to the visible manifestations of dyspepsia, such as the eructation of gas from the stomach, and to the statements and complaints of Mrs. Jeffrey herself. If this testimony was not true, it was easily within the power of the plaintiff to rebut it, by members of the family, who, better than all others, knew what her condition had been for many years. But the plaintiff offered no such rebuttal. Neither the husband of Mrs. Jeffrey, who is the plaintiff, nor her son, who is named as the beneficiary in this benefit certificate, testified at all in this case. We cannot fail to be impressed by this omission, as, indeed, it is legitimate that we should be. No reason is suggested in evidence or in argument why they did not testify. We think their failure to testify as to matters concerning which they must have been cognizant, very greatly strengthens the position of the defendant as to the facts, which are thus left uncontradicted.

The family physician, called by the plaintiff, testified that she was not a woman of robust, strong constitution, and had not been for eight or ten years, while he had known her, that she enjoyed just fair average health, that she was a woman who kept about her work and enjoyed fair ordinary health. It appeared, however, that the physician in making out the proofs of Mrs. Jeffrey's death for another benefit society, certified that she "had been in rather feeble health for some two or three years." Being asked on cross-examination, "Do you now say that she had been in rather feeble health for two or three years prior to her death," answered "Yes, I think perhaps that is a fair statement; she was not a strong woman and was feeble as opposed to being strong." This answer, if not entirely responsive, is perhaps suggestive under the circumstances.

The answer of the applicant disclosed that she had had dyspepsia "in slight form." As has already been suggested concerning another matter, this answer conveyed an expression of opinion, and although it tended to minimize the difficulty and hence was not strictly true, still if it was an honest expression of opinion—the truth as she understood it to be—and if the society was willing to accept her judgment without further inquiry, it cannot now complain. *Peacock* v. *New York Life Ins. Co.*, 20 N. Y. 293. But we think the fair implication of the answer, and the one unquestionably intended, was that she had dyspepsia *only* in a slight form. And making all allowances for disparity in judgment, we are unable to perceive how a woman who had had dyspepsia for twenty years to the extent disclosed in this case, could truthfully answer that she had had dyspepsia only in a slight form.

Again, as to the declaration that her health was then good. It is well settled that a statement in an application for life insurance, that the applicant is "in good health," does not call for a perfect physical condition, an entire freedom from all ills. It does not mean that the applicant is entirely free from all infirmities. But it does mean that the applicant is free from sensible disease, or symptoms of disease, and from any apparent derangement of the functions by which health may be tested. It means good health as the term is ordinarily used and understood by people. It is an expression of common significance, and is to be interpreted as such. It is more easily defined than applied. Yet the definitions given by courts and law writers may aid in making application. "The term good health, as here used, does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities, or from all tendencies to disease. The term good health is to be considered in its ordinary sense, and means that the applicant was free from any apparent sensible disease, or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested." *Goucher* v. *North-Western Traveling Mens' Asso.*, 20 Fed. Rep. 596. "In construing a policy of life insurance it must be generally true that, before any temporary ailment can be called a disease, it must be such as to indicate a vice in

the constitution, or be so serious as to have some bearing upon general health and the continuance of life, or such as according to common understanding would be called a disease." *Cushman* v. *U. S. Life Ins. Co.*, 70 N. Y. 72. Good health does not necessarily nor ordinarily mean that one is exempt absolutely from all the ills that flesh is heir to. The epithet "good" is comparative. It does not require absolute perfection. *Peacock* v. *New York Life Ins. Co.*, 20 N. Y. 293. "The 'sound health' evidently meant in the application is a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition which does not tend to weaken or undermine the constitution of the assured." "Sound health means freedom from serious disease, or grave, important, weighty trouble." *Brown* v. *Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894. "Good health means apparent good health, without any ostensible, or known or felt symptoms of disorder, and does not exclude the existence of latent unknown defects." May on Ins., § 295. "The term good health is to be construed in its ordinary sense, that is, as people ordinarily understand good health. It is to be construed not with technical nicety, with great scrupulousness, but as people ordinarily understand the term good health. Slight, infrequent, transient disturbances not usually ending in serious consequences may be consistent with the possession of good health as that term is employed in contracts of this character." In *Maine Benefit Asso.* v. *Parks*, 81 Maine, 83, this court, speaking of "good health," approved the expressions found in 2 Pars. Cont. (6th Ed.) 465, to the effect that "the health of the body required to make the policy attach does not mean perfect and absolute health, for it may be supposed that this is seldom to be found among men. Nor can there be any other definition or rule as to this requirement of good health than that it should mean that which would ordinarily and reasonably be regarded as good health. Nor should we be helped by saying that this good health must exclude all disorders, or infirmities which might possibly shorten life. The good faith of the answers should be perfect. The presence of it goes very far to protect a policy, while a want of it would be an element of great power in the defense."

These general views are well illustrated by two dyspepsia cases which we cite. One is *Morrison* v. *Wisconsin Odd Fellows Mut. Life Ins. Co.*, 59 Wis. 162, in which it was held that "a touch of dyspepsia coming on" which manifests itself only after long intervals, which yields readily to medical treatment, and which is not shown to have been organic and excessive, is not inconsistent with a representation that the person so affected is in sound health, as that term is employed in contracts for life insurance. The other is *New York Life Ins. Co.* v. *Flack*, 3 Md. 341, 56 Am. Dec. 742, in which it is said that a predisposition to the disease of dyspepsia to such a degree as to seriously affect the health and to produce bodily infirmity is incompatible with a statement of good health. See May on Insurance, § 295.

From these definitions of good health as a life insurance term, it is evident that, when applied to individual cases, it must frequently be a matter of grave doubt whether the applicant has, or lacks, good health; and in cases of doubt, the tendency rather is to resolve the doubt in favor of the insured. Certainly, the court would hesitate long to interfere with the verdict of a jury, whichever way it was, in a case of real doubt. But in this case, upon the evidence disclosed, the court is of opinion that there should be no real doubt. Construing the evidence as liberally and as charitably as possible in favor of the insured, it seems to us a contradiction of terms to say of a woman afflicted as this woman was, and for so many years, that she was in good health at the time she applied for membership in the defendant society. It is unnecessary to consider the other disputed answer. At the trial the facts were not greatly in dispute, but the deductions drawn from them by the jury are, we think, clearly erroneous. Justice requires the verdict to be set aside.

Motion sustained. New trial granted.

KENNEBEC WATER DISTRICT

vs.

CITY OF WATERVILLE, and others.

Kennebec. Opinion December 27, 1902.

Water Company. Eminent Domain. Instructions to Appraisers. Franchise. Valuation. Damages. Evidence. R. S., c. 46, § 23. Priv. and Special Laws, 1881, c. 141; 1887, c. 59; 1891, c. 14; 1893, c. 352; 1899, c. 200.

An act incorporating the plaintiff district authorized it to acquire by the exercise of the right of eminent domain, "the entire plant, property and franchises, rights and privileges now held by the Maine Water Company within said district and the towns of Benton and Winslow." The act further provides that appraisers appointed by the court "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," but that "before a commission is issued to the appraisers, either party may ask for instructions to the appraisers." Both parties having asked for instructions, and the questions of law arising thereon having been reported to the law court, the court is of opinion that the appraisers should be instructed in accordance with the following principles:—

1. The plaintiff, if it takes anything, must take all the property held by the Maine Water Company in the Kennebec Water District and in Benton and Winslow, whether specifically named in the act or not. This includes the real estate or other property, if any, not connected with the water system, it includes the plant or physical system, and it includes all franchises, rights and privileges held by the water company, exercised or capable of being exercised.

2. The Maine Water Company is a quasi-public, or public service, corporation, and is entitled to charge reasonable rates for its services, and no more.

3. The basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public.

4. At the same time, the public have the right to demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals.

5. Summarized, these elemental principles are, the right of the company to derive a fair income based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses, and the right of the public to have no more exacted than the services in themselves are worth.

6. The reasonableness of the rate may also be affected, for a time, by the degree of hazard to which the original enterprise was naturally subjected, that is, such hazard only as may have been justly contemplated by those who made the original investment, but not unforeseen or emergent risks. And such allowance may be made as is demanded by an ample and fair public policy. If allowance be sought on account of this element, it would be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this hazard.

7. The franchises granted to the Waterville Water Company by ch. 141 Private and Special Laws of 1881, as amended by ch. 59, Private and Special Laws of 1887, and ch. 14, Private and Special Laws of 1891, and to the Maine Water Company by ch. 352, Private and Special Laws of 1893, are not exclusive. Neither are they perpetual and irrevocable. They are subject to legislative repeal. In fixing the value of the franchises, both of these considerations are entitled to their just weight. If the business of the company is now practically exclusive, in that it has no competitor, that fact also may and should be considered by the appraisers when they fix the value of the property of the company as a going concern.

8. In determining the present value of the company's plant, the actual construction cost thereof, with proper allowances for depreciation, is legal and competent evidence, but it is not conclusive, nor controlling.

9. The request that "under no circumstances can the value of the plant be held to exceed the cost of producing at the present time a plant of equal capacity and modern design" should not be given. Among other things, it leaves out of account the fact that it is the plant of a going concern, and seeks to substitute one of the elements of value for the measure of value itself.

10. The actual rates which may have been charged heretofore, and the actual earnings, are both admissible and material in determining the value of the plant. The value of the evidence, however, will depend upon whether the appraisers shall find that the rates charged have been reasonable.

11. The quality of water furnished and of the service rendered, and the fitness of the plant and of the source of water supply to meet reasonable requirements in the present and future are material upon the question of present value.

12. The appraisers should regard the franchises of the company as entitling it to continue business as a going concern, but subject to all proper legal duties governing public service companies.

13. Faithfulness or unfaithfulness shown by the water company in the past in the performance of public duty to furnish pure water at reasonable rates is not a proper matter for consideration. It is the franchise as it now exists which is to be taken and paid for.

14. The liability of the company to legal forfeiture of its franchises on account of past unfaithfulness and misbehavior is not to be considered.

15. If the water company and its predecessors have actually received more than reasonable rates hitherto, the excess cannot be deducted from the amount to which the company would otherwise be entitled.

16. No compensation can be allowed to the Maine Water Company for incidental damages to its other property having no physical connection with, or contiguity to that taken, and having no relations with it except those which grow out of common ownership, nor for the impairment of the economy and efficiency of administration which are obtained by the combination of many water systems under one management.

17. The real estate or other outside property not directly connected with the water system should be appraised at its fair market value, not at forced sale, but at what it is fairly worth to the seller, under considerations permitting a prudent and beneficial sale thereof.

18. The appraisers may properly consider what the existing system can be reproduced for. But the cost of reproduction will not be conclusive. It will be evidence having some tendency to prove present value. The inquiry along the line of reproduction should be limited to the replacing of the present system by one substantially like it.

19. In estimating even the structure-value of the plant, allowance should be made for the fact, if proved, that the company's water system is a going concern with a profitable business established, and with a present income assured and now being earned.

20. So far as the water system if practically exclusive, the element of goodwill should not be considered.

21. In fixing structure-value, while considering the fact that the system is a going concern, the appraisers should also consider, among other things, the present efficiency of the system, the length of time necessary to construct the same de novo, and the time and cost needed after construction to develop such new system to the level of the present one in respect to business and income, and the added net income and profits, if any, which by its acquirement would accrue to a purchaser during the time required for such new construction, and for such development of business and income. But these are to be considered "among other things." They are not controlling. Their weight and value must depend upon the varying circumstances of each particular case.

22. In addition to structure-values, the appraisers should allow just compensation for all the franchises, rights and privileges to be taken.

23. The value of the franchise depends upon its net earning power, present

and prospective, developed and capable of development, at reasonable rates; and the value to be assessed is the value to the seller, and not to the buyer.

24. In considering prospective development of the use of a franchise, consideration must also be had of the fact that further investment may be necessary to develop the use, and of the further fact that at any stage of development, the owner of the franchise will be entitled to charge only reasonable rates under the conditions then existing.

25. Subject to all the foregoing limitations, the owner is entitled to any appreciation due to natural causes.

26. The fact that the franchises are to be taken in no respect impairs their value for the purposes of appraisal.

27. The property to be taken, both plant and franchises are to be appraised, having in view their value as property in itself and their value as a source of income. There are these elements of value, but only one value of one entire property is to be appraised in the end. These elements necessarily shade into each other.

28. The capitalization of income even at reasonable rates cannot be adopted as a sufficient or satisfactory test of present value. But while not a test, present and probable future earnings at reasonable rates are properly to be considered in determining the present value of the system.

29. The appraisers should be instructed to receive and consider all evidence offered, so far as admissible under the general rules of law, which is pertinent under the rules stated in the requests of the parties, so far as they have been approved, and as limited or explained, in the opinion of the court.

See *S. C.* 96 Maine, 234.

On report. Instructions to appraisers given by the court to determine the valuation of property of the Maine Water Company and acquired by the plaintiff by the exercise of the right of eminent domain.

In this court below, the parties, in accordance with the provisions of the Act of the Legislature authorizing the Water District to take over the property, filed written requests for instructions which they desired and contended ought to be given by the court to the appraisers to guide them in determining the valuation of the property to be taken over. The case was then reported; the bill, answer, replication and docket entries making part of the case, with a stipulation that all legislation of Maine relating to the Maine Water Company and the Waterville Water Company is to be referred to by either party in argument.

The Kennebec Water District requested the court to instruct the appraisers as follows:—

1. The appraisers are directed to state separately in their report what part of the amount fixed by them as the valuation of the plant, property and franchises of the Waterville Water Company and the Maine Water Company is fixed as the value of the plant and property and what part is fixed as the value of the franchises, and further to state what property and what franchises, they have considered in fixing these values.

2. Upon the question of the value of the companies' plant and property, the actual cost of said plant and property together with proper allowances for depreciation is legal and competent evidence, and for the purpose of fixing this actual cost the companies are directed to produce before the appraisers all book accounts and documents containing entries which bear on the subject.

3. Under no circumstances can the value of the plant of the companies be held to exceed the cost of producing at the present time a plant of equal capacity and modern design.

4. The Waterville Water Company and the Maine Water Company are public service corporations and as such have the right to charge reasonable rates only. What would be reasonable rates can be determined only after and by means of a valuation of the companies' property. Accordingly the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property or of their franchises, and are immaterial.

5. The selling value of the capital stock in the companies has no bearing on the valuation of the companies' plant, property or franchises, and is immaterial.

6. The quality of the water furnished by the companies and of the service rendered by them and the fitness of their plant to meet the reasonable requirements of consumers, in the present and the future, are material questions in fixing the valuation of the companies' plant and property.

7. The franchises of the Waterville Water Company are fixed by Chap. 141, Private & Special Laws of 1881, as amended by Chap.

59, Private & Special Laws of 1887, and Chap. 14, Private & Special Laws of 1891.

8. The franchises of the Maine Water Company material to these proceedings are those of the Waterville Water Company and those granted by Private & Special Laws of 1893, Chap. 352, and no others.

9. The appraisers shall regard the franchises of the companies as entitling them to continue business as a going concern, but subject to all proper legal rules governing public service companies; it being further understood that said franchises are in no way exclusive. The franchises shall not be otherwise appraised or valued.

10. Upon the question of the value of the companies' franchises, the question of the fitness of the source of supply granted by these franchises with reference to the reasonable requirements of the consumers in the present and the future, is material and competent.

11. In fixing the value of the companies' franchises, the appraisers may give such regard as is demanded by ample and fair public policy to the past investment, risks and services of the companies, and to the reasonably just expectations which those who made the investment had in mind when so investing, and also to the faithfulness or unfaithfulness shown by the companies in the performance of their public duty and obligation to furnish pure water at reasonable rates.

12. Competent evidence may be received by the appraisers tending to prove or refute the allegations contained in paragraph 13 of plaintiff's bill, and in case said allegations are found to be true in whole or in part, said facts are to be considered as bearing on the value of the companies' franchises.

13. Competent evidence may be received by the appraisers tending to prove or refute the allegations contained in paragraph 14 of plaintiff's bill, and in case it is found that said companies have actually received more than reasonable rates for the services rendered since operations begun, then the amount of such excess shall be deducted from the amount to which the companies would otherwise be entitled.

14. The appraisers may view the premises so far as they see fit.

15. They shall procure a stenographer to be in attendance who shall take notes of all testimony, and furnish transcripts thereof.

16. They shall make a report showing their doings and findings under each branch of the instructions above given and also the date as of which the valuation was fixed.

The defendants requested the court to instruct the appraisers as follows:—

1. If the court shall be of the opinion that either party at this stage of the case is entitled to instructions under the eighth section of the Act above mentioned, the defendants respectfully ask the court for the following instructions to said appraisers; the defendants understanding that preliminary requests for instructions are authorized by said eighth section, and that they will be asked for on the part of the plaintiff, and not deeming it right that requests should be presented and considered by the court on the one part and not on the other.

2. That by the terms of chap. 200 of the Private and Special Laws of 1899 every item of property within the limits of the Kennebec Water District and of the towns of Benton and Winslow included in the water system of the Maine Water Company at the date selected for appraisal, or then used or usable in connection therewith, whether specifically enumerated in said Act or not, together with all real estate within said District then held by said Maine Water Company, is to be taken from said Water Company, and every such item and every valuable contract, right, privilege or franchise, exercised or capable of being exercised, within the territory aboved named, must be considered and allowed for by the appraisers, separately or otherwise.

3. That any increase of pecuniary obligation or burden or duty, or any damage to, or impairment of the value of its remaining property or franchises, in any way resulting to said Maine Water Company by reason of the exercise of the right of eminent domain contemplated by said Act of 1899, should be considered by said appraisers, and just compensation therefor should be included in their award.

4. That the real estate or other outside property not directly connected with the water system, so far as included in the taking contemplated by this act, should be appraised at its fair market value, not at

forced sale, but at what it is fairly worth to the seller, under conditions permitting a prudent and beneficial sale thereof.

5. That, as to the remaining property constituting the water system to be taken, and the franchises, rights and privileges connected therewith, neither the total construction-cost of the entire water system, measured at the date selected for valuation, nor such construction-cost less wear and tear and depreciation, nor such construction-cost, thus reduced, and afterwards increased by any adjudged percentage or bonus of profit thereon, can constitute the legal criterion of the total values to be awarded under the terms of this Act.

6. That neither can the reproduction-cost thereof, at the date thus selected, either new or in its then condition, constitute the legal criterion of said total values.

7. That the cost, at the date thus selected, of replacing said entire water system by a new one, differently constructed, but equal or even superior in efficiency to the one now existing, is not the legal criterion of said total values.

8. That, in order to determine even the structure-value of said water system, and to award just compensation to said Maine Water Company therefor, under the terms of this Act, a proper sum must be allowed by the appraisers, in their sound judgment, separately or otherwise, in addition to its value as otherwise established, for the fact, if proved, that such water system is not merely an aggregate of materials fitted for use, without actual business, service, connections, takers or income, but a going concern, with a profitable business and good-will already established and with a present income assured and now being earned.

9. That in determining the amount thus to be added to measure adequately even the structure-value of said water system, the appraisers should consider, among other things, the present efficiency of said system, the length of time necessary to construct the same de novo, the time and cost needed, after construction, to develop such new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as such going concern, would accrue to a purchaser during the

time required for such new construction, and for such development of business and income.

10. That in addition to the items to be valued under request 4, and all the structure-values of said water system to be determined in accordance with requests 8 and 9, the appraisers, under the terms of this Act, must consider and allow for, as a material and necessary element of value, by separate item or otherwise, all and several the franchises, rights and privileges, whether now used or capable of being used, of the Maine Water Company, so far as they relate in any manner to the territory included within the Kennebec Water District and the towns of Benton and Winslow, including specifically all the rights of said Company to supply water to municipalities and to all the inhabitants within the entire territory above named, all rights incidental thereto, or connected therewith, and the right to receive and appropriate the net incomes and revenues from its business enterprise or undertaking considered as a whole.

11. That the value of a franchise depends on its productiveness or net earning power, present and prospective, developed or capable of development, within the entire territory embraced by the taking; that whenever net earning power, or net incomes and revenues, is to be determined under this Act, it is to be so determined under reasonable water rates, after due allowance for operating-expense and maintenance or depreciation; that the value of all franchises, rights and privileges to be taken is their full value, not to the taker but to the seller; that "just compensation" under this Act means full compensation for every thing or element of value taken, and that nothing less than such full compensation can be legally awarded, either under the terms of this Act, or under the requirements of the Constitution of this State and of the United States.

12. That the fact that the franchises, rights and privileges of said Maine Water Company are to be taken under this Act in no respect destroys or impairs their value to said Water Company, and cannot diminish or affect the amount to be awarded as just compensation therefor.

13. That in estimating said franchises, and the present and future net earning power included therein, the appraisers should

duly weigh the nature and extent of these franchises, rights and privileges, whether the same are perpetual or otherwise; also, so far as proved, the rights of the Maine Water Company under all existing contracts and the value thereof; the extent of existing business and of the net incomes or revenues now derived or derivable therefrom, the existing demand for new and additional services, and for the development and increase of said business, incomes and revenues, the past, and probable future, growth or decay of the territory now served, or capable of being served under said franchises, in population, in wealth, and in needs and uses for water to be supplied by some water system, and the past, and probable future, increase or decrease in said net incomes and revenues as affected by these or other surrounding conditions; also the fact that by said taking said Water Company will be wholly and forever deprived of all said franchises, rights, privileges, earning-power, incomes and revenues, and that it is the duty of said appraisers to make, in their sound judgment, just and full compensation to said Water Company for all the same.

14. That the true measure of value, under the terms of this Act, and under the requirements of the Constitutions of this State and of the United States, is just and full compensation to said Water Company for each and every thing of value of which it is to be deprived by this taking; that in addition to the special property covered by request 4, the plant, property, franchises, rights and privileges now held by said Water Company within the territory embraced by this Act, contain distinct elements of value, first, as an asset, and, second, as a source of income, having, or not, present and prospective net earning-power; that by the taking under this Act said Water Company will be deprived wholly and forever, both of said asset, and of said source of income; that just compensation to said Company for what is thus compulsorily taken from it requires that the sum to be awarded as a substitute therefor shall be the full equivalent of every thing taken, both in value as an asset, and in net earning power, and such a sum as, in the sound judgment of the appraisers, will be the full money equivalent of all the plant, property, franchises, rights and privileges aforesaid, and, at the same time, if prudently invested at fair current rates of interest, will yield to said Company the same

net incomes and revenues, and for the same term, that it will be deprived of by this taking; the net earning power, incomes and revenues aforesaid to be determined under reasonable water rates, after due allowance on the one hand for operating-expense and maintenance or depreciation, and, on the other hand, with due regard to the probable future increase or decrease thereof under all conditions affecting the same.

15. That the Constitution of the United States, independent of the terms of this Act, requires that just compensation should be made to said Water Company for all its plant, property, franchises, rights, privileges, good-will, incomes and revenues to be taken under this Act, at their full value not to the taker, but to the seller; and, to secure just and full compensation for all the same the defendants are entitled, under the Constitution of the United States, to have the court give, and the appraisers follow, as legal rules and material elements of value, in language or in substance, the several foregoing requests, and this request applies to each of said foregoing requests, separately and without reference to any other.

16. All legal evidence pertinent under either of the foregoing requests, or tending to show the fair market value of the property, rights, privileges and franchises taken, so far as admissible upon general rules of law, shall be received by said appraisers at the hearing before them.

Paragraphs 13 and 14 of the plaintiffs' bill, upon which requests 12 and 13 of the plaintiffs seemed in part to be based, were as follows:—

"13. Your complainant alleges that in spite of the duty imposed upon said Waterville Water Company by its charter to supply pure water, it has constantly, from the commencement of its operations to the time of the conveyance and surrender of its property and powers to the Maine Water Company, and said Maine Water Company from that time until now, furnished water so polluted, foul, unclean, impure and unwholesome as to be utterly unfit for drinking purposes or general domestic use, and a constant menace to the health and lives of the people using the same. Whereby said Waterville Water Company and said Maine Water Company, have utterly forfeited

their rights and franchises to operate as water companies within said Kennebec Water District, and the towns of Benton and Winslow, and have rendered themselves liable to such processes as are appropriate to work legal forfeiture of said rights and franchises.

14. Your complainant further alleges that in spite of the duty of said water companies to render service at reasonable rates, said companies established and have always maintained and are now maintaining a schedule of rates or charges for services utterly disproportionate to the cost of the plant and the expense of maintaining the same, and so unreasonable, excessive and extortionate that said companies have for this reason utterly forfeited their rights and franchises to operate as water companies within said Kennebec Water District, and the towns of Benton and Winslow, and have rendered themselves liable to such processes as are appropriate to work legal forfeiture of said rights and franchises."

H. D. Eaton, G. K. Boutelle; E. R. Thayer, of the Boston bar, for plaintiff.

Counsel cited among other cases: *Lumbard* v. *Stearns,* 4 Cush. 60, 61; *Hangen* v. *Albina Light & Water Co.,* 21 Ore. 411, 14 L. R. A. 424; *Memphis & Little Rock Railroad Co.* v. *Railroad Commissioners,* 112 U. S. 609, 619; Morawetz on Priv. Corp. 2nd ed. vol. 2, c. 11, §§ 922-938; *Rockland Water Co.* v. *Camden & Rockland Water Co.,* 80 Maine, 544, 1 L. R. A. 388; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 686, 697; *People* v. *Bristol, etc., Turnpike Co.,* 23 Wend. 236; *Capital City Water Co.* v. *State of Alabama, ex rel. Gordon Macdonald,* 105 Ala. 406, 29 L. R. A. 743; *Farmers' Loan and Trust Co.* v. *Galesburg,* 133 U. S. 156; *Palestine Water & Power Co.* v. *Palestine,* 91 Tex. 540, 40 L. R. A. 203; Morawetz on Priv. Corp. § 1024, and cases cited; Const. Maine, Art. 1, § 21; *Barron* v. *Baltimore,* 7 Pet. 243; *The Northern Transportation Co.* v. *Chicago,* 99 U. S. 635; *Bauman* v. *Ross,* 167 U. S. 548, 582, 583; *Ripley* v. *Great Northern Railway Co.,* 10 Ch. App. 435; *West River Bridge Co.* v. *Dix and The Town of Brattleboro' and Dummerston,* 6 How. 507, 534; *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595; Public Laws, 1885, c. 378, §§ 1-13; *Cobb* v. *Boston,* 109 Mass.

438, 444; *Maynard* v. *Northampton*, 157 Mass. 218; *Jacksonville Railway Co.* v. *Walsh*, 106 Ill. 253; *White* v. *Commissioners*, 22 L. T. N. S. 591; *Pile* v. *Pile*, 3 Ch. D. 36; 15 Harv. Law Rev. 267, 268; *Crescent City R. R.* v. *Assessors*, 51 La. Ann. 335; *St. Charles Railway Co.* v. *Assessors*, 51 La. Ann. 459; *Hamilton Gas Light & Coke Co.* v. *Hamilton City*, 146 U. S. 258, 268; *Farrington* v. *Putnam*, 90 Maine, 405, 38 L. R. A. 339; *Greenwood* v. *Union Freight Railroad Co.*, 105 U. S. 13, 17, 19, 22.

O. D. Baker; J. W. Symonds, D. W. Snow, C. S. Cook, and C. L. Hutchinson; H. M. Heath, for defendants.

Counsel cited among other cases: *Shoemaker* v. *U. S.* 147 U. S. 282, 290; *London Tramways Case*, 2 Q. B. (1894,) 205; *In re The Kirkleatham Local Board and the Stockton and Middlesborough Water Board*, 1 Q. B. Div. (1893,) 375, 387; House of Lords, App. Cases, (1893,) 449; *Ames* v. *Railway Co.*, 64 Fed. Rep. 176; *Capital City Gas Co.* v. *Des Moines*, 72 Fed. Rep. 829, 843; *Fairbank* v. *U. S.*, 181 U. S. 283, 300.

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

SAVAGE, J. By ch. 200 of the Private and Special Laws of 1899, the Kennebec Water District was incorporated, and by § 6, it was empowered to acquire, by the exercise of the right of eminent domain, "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." This Act was held constitutional and valid, in *Kennebec Water District* v. *Waterville*, 96 Maine, 234. The Act further provides that in the process of the condemnation proceedings, the court shall appoint three appraisers for the purpose of fixing the valuation of the property mentioned in section 6; that the "appraisers shall, upon hearing, fix the valuation of said plant, prop-

erty and franchises at what they are fairly and equitably worth, so that said Maine Water Company shall receive just compensation for all the same," and that "upon 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."

It is further provided that "before a commission is issued to the appraisers, either party may ask for instructions to the appraisers, and all questions of law arising upon said requests or upon any other matters in issue may be reported to the law court for determination before the appraisers proceed to fix the valuation of the property." And it is at this last stage that the proceedings have now arrived. The bill in equity for the judicial appraisal and condemnation of the property having been sustained, *Kennebec Water District* v. *Waterville*, supra, both parties have asked for instructions to the appraisers, and the questions of law arising upon the requests for instructions have been reported to this court for its determination.

To say the least, the method thus authorized and adopted is an anomalous one. The questions before the court, which are comprehensive in scope and minute in detail, in effect, relate to the admissibility of evidence, and yet they must be decided before the court knows, or can know, what specific evidence will be offered or relied upon, or to what conditions the evidence will be applicable. In such case, it is evident that the answers must be general in character. The conditions surrounding properties like the one here proposed to be taken are so variant that it is difficult, and in some particulars impossible, to lay down rules of value which will properly apply to all cases without modification. It was intimated in *Ames* v. *Un. Pac. Ry. Co.*, 64 Fed. Rep., at p. 178, that no hard and fast rule could be made applicable to all properties under all conditions.

And it may be said further that, owing to this fact, and to the fact that in scarcely any two cases are the statutes authorizing condemnation proceedings alike, so far as they provide for an estimate of the different elements of value, the expressions of other courts and results arrived at by them are frequently of less authority than they otherwise would be.

It should be noticed that this is a bill in equity to be heard and determined, except as otherwise provided, according to the practice in equity. The hearings, except upon questions of law reserved upon report or exceptions, are to be before a single justice. A single justice is to make all necessary orders and decrees. And the act contemplates that the justice who directs the issuing of a commission to the appraisers may instruct them in regard to the manner of the performance of their duties. The requests for such instructions can be considered by this court only when they raise questions of law. So we construe the act in question. In this view, plaintiff's requests 1, 14 and 15 are not open for consideration by this court. They relate to details of procedure, and raise no questions of law. They relate to questions concerning which the sitting justice may, in his discretion, give or withhold instructions, according as he may think they are, or are not, practicable, and useful to the parties, the appraisers and the court. The same remarks apply to plaintiff's request 16 in part. Of course, the appraisers must make a report of their doings, and the statute requires that in their report they shall state the date as of which the valuation is fixed. But beyond this, it is for the sittting justice below to pass upon this request, and not for this court.

Before entering upon a consideration of the requests seriatim, we think it will be expedient to discuss certain general propositions, which concern and must qualify or limit the answers to be given to many or all of the requests.

First, as to the subjects of valuation. In substance, it is claimed by the defendants, request 2, and conceded by the plaintiff, that the latter, if it takes anything, must take every item of property held by the Maine Water Company in the Kennebec Water District (the City of Waterville and the Fairfield Village corporation) and in Benton and Winslow at the date of the appraisal, whether specifically named in the Act or not. We think it must be so held. And for every such item of value, the Maine Water Company is entitled to "just compensation." This includes the real estate or other property, if any, not connected with the water system, it includes the plant, or physical system, real and personal, it includes all the franchises,

rights and privileges held by the Maine Water Company in the territory described, except the franchise to be a corporation. It is unnecessary to particularize further. The plaintiff criticises the use of the phrase "capable of being exercised," in speaking of franchises in request 2. But we think it is unobjectionable. Whatever franchise the Maine Water Company holds in this territory is to be taken from it, and must be paid for. Its existence is the criterion, not whether it is being exercised or not. *Joy* v. *Grindstone-Neck Water Co.*, 85 Maine, 109. It may be doubted whether the Maine Water Company has any franchise in this territory which it is not now exercising. It has some franchises which undoubtedly will be more fully exercised than at present, in the course of the development of its system, if it is allowed to continue in possession of it. It would be, however, rather the extension of the use or exercise of a franchise, than the exercise of an unused franchise.

Secondly, as to reasonable rates. We think it is clear that the pecuniary value of the property of the Maine Water Company, both plant and franchises, depends, to a considerable extent, upon the financial returns it can be made to yield to the stockholders—that is, upon its net income. The franchise or right to do business, if unproductive, is of little value; and it stands to reason that the plant as a structure, irrespective of franchise, if the business were profitable, would be worth more, and would sell for more, than if the business were unprofitable. The basis of income, of course, is the tolls charged and received. If the Maine Water Company were doing a private business, knowing its present net income, and the facts tending to show a probable increase in the future or otherwise, it would be comparatively easy to approximate the present value of its plant and franchises. But it is not doing a private business. It is not a private corporation. The value of its property cannot be appraised as if it were a private corporation, doing a private business. *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. Rep. 850. It is a quasi-public, or public service corporation. In pursuit of legitimate gain, it has devoted its property to a public use. In that way the public have acquired an interest in the use of the property. The company owes a duty to the public as well as to its stockholders.

It must serve the public faithfully and impartially, and must charge no more than reasonable rates for service. *Brunswick Gas Light Co.* v. *United Gas Fuel & Light Co.*, 85 Maine, 532, 35 Am. St. Rep. 385. The Legislature may limit the tolls of such a corporation so that they shall be reasonable. *Munn* v. *Illinois*, 94 U. S. 113; *Smyth* v. *Ames*, 169 U. S. 466. Unreasonable charges may be reached by the restraining hand of the court. Thus far the parties agree. And it may be said that the fair and equitable value of the system of the Maine Water Company, as a whole, may in a large sense be measured by its net income at reasonable rates, taking into account future probabilities. But the plaintiff, request 4, asks us to say that "What would be reasonable rates can be determined only after and by means of a valuation of the companies' property," and that "the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property, or of their franchises, and are immaterial." On the other hand, the defendants state their proposition in these words, request 11, "That the value of a franchise depends on its productiveness or net earning power, present and prospective, developed or capable of development, within the entire territory embraced by the taking; that whenever net earning power, or net incomes and revenues is to be determined under this Act, it is to be so determined under reasonable water rates, after due allowance for operating expense, and maintenance or depreciation."

Waiving other questions for the time being, it will be seen that "reasonable water rates" lie at the foundation of this proposition. But so far we are not in any way aided in determining how they should be ascertained. The differing forms in which the parties have presented their requests upon this subject have given rise, in argument, to the question whether the reasonableness of the rates depends upon the value of the property, or whether the value of the property depends upon the income derived at reasonable rates. But the requests do not present the question in this form. The plaintiff asks that reasonable rates be made to depend upon the value of the property, and we think this is correct as far as it goes, as we shall have occasion to show hereafter. The defendants say that the value of the

franchise, that is, of the right to do the business, depends upon the net income at reasonable rates. And this is also correct as far as it goes. *Monongahela Navigation Co.* v. *U. S.* 148 U. S. 312. One refers to the value of the property in gross, the other to the value of the franchise. But the value of the property is not the only element to be considered in determining what are reasonable rates. As declared in *Smyth* v. *Ames*, 169 U. S. 466, the basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public. Yet while the company is entitled, so far as this case shows, to a fair return upon the value of the property used for the public at the time it is being used, the public, that is, the customers, may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. The value of the services in themselves is to be considered, and not exceeded. These views seem to be consonant with reason. They are also established by the highest judicial authority in our country.

In *Smyth* v. *Ames*, 169 U. S. 466, at p. 554, the court said, "Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guaranties for the protection of its property. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the *fair value of the property used* for the public, or the *fair value of the services rendered*, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders." Again, at p. 547, "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to

demand is that no more be exacted for the use of a public highway than the services rendered by it are reasonably worth." Of course, the same principles apply to the water rates as to railroad rates. *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739. In the case last cited, it was claimed by the appellant, as bearing upon just or reasonable rates for water service, that the court should take into consideration the cost, the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same, the annual depreciation of the plant from natural causes resulting from its use, and a fair net profit. The court said, at p. 757, "Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring *the real value of the property* and *the fair value in themselves of the services rendered* to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

In *Covington & Lexington Turnpike Road Co.* v. *Sanford*, 164 U. S. 578, it was held that the nature and value of the service rendered by a turnpike company bears upon the reasonableness of rates charged. And in the same case it was held that other considerations were involved, such as, "the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise."

In *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, decided since these proceedings were begun, Mr. Justice Brewer declared, p. 91, that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered.

In the same case, at p. 96, the case of *Canada Southern Railway Co.* v. *International Bridge Co.*, 8 App. Cases, 723, was cited with approval to the point that the question is not what profit it may be

reasonable for a company to make, but what it is reasonable to charge to the person who is charged. And Mr. Justice Brewer adds: "The question is always not what does he make as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services. Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and it is not that which finally determines the question of reasonableness."

We deem the principles established by the Supreme Court of the United States as affecting the reasonableness of rates of public service corporations to be authoritative. The rates of such corporations are within the protection of the Fourteenth Amendment to the Federal Constitution. *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362; *Covington & Lexington Turnpike Road Co.* v. *Sanford*, supra; *Smyth* v. *Ames*, supra; *San Diego Land Co.* v. *National City*, supra. And the declarations of the highest Federal Court thereon are of controlling force.

The elemental principles thus far noted may be summarized as, on the one hand, the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth.

In some of the cases to which we have referred, it is suggested that there may be instances where these two principles will clash, where public service rendered at rates not higher than the service in itself is worth may produce less than a fair income, or no net income at all. But we assume that it is unnecessary to discuss this question here, for neither upon the face of the bill and answer, nor in the requests for instructions, nor in the arguments of counsel is there any suggestion that what will be reasonable rates for the public in this case will not also be reasonable rates for the company.

There is another matter which we think may fairly be considered in connection with the reasonableness of rates. We think something may be allowed in this respect for the risks of the original enterprise, if there were any. It is common sense that they who invest their money in hazardous enterprises may reasonably be entitled, for a time at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning. The plaintiff, in request 11, concedes that such risks may be considered in valuing the franchise. But inasmuch as the value of the franchise depends chiefly upon the net income which may be produced by its exercise at reasonable rates, as has already been stated, it follows, we think, that the reasonableness of the rate may be affected by the degree of risk to which the original enterprise was naturally subjected. This does not mean unforeseen or emergent risks, but such as may have been justly contemplated by those who made the original investment. We use the word "chiefly," because we apprehend that a franchise, even of an unprofitable business, might have a temporary value for some purposes. But that condition does not seem to exist in this case. The element of risk, however, is not controlling. It is only one element. It is to be fairly considered in connection with the other elements named. To say just how much allowance should be made, and for how long a period, requires the exercise of a careful, conservative and discriminating judgment. If allowance be sought on account of this element of original risk, we think it will be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this risk. This latter inquiry should be limited to this specific purpose, and is not open, as we shall hold, under plaintiff's request 13.

Thirdly, as to the character and duration of the franchises. It must be evident that the value of the plant and the franchises themselves, whether taken separately or as a whole, is affected by the character and duration of the franchises. *Bristol* v. *Bristol & W. Waterworks*, 19 R. I. 413, 34 Atl. Rep. 359, 32 L. R. A. 740; *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270. An exclusive franchise to do a profitable business is worth more than one which is not exclusive.

A perpetual franchise to do a profitable business is, or may be, worth more than one which is subject to repeal.

The plaintiff, request 9, asks an instruction that the franchises now held by the Maine Water Company are in no way exclusive. The defendants suggest that whether the franchises are exclusive or not is a question for the appraisers to answer after the charters have been put in evidence, and not for the court, in the first instance at least. We do not think so. Certain acts incorporating the Waterville Water Company and the Maine Water Company, and granting to them powers and franchises are referred to in the bill and are admitted by the answer. They are necessarily in the case without further proof. The plaintiff may properly ask for a construction of the franchises granted by those acts. Such construction is a matter of law.

We have not searched for other grants of franchises than those contained in plaintiff's requests 7 and 8. It is not our duty to do so. But we have no hesitation in saying that so far as the franchises granted by those acts are concerned, they are not exclusive. The Legislature may at any time, according to its own wisdom, grant to the municipalities within which this water system is situated franchises similar to the ones in question. It may grant similar franchises to one or more corporations like the Waterville Water Company or the Maine Water Company. *In re City of Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270; *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685. It has granted similar franchises to this plaintiff, a municipal district, and has even authorized it to take away from the defendant water company all the franchises it holds within the district and Benton and Winslow. *Kennebec Water District* v. *Waterville*, 96 Maine, 234. But the defendants say that the Maine Water Company was "practically in the enjoyment of an exclusive franchise" because it had no competitor, although its franchise may not be legally an exclusive one, citing *Gloucester Water Co.* v. *Gloucester*, 179 Mass. 365. And we say that the fact that the company was doing its business without competition may and should be considered by the appraisers when they are valuing the property of the defendant as a going concern. That fact is one of the characteristics of the going business, and may enhance its value. We are considering now only

the legal situation of the company. There is a difference between a franchise which is practically exclusive and one which is actually exclusive, as there is a difference between uncertainty and certainty. The distinction is vital in principle, and it may be important in fixing value. Of how much or how little importance it is can only be estimated by the appraisers after hearing the evidence.

Again, the charters under which the company operates are subject to repeal by the Legislature. R. S., c. 46, § 23. The franchises are not perpetual and irrevocable. It may be that it is extremely unlikely that the Legislature would repeal the charters, without providing for compensation in some way. The probabilities are fairly open to consideration. But the legal condition exists. It is a factor to be considered for what it is worth.

Having considered these general propositions, which are far reaching and which affect substantially all of the requested instructions, it will now be comparatively easy to pass upon the several requests in the form in which they are presented.

I. PLAINTIFF'S REQUESTS.

The plaintiff, in request 2, asks that the actual cost of the plant and property together with proper allowances for depreciation be declared to be legal and competent evidence upon the question of the present value of the same. We so hold. It is competent evidence, but it is not conclusive. It is not a controlling criterion of value, but it is evidence. *National Water Works Co.* v. *Kansas City*, 62 Fed. Rep. 853, 27 L. R. A. 827; *Smyth* v. *Ames*, supra; *San Diego Land Co.* v. *National City*, supra; *Cotting* v. *Kansas City Stock Yards Co.*, supra; *West Chester Turnpike* v. *West Chester County*, 182 Pa. St. 40; *Griffin* v. *Goldsboro Water Co.*, 122 N. C. 206, 41 L. R. A. 240. Of course this element is subject to inquiry as to whether the works were built prudently, and whether they were built when prevailing prices were high, so that actual cost, in such respects, may exceed present value. *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739.

The remainder of plaintiff's request 2 asks that the companies be directed to produce their book accounts and other documentary evi-

dence bearing upon the question of cost before the appraisers. This request raises no question of law and cannot be considered by us.

Plaintiff's request 3 ought not to be given in the form in which it is presented, which is that "under no circumstances can the value of the plant of the companies be held to exceed the cost of producing at the present time a plant of equal capacity and modern design." Among other things, it leaves out of account the fact that it is the plant of a "going concern," and it seeks to substitute one of the elements of value for the measure of value itself. *Montgomery County* v. *Bridge Company*, 110 Pa. St. 54. We shall discuss further the competency of the cost of reproduction when we consider defendants' requests 6 and 7.

We have already discussed sufficiently the first two propositions of plaintiff's request 4. The deduction sought to be established by the third proposition is that "the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property or of their franchises and are immaterial." We cannot say this as a matter of law. As a matter of proof, we think the evidence of such facts is admissible and material. The value of the evidence, however, depends upon whether the appraisers shall find that the rates charged have been reasonable or not. If reasonable, these facts furnish one important test, but not the only one, in fixing the present value of plant and franchises. *Monongahela Co.* v. *United States*, supra. But if the charges have been excessive, past receipts should not be regarded by the appraisers as a proper test of value. *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. Rep. 850.

We omit plaintiff's request 5. In argument the counsel on both sides seem to agree that the selling price of the capital stock of the water company is not to be considered as affecting the valuation of the property. The plaintiff does so in part on general principles; the defendant, because of the special circumstances of this particular case; and it is immaterial to the present discussion which is right. If the claim of the defendants that the entire capital stock of the Waterville Water Company is owned by the Maine Water Company, and that the capital stock of the Maine Water Company represents

not only the property in the Waterville system, but also of many others in other towns and cities of the state, is found to be correct, certainly the selling price of capital stock will afford no aid in fixing the value of the Waterville system.

We think the appraisers should be instructed in accordance with plaintiff's requests 6 and 10, without any qualification. They ask that the quality of the water furnished and of the service rendered, and the fitness of the plant and of the source of water supply to meet reasonable requirements in the present and future, be deemed material upon the question of present value.

We have already discussed sufficiently plaintiff's requests 7 and 8, and to some extent its request 9. This last request is, that "the appraisers shall regard the franchises of the companies as entitling them to continue business as a going concern, but subject to all proper legal duties governing public service companies." So far we think the instruction should be given. *National Water Works Co.* v. *Kansas City*, 62 Fed. Rep. 853, 27 L. R. A. 827; *Newburyport Water Co.* v. *Newburyport*, 168 Mass. 541. The matter of exclusive franchise referred to in this request has already been disposed of. The remainder of the request is that "the franchise shall not be otherwise appraised or valued." In its present form, this is not approved. It is, to say the least, likely to be misleading. If it means to include all of the franchises of the companies, so far as they have been disclosed to us, it is unobjectionable. But if it is intended to include all franchises not now exercised by the going concern, or future extensions of the use of franchises now exercised, it is objectionable. The plaintiff will take all of the franchises of the companies, except the franchise to be a corporation, and for all of these franchises of which it will be deprived, the Maine Water Company will be entitled to just compensation.

Plaintiff's request 11, in so far as it says that "in fixing the value of the companies' franchises the appraisers may give such regard as is demanded by ample and fair public policy to the past investment, risks and services of the companies, and to the reasonably just expectations which those who made the investment had in mind when so investing," is approved. We have already discussed this proposition

in a former part of this opinion, relating to reasonable rates, to which we think it properly relates.

The remainder of request 11 is not approved. It is that in fixing the value of the companies' franchises the appraisers may give regard "to the faithfulness or unfaithfulness shown by the companies in the performance of their public duty and obligation to furnish pure water at reasonable rates." We do not think that past faithfulness or unfaithfulness in the exercise of a franchise bears any such relation to the present value of it as to make it a proper matter for consideration. It is the franchise as it now exists which is to be taken and paid for. It is the right to do business now, under and within the charter, which must be appraised, irrespective of the past use of that right. If past misconduct has incidentally resulted in lessened business, that matter will have due consideration under other heads. But in this process of condemnation of property, the owner is not to be punished for past misuse of it.

Requests 12 and 13 may be considered together. They seem to imply that the companies in the past have been unfaithful in the performance of their public duties, both by furnishing impure water and by charging excessive rates, and by reason thereof, it is claimed that the companies "have rendered themselves liable to such processes as are appropriate to work legal forfeiture" of their rights and franchises, and that this liability to forfeiture is to be considered in fixing the value of the property. We cannot give our assent to this doctrine. If these franchises have become forfeitable for misbehavior of the companies, the remedy is found in quo warranto brought by the State, and only by the State. Any individual, affected by the wrongful conduct of the companies, might have invoked the intervention of the State. But this does not seem to have been done. On the contrary, it is proposed to take these franchises as they are. Even if forfeitable, they have not been forfeited. They are in full force and vigor. They must be valued as living franchises, not as dead or moribund. Whether the State would ever institute process for forfeiture, and if it did, whether the court would find the facts as the appraisers might, are questions so very uncertain, that an inquiry concerning them must be purely speculative and unfruitful. To

permit this inquiry would be to permit the appraisers to speculate upon what the judgment of the court might be at another trial, under other conditions. We think the franchises must be appraised as they are now held and used by the companies. Whatever the past misconduct may have been, we do not see how it can affect the value of the present right and ability to exercise the franchises. We think, however, that this liability to forfeiture arising from misconduct is to be distinguished from liability to legislative repeal to which we have already alluded. The latter is a limitation of the franchise which inheres in the franchise itself, from its creation. There is no franchise, except as so limited. It is the only kind of a franchise the companies ever held.

Plaintiff's request 13 asks that if it be found that the companies have actually received more than reasonable rates for the services rendered since operations began, then the amount of such excess shall be deducted from the amount to which the companies would otherwise be entitled. It is not approved. It is sufficient to say that this is not a process of accounting, but one of condemnation of property, for which the owner is entitled by statute and Constitution to just compensation at its present value, without any deduction.

II. DEFENDANTS' REQUESTS.

The first paragraph of the defendants' requests presents no question of law, and the second request has already been considered.

Their request 3 is "that any increase of pecuniary obligation or burden or duty, or any damage to, or impairment of the value of its remaining property or franchises, in any way resulting to said Maine Water Company by reason of the exercise of the right of eminent domain contemplated by said act of 1899, should be considered by said appraisers and just compensation therefor should be included." It seems to be assumed in argument, and we assume, that this request is based upon the fact that the Maine Water Company is the owner of other water systems situated at other places. Of course it cannot refer to any remaining property at Waterville, for there will be none. The argument is that by depriving the company of its Waterville plant, the general expense of supervision and management will still

remain practically unchanged, and will be a proportionately heavier burden upon the remaining property. The language of counsel is that "the economy and efficiency of administration which are sought and obtained by the combination are inevitably more or less impaired by breaking it up, either in whole or in part." The compensation asked is not for property taken, but for incidental damages to other property having no physical connection with, or contiguity to, that taken, and having no relations whatsoever with the property taken except those which grow out of common ownership. The defendants rest their claim upon the familiar doctrine of damages for severance, namely, that when a portion of a property is taken, the impaired value of the remainder, by reason of the severance, may and should be considered, and compensation awarded therefor. But we think this case cannot be brought within that rule. That rule applies only when the property taken and the property left may fairly be considered one property, and not when they are separate and distinct. In *Bangor & Piscataquis R. R. Co.* v. *McComb*, 60 Maine, 290, KENT, J., after stating the reasons for allowance of damages for severance, uses this language:—"The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, *confined to that lot*, occasioned by the taking of his land. The paramount law intends that such owner, *so far as that lot is in question*, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if *that lot of land* had remained entire, as his own property. How much less is *that lot* . . . worth . . . than the whole lot intact was the day before such taking?" The implication of this language clearly is that the parcels must be of the same property, in that case, the same lot. In 10 Am. & Eng. Ency. of Law (2d ed.) p. 1166, Tit., Eminent Domain, it is said that "to entitle an owner to recover damages to the whole tract when a part of his lands have been taken, there must have been a unity of contiguous parcels. The land must have been together; all of it must have been used as a single tract." In 3 Sedgwick on Damages, 8th ed., at p. 413, the rule is laid down that "in assessing damages or benefits, the inquiry is limited to the tract of land immediately affected. This is held to be so

much as belongs to the proprietor whose land is taken, and is continuous with it, and used together for a common purpose. . . . . When land is divided into blocks by the owner, and dealt with as such by himself and purchasers, it is held that each block is to be considered as a separate tract in assessing damages." *Laflin* v. *Chicago, etc., Ry.*, 33 Fed. Rep. 415. Nor are the two cases, which the learned counsel for the defendants say are the only ones found in which the question of damages for the dismemberment of a public service corporation by a compulsory taking has been raised, opposed to this doctrine. In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, the general government was proceeding to condemn under the power of eminent domain, one of the seven locks and dams owned by the Navigation Company. The court, calling attention to the doctrine of damages by severance, said, "This is a question which may arise possibly in this case, if the seven locks and dams belonging to the Navigation Company *are so situated as to be fairly considered one property*, a matter in which the record before us furnishes no positive evidence. It seems to be assumed that each lock and dam by itself constitutes a separate structure and separate property, and the thoughts we have suggested are pertinent to such a case." The other case so cited and referred to by counsel is *U. S.* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668. But this case seems rather to be within the rule of the "single tract" cases. The court simply says: "If the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts might enter into the question of the amount of the compensation to be awarded." It was alleged by the company that the effect of the condemnation of the strip of land in question would be to cut off a particular branch railway or extension belonging to it, and destroy its continuity and prevent its construction. It seems to us clear that the several parts of an electric railway system may properly be regarded as a single property. No other authority cited by the defendants upon this point aids them. The damages occasioned to the company by the taking of the Waterville property, considered with respect to its other and distinct property, if any, will be incidental and consequential. And

such damages are not within the statutory and constitutional requirements of "just compensation." *Cushman* v. *Smith*, 34 Maine, 247; *Brooks* v. *Cedar Brook Imp., etc., Co.*, 82 Maine, 17, 17 Am. St. St. Rep. 459, 7 L. R. A. 460.

The defendants' request 4 should be given. It relates to property not directly connected with the water system or plant. It should be appraised "at its fair market value, not at a forced sale, but at what it is fairly worth to the seller, under conditions permitting a prudent and beneficial sale." *Chase* v. *Portland*, 86 Maine, 367; *Somerville R. R. Co.* v. *Doughty*, 22 N. J. L. 495; 10 Am. & Eng. Ency. of Law, 2nd ed., 1152; *Monongahela Navigation Co.* v. *United States*, supra; *Montgomery County* v. *Bridge Co.*, supra; *West Chester Turnpike* v. *West Chester Co.* 182 Pa. St. 40. In *Chase* v. *Portland*, our own court quoted with approval from *Lawrence* v. *Boston*, 119 Mass. 126, the following: "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not value obtained from the necessities of another. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy." *Palmer* v. *Penobscot Lumbering Association*, 90 Maine, 193. The statute provides for fixing the "just compensation" for the property taken at its fair and equitable value, but it does not provide for compensation for consequential damages,

Defendants' request 5 has already been discussed. It should not be given except as already qualified. We hold that the construction cost is admissible, but not controlling, on the question of present value. It must be borne in mind, as said by Mr. Justice Brewer in *National Water Works Co.* v. *Kansas City*, supra, that "original cost and present value are not equivalent terms," and that besides the elements of wear and tear, and depreciation in physical structure or in value, the property may have cost more than it ought to have cost. *San Diego Land Co.* v. *National City*, supra.

Defendants' requests 6 and 7, as limited in their brief, are that neither the reproduction cost of the existing plant, nor the cost at present of a new one differently constructed, but equal or even

superior in efficiency to the one now existing, is the legal criterion of the total values to be awarded, or even of the plant or structure value. This is undoubtedly true, if by "criterion" is meant a sole or controlling test of present value. There are other elements besides cost of reproduction or replacement which affect present value. The present value of the property is of vital importance, for, as we have seen, the value of the property at the time it is being used for the public is one of the elements essential in determining what are then reasonable rates, and question of franchise value depends upon the rates which may reasonably be charged. *San Diego Land Co.* v. *National City*, supra. We think it will be proper for the appraisers to consider what the existing system can be reproduced or replaced for, because evidence of cost of reproduction will have some tendency to show what is the present value. Such cost will not, however, be conclusive. There are other elements still to be noticed, which should be considered in fixing present value. In *Newburyport Water Co.* v. *Newburyport*, the cost of the reproduction of all of that part of the physical plant used in pumping and delivering water, less any depreciation, was considered without objection, and seems to have been approved by the court. *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365; *Smyth* v. *Ames*, supra. But the mere cost of reproduction is not enough. Judge Brewer, in *National Water Works* v. *Kansas City*, supra, calls attention to two additional elements, one, that it is a completed structure connected with buildings prepared for use, and the other, that the company is a going concern. He says, p. 865, "Nor would the mere cost of reproducing the water works plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets — in other words the cost of reproduction — does not give the value of the property as it is to-day. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning in consequence

thereof the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that the 'fair and equitable value' is something in excess of the cost of reproduction."

The court, in *San Diego Water Co.* v. *San Diego*, 118 Cal. 556, 62 Am. St. Rep. 261, 38 L. R. A. 460, holds that the method of fixing present value by ascertaining cost of replacement is not applicable to property of this character, because, chiefly, the construction and development of water works is a matter of growth. At the outset the company owning them is a pioneer. It must keep pace with or anticipate municipal growth. The works must be constructed, and usually no reward can be realized by the constructors until some time has elapsed. In the meantime, as the city grows, the facilities of building such works are increased, and the cost of construction thereby diminished. But we think that, at the most, these considerations suggest only that other elements are also taken into account in fixing present value. So far as they relate to the original hazard, we have discussed them in an earlier part of this opinion. We think the inquiry along the line of reproduction should, however, be limited to the replacing of the present system by one substantially like it. To enter upon a comparison of the merits of different systems, to compare this one with more modern systems, would be to open a wide door to speculative inquiry, and lead to discussions not germane to the subject. It is this system that is to be appraised, in its present condition and with its present efficiency.

Defendants' request 8 is in effect that in estimating even the structure-value of the plant, allowance should be made, in addition to the value as otherwise established, for the fact, if proved, that the water system is a going concern, with a profitable business and good-will already established, and with a present income assured and now being earned. We think this instruction, with a modification to be noted, should be given. *Newburyport Water Co.* v. *Newburyport*, supra; *National Water Works Co.* v. *Kansas City*, supra; *Gloucester Water Supply Co.* v. *Gloucester* supra; *Bristol* v. *Water Works*, 19 R. I. 413, 49 At. Rep. 974. But the term "good-will" may be mislead-

ing. Lord Eldon said that good-will is nothing more than the probability that the old customers will resort to the old place. *Crutwell* v. *Lye*, 17 Ves. Jr. 335. See *Flagg Mfg. Co.* v. *Holway*, 178 Mass. 83. Under any possible definition it involves an element of personal choice. This phrase is inappropriate where there can be no choice. So far as the defendants' system is "practically exclusive," the element of "good-will" should not be considered. *Bristol* v. *Water Works*, supra.

The defendants, in request 9, ask that in determining the amount to be added to structure-value, in consideration of the fact that the system is a going concern, the appraisers should consider, among other things, the present efficiency of the system, the length of time necessary to construct the same de novo, the time and cost needed after construction to develop such new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as such going concern, would accrue to a purchaser during the time required for such new construction, and for such development of business and income. We think this instruction should be given. These are all proper matters for consideration "among other things." They are not controlling. Their weight and value depend upon the varying circumstances of each particular case. Of course a plant, as such, already equipped for business, is worth more, if the business be a profitable one, than the mere cost of construction.

The defendants' request 10 should also be given. It asks, in effect, that in addition to structure-values already considered, the appraisers should consider all the franchises, rights, and privileges now held by the Maine Water Company within the Kennebec Water District and Benton and Winslow, and allow just compensation for them as such. This valuation, however, must be made with reference to the character and duration of the franchises. So far as appears, they are not exclusive, and they are subject to repeal. This we have already discussed. A franchise is property and it has value. In this case the franchises have value in themselves, inasmuch as they give the owner the privilege of doing what is called a profitable business. We have already shown that the existence of such franchises may also enhance the

value of the plant by which they are exercised It should be remembered, however, that a franchise has only one appraisable value, and care should be taken that that value is appraised only once.

The defendants' request 11 should be given in this case. It has been given in part already. It is that the value of a franchise depends upon its net earning power, present and prospective, developed and capable of development, at reasonable rates, that the value to be assessed is the value to the seller and not to the buyer, and that "just compensation" means full compensation for everything or element of value taken. *Monongahela Nav. Co.* v. *United States*, supra. The appraisal must be made having in mind what we have already said concerning the character and duration of the franchises and the reasonableness of rates. While with these limitations, the owner is entitled to receive the value of the franchises, having reference to their prospective use as now developed, and to the future development of their use, consideration must also be had of the fact that further investment may be necessary to develop the use, and of the further fact that at any stage of development the owner of the franchise will be entitled to charge only reasonable rates under the conditions then existing. But, subject to such limitations, we think it should be said that the owner is entitled to any appreciation due to natural causes, such as, for instance, the growth of the cities or towns in which the plant is situated. *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. Rep. 850.

Defendants' request 12, "that the fact that the franchises, rights and privileges of said Maine Water Company are to be taken under this Act in no respect destroys or impairs their value to said Water Company, and cannot diminish or affect the amount to be awarded as just compensation therefor," is approved, and the instruction should be given.

Subject to the suggestions we have made under defendants' request 11, their request 13 is approved, and the instruction should be given. It is as follows:—"That in estimating said franchises, and the present and future net earning power included therein, the appraisers should duly weigh the nature and extent of these franchises, rights and privileges, whether the same are perpetual or otherwise; also, so far as proved, the rights of the Maine Water Company under all

existing contracts and the value thereof; the extent of existing business and of the net incomes or revenues now derived or derivable therefrom, the existing demand for new and additional services, and for the development and increase of said business, incomes and revenues, the past, and probable future, growth or decay of the territory now served, or capable of being served under said franchises, in population, in wealth, and in needs and uses for water to be supplied by some water system, and the past, and probable future, increase or decrease in said net incomes and revenues as affected by these or other surrounding conditions; also the fact that by said taking said Water Company will be wholly and forever deprived of all said franchises, rights, privileges, earning power, incomes and revenues, and that it is the duty of said appraisers to make, in their sound judgment, just and full compensation to said Water Company for all the same."

Defendants' request 14, is as follows:—"That the true measure of value, under the terms of this Act, and under the requirements of the Constitutions of this State and of the United States, is just and full compensation to said Water Company for each and everything of value of which it is to be deprived by this taking; that in addition to the special property covered by request 4, the plant, property, franchises, rights and privileges now held by said Water Company within the territory embraced by this Act, contain distinct elements of value, first, as an asset, and, second, as a source of income, having, or not, present and prospective net earning power; that by the taking under this Act said Water Company will be deprived wholly and forever, both of said asset, and of said source of income; that just compensation to said Company for what is thus compulsorily taken from it requires that the sum to be awarded as a substitute therefor shall be the full equivalent of everything taken, both in value as an asset, and in net earning power, and such a sum as, in the sound judgment of the appraisers, will be the full money equivalent of all the plant, property, franchises, rights and privileges aforesaid, and, at the same time, if prudently invested at fair current rates of interest, will yield to said Company the same net incomes and revenues, and for the same term, that it will be deprived of by this taking; the net earning power, incomes and revenues aforesaid to be determined under reason-

able water rates, after due allowance on the one hand for operating expense and maintenance or depreciation, and, on the other hand, with due regard to the probable future increase or decrease thereof under all conditions affecting the same."

Some portions of this request have already been considered so fully that it is unnecessary to repeat. It is doubtless true that the property to be taken, both plant and franchises, are to be appraised, having in view their value as property in itself and their value as a source of income. The physical property has value irrespective of the franchise, and the franchise without reference to the physical property. But these two kinds of value practically shade into each other. The value of the physical property is enhanced by the existence of franchises which make it usable. The value of franchises is enhanced by the existence of physical property by which they may be profitably exercised. There are these items of property, but only one entire system. There are all of these elements of value, from which is to be estimated the value of the entire property, tangible and intangible, as a whole. The plaintiff is not to take the physical property without the franchises, nor the franchises without the physical property. It will pay one gross sum as an entire value, and take all the property. The consideration of the elements will be useful only as it will enable the appraisers to fix the just compensation to be paid for the entire property as a whole.

But we cannot assent to the proposition that the capitalization of income even at reasonable rates can be adopted as a sufficient or satisfactory test of present value. Such a capitalization would fix at the present time a specific value which would continue for all time to come, as a fixed and unvarying source of income, no matter how conditions may be changed.

Our attention has been called to no case resting on the same principles as this one does, where the capitalization of profits has been adopted as the test of present value, certainly not in this country. Take for instance, the case of *Edinburgh Street Tramway Co.* v. *Lord Provost*, Appeal Cases, 1894, p. 456, cited by defendants. It does not support the doctrine. In that case the arbitrator declined to value the tramway lines by capitalizing the rental, and upon appeal,

his assessment was affirmed and the appeal dismissed. It was held that the statute under which the proceedings were had limited the appraisal to construction value, which the arbitrator had considered in the light of the fact that the tramways were then successfully constructed and in complete working condition; in other words, that the company was a going concern. Lord Watson, in the same case, at p. 475, said that valuation by rental "is not a satisfactory method in the case of a tramway line which has never been let, and has no competing line within its district." How much importance is attributed to the last suggestion is not stated. See *National Water Works Co.* v. *Kansas City*, 62 Fed. Rep. 853, supra; *Newburyport Water Co.* v. *Newburyport*, 168 Mass. 541. If the franchises were exclusive, if they were perpetual, and if it could be known that what are reasonable rates now would continue to be reasonable, there would be more ground for sustaining such a test. But the franchises are not exclusive, competition is possible, even, as the event has shown, more than probable. They are not perpetual, but may be repealed. And what may be reasonable rates at any given time will depend upon conditions which not only may vary, but are likely to vary. Therefore the basis for capitalization is too uncertain to afford a satisfactory test of value. By this, we do not mean to say that, while not a test, present and probable future earnings at reasonable rates are not properly to be considered in determining value. We have already stated that they are.

Defendants request 15 raises no new question of law. It is sufficient to say the Constitution of the United States requires that just compensation should be made to said Water Company for all its property of every nature taken under the Act in question at its full value, not to the taker, but to the seller.

To conclude. The appraisers should be instructed to receive and consider all evidence offered, so far as admissible under the general rules of law, which is pertinent under the rules stated in these requests, so far as they have been approved by this court, and as limited or explained in this opinion.

So ordered.

JOHN N. STAFFORD, In Equity *vs.* GEORGE H. MORSE.

Somerset. Opinion December 29, 1902.

Mortgage. Foreclosure by Publication. Time of Record. Evidence. R. S., c. 7, § 15; c. 73, § 28; c. 90, § 5; c. 91, § 2.

1. When it is sought to foreclose a mortgage on real estate by publication, the foreclosure will be ineffectual, unless it appears by record that a copy of the printed notice and the name and date of the newspaper in which it was last published were recorded in each registry in which the mortgage deed was or by law ought to have been recorded, within thirty days after such last publication.
2. The time of record must appear of record; and when the record is silent, it cannot be shown by evidence aliunde the record.
3. When the record is silent as to time of recording, it cannot be amended after the thirty days have expired so as to show that the recording was within the thirty days.

On report. Bill in equity to redeem a mortgage. Sustained.

This was a bill in equity for the redemption of a mortgage of real estate. The bill, answer, notice of foreclosure, record and certificate of the register of deeds, demand for an account and response, were put in evidence.

The plaintiff offered to prove that he had no knowledge of where the newspaper, in which the notice of foreclosure appeared, was printed and published; and it was agreed that the same should be taken as proved if the evidence was legally admissible.

The defendant offered to prove, by oral evidence, by the production of the mortgage, by assignments and quit-claim deed, by the original notice of foreclosure, a copy of which is on the register's certificate, by the production of the newspapers in which the notices of foreclosure were printed and published, by introduction of the records of the registry of deeds of Somerset County, in addition to other evidence stated in the report, all the allegations set out in his answer, to establish the fact of foreclosure of the mortgage—the same to be taken as proved if legally admissible.

The defendant also asked leave to have the register of deeds amend his record and certificate of foreclosure in accordance with the facts stated in his answer, which was to be done if legally admissible.

E. N. Merrill, for plaintiff.

J. W. Manson, for defendant.

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

SAVAGE, J. Bill in equity to redeem from a mortgage. The defendant holding under the mortgagee claims an absolute title through a complete foreclosure by publication. The plaintiff denies that the mortgage was legally foreclosed. And this is the sole issue here. The plaintiff urges several objections to the foreclosure proceedings, only one of which do we consider, as we think that one is necessarily fatal.

The statute, R. S., chap. 90, § 5, requires one who seeks to foreclose a mortgage by publication, to cause a copy of the printed notice, and the name and date of the newspaper in which it was last published, to be recorded in the registry of deeds in which the mortgage deed is, or by law ought to be recorded, within thirty days after such last publication. That the printed notice was recorded in this case is not in dispute. The defendant says in his answer that it was recorded within thirty days after the last publication. But the certificate of the register, which by statute is made prima facie evidence of the fact of such publication, does not prove the allegation. It is not dated, and there is no record evidence that the printed notice was seasonably recorded. By statute, every instrument is "considered as recorded" at the time when the minute of its reception is made by the register upon the instrument itself. R. S., c. 7, § 15. In order to effect a legal foreclosure, all conditions required by statute must be strictly performed. *Freeman* v. *Atwood,* 50 Maine, 473; *Bragdon* v. *Hatch,* 77 Maine, 433; *Hollis* v. *Hollis,* 84 Maine, 96; *Belfast Savings Bank* v. *Lancey,* 93 Maine, 422. And to support a foreclosure title, the performance of all statute conditions must be proved.

The defendant seeks to supply the want of record evidence by oral evidence, or by an amendment of the record. And it is agreed by the parties that if this can legally be done, it is to be regarded as done. We are brought, therefore, to a consideration of the question whether evidence aliunde the record is admissible, when the record is silent, to prove that the printed copy was received for record within thirty days from the last publication, or whether that fact must appear upon the record itself. Much has been said in argument upon the question whether the statute contemplates that the register's certificate of publication should be recorded. The defendant contends that it does not, and then argues that, ex necessitate rei, the time of recording the printed copy must be proved aliunde. It is true, that there is no statute specifically requiring registers to record the time when notices of foreclosure are received for record, either by certificate or otherwise. So there is no statute requiring registers to record upon the book where the instrument is recorded, the time when any other instrument is received. Yet it is believed that throughout the entire history of this State, registers have well-nigh universally recorded, and have regarded it as a part of their duty to record, on the book, with the record of the instrument, the date on which it is received for record, which, of course, is the date of record; and that failure to do so, if any, has been due to inadvertence. The very universality of the practice for so many years is of itself significant of the proper interpretation of the statutes of registry. It is the interpretation which seems to have suggested itself to all concerned. The statute requires the register to minute on every instrument the time it is received for record. R. S., ch. 7, § 15; ch. 73, § 28. And the official memorandum seems to have been then regarded as a part of the instrument itself for recording purposes. The courts and the profession have invariably regarded the records of the date of receiving instruments for record as they appear in the books with the records of the instruments, as satisfactory and sufficient evidence to determine priority of title by priority of record; and yet unless these records are made as a part of the official duty of the registers, they are not evidence at all.

But if we were to concede the premises of the defendant, we do

not think it would necessarily follow that it need not appear of record that the printed notice of foreclosure was seasonably received for record. The design of the statute undoubtedly is that the record shall give notice of the foreclosure. To give notice of the foreclosure, it must give notice of the successive essential steps necessary to complete foreclosure, because if any are missing, it is not a foreclosure, and notice of such imperfect proceedings would not be notice of a foreclosure. A defective record is not notice. *Hill* v. *McNichol*, 76 Maine, 314. The time of recording is essential, because the foreclosure proceedings are null and void unless the printed notice is recorded within thirty days after the last publication. The argument, therefore, is not based upon any specific provisions of any statute, but rather upon what is believed to be the reasonable and proper, if not necessary, interpretation of the statute requiring registry of a published notice of foreclosure within thirty days. To re-state it, it is that registry within thirty days is essential to the very validity of the foreclosure. Ordinarily an instrument of conveyance becomes effective without any regard to the registry. It is valid whether registered or not. It conveys title whether registered or not. Registry merely serves to give notice to third parties. In law, it is notice. But a foreclosure does not become a foreclosure *unless* it is recorded, and recorded within thirty days. The record becomes a part of the muniment of title. And if there is no title by record within the thirty days, there never can be. Inasmuch as the time of record is essential to the validity of the title created by record, that also must appear of record, or else there fails to appear a complete record title. All that appears of record may be true, and yet no title. It is not a muniment of title. It does not prove title. One cannot set it up as the last step in the proof of a record title,— that is, a title not merely protected, but created by registry, without showing something that the record does not contain. The step is not long enough to reach across the chasm. Hence we think that the time of recording must appear of record.

It is suggested that the statute provision making the register's certificate prima facie evidence of the fact of publication raises a fair

implication that the fact of publication may be shown otherwise. Whether that be so or not, it is certainly true that the fact that there was no publication may be shown otherwise. It is prima facie evidence, but not conclusive. The certificate may be attacked, but is sufficient as far as it goes, if not attacked. Whether or not there may be a vital distinction in respect to the prima facie evidential force of the certificate, between the case of one who seeks to prove a title created by record, and who may stand with a record or fall for want of one, and that of him who would attack such a title, need not be decided. Here we are not concerned with the contents of the certificate, but with what it does not contain, or to speak more exactly, with the fact that it is not shown by record either in the certificate, or out of it, that the notice was recorded within thirty days from the last publication.

There being no record evidence that the printed notice was recorded seasonably, can the want of it be supplied by evidence aliunde? We think not. Besides the reasons already stated, there is a strong reason to be deduced from the very purpose of our system of registration of land titles, and that is, certainty and security of land tenure. The stability of land titles depends in a large degree upon the certainty of record evidence.

In *Chase* v. *Savage*, 55 Maine, 543, a mortgagor sought to extend the time when foreclosure would become absolute by showing that the mortgagee had fraudulently misstated to him the time when the right of redemption would expire. The court, after saying that the claim was not sustained by the evidence, added words which are peculiarly appropriate here. "Besides," the court said, "the record was the only fountain from which such information could flow. To that place all parties interested could and must resort. Otherwise the record, designed to protect the interests of all, becomes a nullity, since it might be avoided by parol testimony, or the weight of testimony as judicially decided, based upon the imperfection of human memory, rather than the recorded certainty."

Nor can the record be now amended. The record which makes a foreclosure legal and complete must be made within thirty days from the last publication. The record as it is on the last one of these

thirty days is the record that must stand. No later amendment could be recorded within the thirty days, and so be in compliance with the statute requirement. A record which is a muniment of title, and which must exist as such within thirty days, or not at all, cannot be subsequently amended so as to make that good, which never was good within the thirty days.

The foreclosure relied upon by the defendant is, therefore, ineffectual to give him absolute title. It is unnecessary to decide, and we do not decide, the other questions discussed by counsel, namely, whether the publication of notice as described in the register's certificate was sufficient, and if not, then whether proper publication in fact may be otherwise shown.

The plaintiff is entitled to redeem. In accordance with the stipulation, the case is to be remanded to the court below to ascertain the amount due on the mortgage.

Bill sustained with costs.

Case remanded in accordance with stipulation.

EMERY, PEABODY and SPEAR, JJ., dissenting.

We dissent for the following reasons among others.

I. Our system of registration of titles is wholly the creature of statute. The registering officer is purely a statutory officer. He has only statutory duties which of course he must perform carefully and faithfully. The statute requires the register of deeds to minute on the instrument to be recorded the day and time of day when received. R. S., ch. 7, § 15. It does not require him to minute such time, or any time, on the page where the instrument is eventually recorded. The majority opinion concedes this, but proceeds to add that duty to his statutory duties. This seems to us legislation, which the constitution forbids the court to undertake.

The Legislature has required the town clerk, as a registering officer of chattel mortgages, to note the time *on the record* as well as on the instrument. R. S., ch. 91, § 2. It has made no such requirement of the register of deeds. There is no presumption that this omission

in the case of the register of deeds was unintentional, but if it be a casus omissus and much inconvenience and loss must result unless the omission be supplied, it is for the Legislature, and not for the court, to supply it. *Parsons* v. *Copeland*, 33 Maine, 370, 375. A general custom of registers of deeds to note upon the page of the record the time when recorded is assumed without evidence, but such a custom, if it exists, cannot make a statute nor add to one. Suppose this register to be indicted for this omission, will the court convict and punish him criminally because of the custom of other registers, without any statute? Can other registers make a law to convict him?

II. The register of deeds was authorized by the statute to record this notice of foreclosure if filed within thirty days from its last publication. For him to record it if filed after that thirty days would be an unauthorized and unlawful act. *De Witt* v. *Moulton*, 17 Maine, 418. The notice *was* recorded and there is nothing showing it to have been unlawfully recorded.

The ancient and favored rule is omnia rite acta præsumuntur. It has been repeatedly applied by this court to sustain interests otherwise imperilled by acts or omissions of public officers. *Treat* v. *Orono*, 26 Maine, 217; *Shorey* v. *Hussey*, 32 Maine, 579; *Blanchard* v. *Dow*, 32 Maine, 557; *Pratt* v. *Pierce*, 36 Maine, 448; *McClinch* v. *Sturgis*, 72 Maine, 468; *Snow* v. *Weeks*, 75 Maine, 105, 108; *Maxcy* v. *Bowie*, 96 Maine, 435. The majority of opinion, however, holds in effect that it must be presumed, not only prima facie but conclusively, that the record was unlawfully made, and that the register was guilty of an illegal act. No authority is cited in support, and we think none can be found.

III. The report of the case shows that the mortgagee in fact did all that the statute required of him to perfectly foreclose the mortgage. He caused the proper notice to be published in the proper newspaper, and within thirty days after its last publication furnished to the register of deeds a copy thereof to be recorded, and the register "received" it for record within that time. There was nothing more for the mortgagee to do, or that he could do. The register

was not his agent. The State then took charge of the procedure through its own agent, or officer, the register. The report authorizes us to assume that the register minuted on the copy of notice furnished him, the time when it was received, and hence when to "be considered as recorded." The only slip by anybody, according to the report, was the omission to also minute on the record the time when received, if that be a slip. This slip was not that of the mortgagee nor of his agent, but solely that of the State's officer, the register.

We think reason and authority both hold that the mortgagee having fully complied with the State's requirements should not suffer from a subsequent omission of the State's officer, but that the consequences should fall on the searcher, who after all only relies on such visible omission to establish his own title. We are to assume, as above stated, that the register minuted upon the copy of the copy of the notice the time when received for record. In *Gillespie* v. *Rogers*, 146 Mass. 610, 612, the court declared the law as follows: "If the recording officer places upon it (the instrument to be recorded) his certificate that it has been so received, even though he afterwards fails in his duty, by recording it inaccurately, by omitting material portions of it, or even by altogether suppressing it from the records, yet in contemplation of law the whole world has constructive notice of it, just the same as if it had been accurately copied in full upon the records. It is obvious that, under this rule, one searching the records may fail to find all that is necessary for his protection; but nevertheless he will be bound." See cases cited in that opinion, especially *Sykes* v. *Keating*, 118 Mass. 517, 519; also see *Monaghan* v. *Longfellow*, 81 Maine, 278; *Maxcy* v. *Bowie*, 96 Maine, 435; *Lewis* v. *Hinman*, 56 Conn. 55; *People* v. *Bristol*, 35 Mich. 28; *Nichols* v. *Reynolds*, 1 R. I. 30; *Chase* v. *Bennett*, 58 N. H. 428; *Mutual Life Ins. Co.* v. *Dake*, 87 N. Y. 217; *Bigelow* v. *Topliff*, 25 Vt. 273; *Steam Stone Cutter Co.* v. *Sears*, 23 Fed. Rep. 313; *Lytle* v. *Arkansas*, 9 How. (U. S.) 314; 1 Devlin on Deeds, 686. All the above cases and many others sustain the doctrine that the person seasonably filing the instrument for record is protected, and the consequences of the recording officer's subsequent omissions fall upon the searcher of the records. Only one case is cited in the

majority opinion on this point, *Hill* v. *McNichol*, 76 Maine, 314, in which there was not an omission, something left out, as here, but a complete record apparently full and correct, with nothing to suggest to the searcher any error or incompleteness. In the case at bar, the incompleteness was apparent and it was also apparent that the incompleteness was the error of the register. Even if it could not be presumed that the record was in fact seasonably made nothing appearing to the contrary, the record was made and was visible. It put the searcher upon inquiry if he doubted whether seasonably made. He should not base his title on such an omission.

The effect of the majority opinion is to deny the citizen, without fault of his, an acknowledged legal right earned by his full performance of every legal duty imposed upon him, and though not necessary to protect the rights of innocent third parties. This seems to us an injustice which could be easily avoided by a reasonable application of approved legal principles.

ROY J. BOSTON, by next friend, *vs.* SAMUEL BUFFUM, and others.

York. Opinion December 29, 1902.

Negligence. Machinery. Printing-press. Shafting. Steam Engine. Overloading Power. Contributory Negligence. New Trial.

A proposition which, if not mechanically impossible, is exceedingly improbable, should not be permitted to serve as the basis for the verdict of a jury.

Where a verdict is so manifestly wrong as to induce a belief that it was the product of misapprehension, bias or prejudice on the part of the jury, it should be set aside.

Plaintiff was operating a printing-press supplied with power by the same engine which operated the other machinery in defendants' box factory, printing strips of board for box covers. The lower jaw of the press falling after an impression made, it was the duty of the plaintiff to remove the printed strip from the platen with his right hand, and with his left during the upward movement, to put a new strip in place to be printed. He tes-

tifies that in the instance in controversy the press opened more slowly than usual and closed more quickly and did not give him time to take his hand out before it was caught, but testified to no jump and used no similar graphic word to suggest any such sudden motion of the lower jaw of the press as the word "jump" does. It is self-evident, and the previous action of the press under similar variations of the load on the shaft as described by the other witnesses, and the plaintiff himself, showed that the first effect of a sudden quickening in speed of the shaft would only be to cause the belt to slip and then to gradually accelerate the speed of the press.

Held; that a theory, that at the time when plaintiff was feeding the press its lower jaw gave a sudden jump, caused by a rapid increase in the speed of the main power shaft of the factory, and caught the fingers of plaintiff's left hand between the frame-work of the platen and the die before he could, by the exercise of due care, discover the danger and remove his hand, is not well founded.

Motion by defendant. New trial granted.

Case for injuries to the fingers of plaintiff's left hand which were crushed between the frame-work of the platen and the die plate of a printing-press in defendants' box factory, in North Berwick. Plaintiff's declaration was as follows:—

"In a plea of the case, for that the said plaintiff says the defendants are the owners of a box factory situated in said North Berwick and operated the same, on the ninth day of August, A. D. 1900; that the said plaintiff was employed by said defendants to work in their said box factory at a printing-press; that said plaintiff's duties consisted in feeding said press with the materials to be printed; that said printing-press was run by force transmitted by machinery connected with an engine which was used to furnish the motor power for said box factory; that it was the duty of said defendants to furnish said plaintiff with proper, safe, and suitable machinery and implements to work; that said defendants, wholly regardless of this duty, negligently and carelessly furnished this mill or box factory with an improper, dangerous, inadequate and defective engine, which furnished the motor power that run said printing-press; that by reason of said defendants' negligence and carelessness in furnishing said defective engine as aforesaid, said printing-press worked and run in an irregular, defective and dangerous manner, and opened and closed at irregular and deceptive intervals; and while said plaintiff was engaged in the work for which

he was employed by said defendants at said printing-press, and while he was in the exercise of due care and diligence, on the ninth day of August, A. D. 1900, at said box factory in said North Berwick said plaintiff's left hand was caught in said printing-press and crushed, the bones of said hand and wrist fractured and displaced, and said hand was seriously and permanently injured, and the plaintiff has thereby been prevented from doing any labor or using said hand; has been put to great expense for medicine and medical attendance, and has suffered great distress of mind and body, to the damage etc."

The defense was the general issue with a brief statement in effect alleging knowledge and assumption of the risk by the defendant, also contributory negligence.

The facts are stated in the opinion.

E. P. Spinney, for plaintiff.

In an employment like this it is absolutely necessary that the press close regularly; for the work is rapid, requiring great attention, and because the operator must naturally acquire a personal automatic motion in order to feed the press, and any sudden variation of the motion of the press would deceive the operator and thereby cause him injury. And this automatic motion of the operator and the deception a change of speed would cause, is admitted by the defendants' foreman.

The plaintiff says he was under these conditions in the exercise of due care and not guilty of any contributory negligence, because he did not know the press would jump, and so have the jury said by their verdict.

What is ordinary care, due care and diligence, and contributory negligence under the circumstances of the case, are not matters of law, but wholly for the jury where there is evidence produced. 16 Am. & Eng. Encly. of Law, 465, and cases cited: *Watson* v. *Portland & Cape Elizabeth Railway Co.*, 91 Maine, 584, 67 Am. St. Rep. 268, 44 L. R. A. 157; *Eagan* v. *Fitchburg Railroad Co.*, 101 Mass. 315, 317; *Garmon* v. *Bangor*, 38 Maine, 443; *Hooper* v. *Boston & Maine Railroad*, 81 Maine, 260; *Plummer* v. *Eastern Railroad Co.*, 73 Maine, 591, 592.

The defendant should have provided suitable machinery and kept the same in a safe condition, as employers are required by law to do, and should not have taxed the same beyond its capacity. *Buzzell* v. *Laconia Manufacturing Co.*, 48 Maine, 113, 77 Am. Dec. 212.

The damages are not excessive. *Verrill* v. *Minot*, 31 Maine, 299; *Mason* v. *Ellsworth*, 32 Maine, 271; *Blackman* v. *Proprietors of Gardiner and Pittston Bridge*, 75 Maine, 214.

The following verdicts for injuries to hand and loss of fingers were held not excessive,—"disability of fingers, $4500," *Bolden* v. *Jensen*, 70 Fed. Rep. 505; "3 fingers, $2400," *Savannah R. R. Co.* v. *Howard*, 91 Ga. 99; "2 fingers, $2500.", *Campbell* v. *McCay*, 3 Tex. 298; "3 fingers, $3000," *Neilson* v. *Marinette & M. Paper Co.*, 75 Wis. 579; "3 fingers, $4000," *Barg* v. *Bansfield*, 65 Minn. 355; "4 fingers, $7500," *Lake Shore R. Co.* v. *Hundt*, 41 Ill. App. 200.

In *Hastings* v. *Stetson*, 91 Maine, 229, 233, the court says: "In estimating damages for such injury much must be left to the sound judgment of the jury. Their judgment is entitled to respect."

Counsel also cited: *Frye* v. *Bath Gas & Electric Co.*, 94 Maine, 17, 18; *Allen* v. *Boston & Maine Railroad*, 94 Maine, 402; *Williams* v. *Gilman*, 3 Maine, 276; *Hunter* v. *Heath*, 67 Maine, 507; *Smith* v. *Brunswick*, 80 Maine, 189, 192; *Bernard* v. *Merrill*, 91 Maine, 358; *Tower* v. *Haslam*, 84 Maine, 86; *Dodge* v. *Dodge*, 86 Maine, 393; *Dutch* v. *Bodwell Granite Co.*, 94 Maine, 34; *Rhoades* v. *Varney*, 91 Maine, 222, 226; *Parks* v. *Libby*, 92 Maine, 133.

H. B. Cleaves and S. C. Perry; *B. F. Cleaves, H. T. Waterhouse and G. L. Emery*, for defendant.

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

SAVAGE, J. Action for personal injuries. The defendants were the owners and operators of a box factory in North Berwick. In the factory were two resaws, a planer, a groover, a cutting off bench, a nailing machine, a printing-press, and other machines, all belted to a single main shaft overhead. Power was supplied by an engine of

25 horse-power, which was connected with the main shaft by a single belt. The governor upon the engine was adjusted to a maximum or normal speed of 185 revolutions a minute. The printing-press, concerning which this controversy has arisen, was the Prouty press so-called. The die, or type, was placed in a nearly perpendicular position. The platen, upon which matter to be printed was placed, was fastened to a yoke, and constituted what some of the witnesses called the "lower jaw" of the press. The platen and yoke were so adjusted to the frame-work of the press that in operation they moved with a hinge-like movement, the hinge being at the bottom of the die. The outer edge of the platen, that is, the edge nearest to the operator who stood in front of the press, moved upwards, carrying the matter to be printed until it was impressed evenly against the die. Then the jaw opened and the platen and yoke went back towards a horizontal position. When closed, the frame-work of the platen was within three-eighths of an inch of the die. In opening or closing, the outer edge of the platen passed through a distance of eighteen inches. There were guards on the platen to keep in place the matter to be printed, and they were so situated that the operator in feeding the press would necessarily extend his hand into the jaw, about to the wrist. The belt connecting the printing-press with the main shaft was an inch and a half wide. The pulley on the main shaft was six inches in diameter, and the one on the press was twelve inches. The latter pulley was double, consisting of a loose pulley two inches in width, and a fast pulley of the same width. The press was started by shipping the belt from the loose pulley to the fast one. The exact weight of the platen and yoke is not known, but it was estimated, and we think fairly, at about 200 pounds. This weight, turning upon the hinge, had to be lifted by mechanical power for each impression. Its own weight helped to carry it back. Attached to the press was a balance wheel, forty inches in diameter, with a solid iron rim three inches across the face and four inches deep. The rim was supported by seven or eight solid iron spokes, each an inch in diameter. The weight of the balance wheel was fairly estimated, we think, at about 150 pounds. The balance wheel was upon the same shaft as the press pulley was, and consequently was turned with the

pulley. Ordinarily the press made about twenty impressions a minute. The plaintiff testified that it was twenty-two, and the defendant, that it was seventeen. But approximately, it took three seconds for the jaws of the press to open and close.

The plaintiff had been employed in the defendants' factory for a year and a half, and at the time of his injury was tending the press, and had been doing so for much of the time for six months. He was printing upon strips of board prepared for box covers. The strips were five and three-quarters inches long, three and three-quarters inches wide, and three-sixteenths of an inch thick. While the lower jaw of the press was falling, after an impression had been made, it was the duty of the plaintiff to remove the printed slip from the platen with his right hand, and with his left hand to place a slip to be printed, upon the platen, during its upward movement, and before it reached the point of impression.

The plaintiff, in argument, claims that while so placing a slip upon the platen, it made a sudden jump, owing to an acceleration of the speed of the main shaft, and that the fingers of his left hand were caught between the frame-work of the platen and the frame-work of the die, three-eighths of an inch apart, and severely injured. He claims that the speed of the revolutions of the main shaft was irregular, and that in this instance it suddenly increased, with the effect of making the lower jaw of the press *jump*. His testimony was that the press opened more slowly than usual, and closed more quickly, and did not give him time to take his hand out of the press before it was caught. He used no language as graphic or significant as the word "jump" is. And he attributes this sudden acceleration of speed to the fact that the engine was not possessed of sufficient power to carry evenly the load which was placed upon it. He says that on many occasions, while working on other machines, he had noticed variations in the speed of the shaft, or in the machines which took their power from the shaft, but that once and only once he had noticed a variation in the speed of the press itself. He does not characterize that variation as a "jump." Nothing in the case has any tendency to show that there was any fault in the engine and

machinery or their operation, except that the engine was too small for the load put upon it.

It is both proved and admitted that the engine was overloaded; that when all the machines were running, the speed of the engine was retarded below the normal speed fixed by its governor; and that when one or more machines ceased to run, and their load was taken off, the speed of the engine was thereby accelerated. And it is shown that this happened frequently, if not daily. But the defendants claim that this acceleration was gradual, and not sudden, like a jump; that the increase in speed was controlled in part by the governor upon the engine; and that particularly as to the press, its variations in speed were so regulated by the balance wheel as to make it mechanically impossible, belted as it was to the main shaft with a belt only an inch and a half wide, for the jaw of the press to make a sudden jump. It is claimed that the inertia of the balance wheels would so far resist a sudden acceleration of speed in the shaft as to cause the belt to slip momentarily upon the pulley, and that the quickening of the speed of the jaw would be gradual and not sudden. And the defendants contend that such an acceleration of speed would be noticeable to an operator who was duly careful, and that, in any event, it would be no greater acceleration than should have been anticipated by an operator of the age, intelligence and experience of the plaintiff, who knew of the frequent variations in the speed of the machinery; that the danger was obvious and appreciable, and hence that the risk was assumed by the plaintiff, under the rules of law governing the relation of master and servant.

And the bite of the chief contention between the parties in this case is whether, on the one hand, upon the plaintiff's testimony that the jaw "opened slowly and closed quickly," its speed was increased so suddenly and so greatly, like a jump, that the plaintiff could not reasonably have anticipated it, or have seen it, and so avoided the consequences, or whether, on the other hand, the acceleration of speed necessarily was gradual, and no greater than should have been anticipated by the plaintiff, with his knowledge of previous variations in shaft and press, and no greater than would have been noticeable to an attentive operator, with his eyes and his mind upon his work and the

press. For the defendants say, in this connection, that the injury to the plaintiff was due to his own careless inattention, which has been said to be the very essence of negligence. *Tasker* v. *Farmingdale*, 85 Maine, 524.

It is evident that the plaintiff's employment was one attended with danger. The general danger was obvious, and, without doubt appreciable by the plaintiff. To feed the press, moving normally, without endangering the hand of the plaintiff, required constant attention and watchfulness on his part. This is so, even if long continued work at the press had made the movements of his arm and hand more or less automatic, as he claims. And it is all the more his duty to be watchful, if he knew, as he says he did, that the speed of the engine was irregular. For if he knew that, he must have known also that an irregularity in the speed of the engine tended to create an irregularity in the speed with which the lower jaw of the press rose to meet the die.

There is no evidence that at the time of the accident any load was taken off the engine. It is only presumed. But we think that if there were any acceleration in the speed of the press, it might fairly be inferred, under the circumstances, that it was due to a lessening of the load of the overloaded engine. This would account for the quickening of speed testified to by the plaintiff, though we are unable to see how it can account for the change in the prior downward movement of the jaw, which the plaintiff says was slower than usual.

The defendants, as already stated, claim that the action of the governor upon the engine had a tendency to prevent a sudden increase of speed like a jump. But we are not satisfied that this would be so when the engine was overloaded. In such case the load, and not the governor, holds back the engine, and keeps its speed below the normal rate. If, however, the load is taken off, the engine increases its speed, the governor thereby is made to revolve more rapidly, and the centrifugal force tends to extend its arms towards a horizontal line. The mechanical effect of this movement is to shut off steam as the speed nearly approaches the maximum, and thereby prevent the speed exceeding the maximum. Now if at the time the load is taken off the engine, the speed is so near the maximum point that any fur-

ther increase would have the effect at the same time of shutting off steam by the governor, the governor may prevent a sudden jump. But we think if the speed was much below the maximum, the governor would not at once have any material effect in retarding speed.

We must, therefore, examine another claim of the defendants, namely, that the balance wheel on the press would itself prevent a sudden jump in the speed of that machine. The object of a balance wheel, of course, is to balance or regulate the speed of the machine, and to steady its movements. When the yoke and platen of this press were being raised to make an impression, their weight constituted a load to be lifted. That weight would have a tendency to retard the press. During the falling movement of the platen and yoke, the press, without a balance wheel, would recover its speed. There would, therefore, be a constant tendency towards an irregularity, an unevenness, in speed. The balance wheel is designed in part to overcome this unevenness. Its rapid revolutions, three for each printed impression, in this case, created a momentum which helped to carry the load up evenly, and also tended to prevent a quickening in speed while the platen and yoke were falling. It carried the machine over the bunches, so to speak. But a balance wheel regulates the movements of a machine not only as against uneven loads, but as against uneven power. Its momentum tends to carry the machine along evenly if the power slackens momentarily, and likewise its inertia resists and tends to retard any sudden acceleration of speed.

It appears clearly in this case that the inch and half belt running on the press pulley, unless very tight, would not lift the platen and yoke when lying down, without the aid of the momentum of the balance wheel. When the machine was at rest, the belt, unaided, would slip upon the upper or six inch pulley. To start the press, the operator had to start the balance wheel with his hand.

Now, under these conditions, the question is whether the jury were justified by any reasonable inference in finding that any acceleration of speed in the engine and main shaft could be transmitted by that belt to that press, and so overcome the inertia of that balance wheel as to give the platen and yoke a jump, such as the plaintiff

now complains of, and at a time when the platen and yoke were being lifted. We think they were not. We think the proposition, if not mechanically impossible, is so very improbable that it should not be permitted to sustain this verdict. Under the conditions which the case discloses, it seems to us self-evident that the first effect of a sudden quickening in the speed of the main shaft would only be to cause the belt to slip, and then gradually, and probably quickly, to increase the speed of the press. To the suggestion that perhaps the jump occurred when the platen and yoke were falling or at the point of momentary rest between the downward and upward movements, and so, when they were not a load upon the power, it is only necessary to say that that is not the jump which the plaintiff claims hurt his hand, nor does it describe the movements he testified about.

Our conclusion is strengthened by the fact that although there were frequent, daily, if not hourly, variations in the speed of the overloaded engine, caused by changing the load, and although the plaintiff had worked at this press for six months whenever it was in operation, and had observed the variations in the speed produced by the engine, he does not claim that he ever saw the press vary its motion before, except on one occasion; and of the several other witnesses who had worked on the press, none, as they testify, had ever seen it vary at all.

We also find it difficult to rid ourselves of the conviction that if the plaintiff had been paying proper attention to his work, with his mind as well as with his eyes, he would not have failed to discover his hand approaching the die, more quickly perhaps, but in season to have removed it, so far as respects any acceleration of speed which has been testified to, or would have been possible under the circumstances.

We think the verdict was clearly wrong.

Motion sustained. New trial granted.

LAURA A. CONLEY, and another,

vs.

INHABITANTS OF WOODVILLE.

Penobscot. Opinion January 1, 1903.

Pauper. Relief by Non-resident. R. S., c. 24, § 43.

No statute of this State creates any liability upon part of a municipality to re-imburse an inhabitant of another town for expenses incurred by him in such other town for the relief of a pauper, whose settlement is in the town sought to be held liable for such expenses. Consequently, an action for such expenses so incurred, not based upon any contract express or implied with the defendant town, cannot be maintained.

Agreed statement. Judgment for defendant.

Action for board for 77 days of an aged woman whose pauper settlement, for the purposes of this suit only, was admitted to be in the defendant town.

The case is stated in the opinion.

A. W. Weatherbee, for plaintiff.

Counsel contended that the defendant town, since with full knowledge of this woman's distressed condition, it suffered her to remain at the house of the plaintiffs without making provision for her, cannot avoid its responsibility, through the neglect of its overseers.

Hugo Clark, for defendant.

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

WISWELL, C. J. R. S., c. 24, § 43, provides that: "Towns shall pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice and request to the overseers, until provision is made for them." But neither this nor any other statute creates any liability upon the part of a municipality to re-imburse an inhabitant of another town for expenses

incurred by him in such other town for the relief of a pauper. *Warren* v. *Islesborough*, 20 Maine, 442; *Boothby* v. *Troy*, 48 Maine, 560.

In this case the plaintiffs, living in the town of Lincoln, sue the inhabitants of the town of Woodville, for the board of a person having her pauper settlement in the latter town, which board was furnished in the town where the plaintiffs reside, after notice to the defendant town. The statute gives no such remedy.

It is undoubtedly true that a town may become liable to an inhabitant of another town for relief furnished a pauper, by virtue of a contract between the town and the person furnishing relief, but no such contract, either express or implied, is shown in this case.

In accordance with the stipulation of the report, the plaintiffs will be nonsuited.

Plaintiffs Nonsuit.

MICHAEL J. FRYE, Admr., In Equity,

vs.

BATH GAS AND ELECTRIC Company, and others.

Sagadahoc. Opinion January 1, 1903.

Accident Insurance. Casualty Company. Indemnity. Liability to Third Persons.

The plaintiff's intestate, while in the employ of a gas company, sustained bodily injuries through the latter's negligence. In an action commenced by him against the gas company to recover damages for such injuries, his administrator, he having died pending the litigation, recovered judgment. This judgment has been in no part satisfied, and is now worthless, the gas company having made an assignment for the benefit of such of its creditors as became parties thereto, and neither the plaintiff nor his intestate ever became a party to this assignment.

At the time of the accident wherein the plaintiff's intestate received his injuries, the gas company had a contract with a casualty insurance company, wherein the latter had agreed to indemnify the gas company, for the period of time named therein, "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal,

accidentally suffered by any employee or employees of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, caused by the negligence of the assured, and resulting from the work described in the said schedule, subject to the following special and general agreements, which are to be construed as co-ordinate, as conditions." One of these conditions was as follows: "No action shall lie against the company (the insurer) as respects any loss under this policy unless it shall be brought by the assured himself to re-imburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

Upon a bill in equity brought by the judgment creditor against the gas company, the casualty insurance company and others, wherein the complainant prays that the insurance company may be compelled to pay to the complainant the amount of his unsatisfied judgment, *held;* that the contract of the insurance company was not one of insurance against liability, but of indemnity against loss by reason of liability; that it was not the object or intention of the contracting parties that the insurer should guarantee the gas company's liability for negligence to its employees; that the undertaking of the insurer was to re-imburse or make whole the assured against loss sustained by it on account of its liability to its employees for negligence; and that independently of the condition in the contract of insurance above quoted, the court would be compelled to construe this contract as one of indemnity only.

Also; that there can be no doubt about the meaning of the language of the condition above quoted, and no question about the right of the contracting parties to insert such a provision in their contract for the purpose of making clear the nature and limit of the liability of the parties or either of them; that by this unequivocal language in the condition above quoted the undertaking of the insurer was expressly limited to liability in an action brought by the insured "to re-imburse him for loss actually sustained and paid by him."

See *Frye* v. *Bath Gas, etc., Co.*, 94 Maine, 17.

On report. Bill dismissed.

Bill in equity against the Bath Gas and Electric Company, its assignees under a common law assignment, the trustee of a mortgage given by the Gas Company to secure its bonds, and the Fidelity and Casualty Company, alleging that the latter named company refuses to pay the amount of the judgment recovered by the plaintiff (see *Frye* v. *Bath Gas, etc., Co.*, 94 Maine, 17) and that the Gas Company, its transferee, and its assignees, neglect to enforce the contract with the Casualty Company, or to pay the amount of the aforesaid judgment; and praying that the Casualty Company be compelled to pay the same.

The case is stated in the opinion.

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

C. W. Larrabee and G. E. Hughes, for defendants.

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

WISWELL, C. J. At the December term 1898 of this court for Sagadahoc County, the plaintiff's intestate, entered an action against the Bath Gas and Electric Company to recover damages for personal injuries sustained by him on March 10, 1898, while in the employ of that company, and by reason of its alleged negligence. After a trial before a jury, in which a verdict was rendered for the plaintiff, the case was taken to the law court upon the defendant's motion for a new trial, and finally, at the April term, 1900, judgment was rendered against the Gas and Electric Company in favor of the complainant as administrator of the plaintiff in that action, the latter having previously died, for the sum of $4416.65 and costs.

At the time of the accident, wherein the plaintiff's intestate received the injuries complained of in the suit above referred to, the defendant in that suit had a contract of indemnity with the Fidelity and Casualty Company, one of the present respondents, wherein the latter, for a valuable consideration, had agreed to indemnify the Bath Gas and Electric Company, for the term of twelve months from December 1, 1897: "Against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any employee or employees of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, caused by the negligence of the assured, and resulting from the work described in the said schedule, subject to the following special and general agreements, which are to be construed as co-ordinate, as conditions." One of these conditions was as follows: "No action shall lie against the company (the insurer) as respects any loss under this policy unless it shall be brought by the assured himself to re-imburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The defense of the original suit was partially assumed by the Casualty Company, and was conducted by its counsel in conjunction with that of the Gas Company, under a clause in the contract of insurance which gave the insurer the right to defend such suits.

In August, 1898, the Bath Gas and Electric Company, being insolvent, made a common law assignment for the benefit of such of its creditors as became parties to the assignment within the time limited therein, of all its property of every description. The assignees subsequently sold and conveyed all of such property to George F. West, one of the respondents; and on September 6, 1898, this contract of insurance with the Casualty Company was transferred by the assignees to West, with the consent of the insurer.

Execution was duly issued upon the judgment recovered by the complainant and was placed in an officer's hands for enforcement, but he was unable to find any property of the judgment debtor, and the judgment has remained wholly unsatisfied; this judgment, as against the Gas Company, is entirely worthless.

The complainant has commenced this bill in equity against the defendant in the original suit, its assignees under the common law assignment, the transferee of the property, the trustee of a mortgage given by the Gas Company to secure its bonds, and the Fidelity and Casualty Company, alleging, in addition to some of the facts above stated, that the Fidelity and Casualty Company refuses to pay the judgment above referred to, that the Gas Company, its assignees, and the transferee of its property, neglect to enforce the contract of the Casualty Company, or to pay the amount of the judgment, and praying that the Casualty Company be compelled to pay to the complainant the amount of such judgment.

We are unable to perceive any ground upon which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the Gas Company to indemnify that company "against loss" from liability for damages on account of bodily injuries accidentally suffered by an employee and caused by the negligence of the assured. The use of the word "indemnify" shows the object and nature of the contract, it was to re-imburse, or make whole, the assured against loss on account of such liability.

There can be no re-imbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guarantee the Gas Company's liability for negligence to its employees. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability.

This distinction was clearly recognized in the case of *Anoka Lumber Company* v. *Fidelity and Casualty Company*, 63 Minn. 286, 30 L. R. A. 689. There is no stipulation in this contract that the insurer shall pay to the employer, "all sums for which it shall become liable to its employees," as in *Hoven* v. *West Superior Iron & Steel Co.*, 93 Wis. 201. Nor did the insurer contract to pay "all damages with which the insured might be legally charged, or required to pay or for which it might become liable," as in *American Employers' Liability Insurance Company* v. *Fordyce*, 62 Ark. 562, 54 Am. St. Rep. 305, in which this distinction is noticed in this language: "The difference between a contract of indemnity and one to pay legal liabilities is, that upon the former an action cannot be brought and a recovery had until the liability is discharged, whereas, upon the latter, the cause of action is complete when the liability attaches."

In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the Gas Company for the benefit of its employees, but for its own benefit exclusively, to re-imburse it for any sum that the company might be obliged to pay, and had paid, on account of injuries sustained by an employee through its negligence. Independently of the condition in the contract of insurance above quoted, we should be compelled to construe this contract as one of indemnity only.

But this provision puts an end to all questions or doubt, if any there could be. The parties have expressly provided in the contract which they chose to make, that: "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to re-imburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." By reason of the unequivocal language of this provision, the under-

taking of the insurer was expressly limited to liability in an action brought by the insured "to re-imburse him for loss actually sustained and paid by him." There can be no doubt about the meaning of this language and no question about the right of the contracting parties to insert such a provision in their contract for the purpose of making clear the nature and limit of the liability of the parties or of either of them.

Precisely similar language in a contract of this nature was construed by the court in *Moses* v. *Travelers' Insurance Company*, (N. J.) 49 Atl. Rep. 720, wherein it was held: "That not the amount of the employee's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible." In this case the court decided that the transfer of the employer's property to a trustee in bankruptcy, by operation of the United States Bankrupt Act, was payment, within the requirement of this clause, and perfected the liability of the insurer for so much as the employee was entitled to receive out of the bankrupt's estate, that this liability of the insurer passed to the trustee in bankruptcy and that the amount for which the insurer was liable would be determined by ascertaining what percentage all the assets of the bankrupt, outside of the insurance policy, would pay on all the debts proved against the estate, outside of the employee's judgment.

But this doctrine is not applicable to the case under consideration for various reasons; the common law assignment of the Gas Company was for the benefit of such of its creditors as became parties thereto within the time limited, long since elapsed, and neither the complainant, nor his intestate during his lifetime, became a party to this assignment. Again, it does not appear that any dividend has ever or will ever be paid; upon the contrary it is said in argument that there were no assets to be divided.

For these reasons the bill cannot be sustained against any of the respondents. A decree will be made below dismissing the bill, at which time such order will be made in regard to costs as seems proper to the justice who makes the decree.

So ordered.

WILLIAM CARRIGAN, Admr., *vs.* CLEVELAND S. STILLWELL.

Penobscot. Opinion January 1, 1903.

Death by Injury. Pleading. Negligence. Fire-escape. Tenant. Owner. Stat. 1891, c. 124; 1891, c. 89; R. S., c. 26, §§ 26-29.

While ch. 124, Stat. of 1891, gives only a right of action to the personal representative of a deceased person, whose immediate death was caused by the negligence or fault complained of, and while it necessarily follows that the declaration in an action under this statute must contain a sufficient averment of such immediate death, it is not necessary that any particular words should be used for this purpose. It is sufficient if it necessarily appears from the phraseology of the averment that the death of the deceased was immediate.

Where the negligence complained of is the failure of the defendant to provide and maintain suitable fire-escapes upon a building owned and controlled by him and under his management, and the allegation is, that the deceased, being properly in the third story of the building at the time that the fire broke out therein, by reason of such fault of the defendant, and without fault upon her part, "Was then and there burned to death and consumed by said fire, and then and thereby lost her life," *held;* that the necessary meaning of this averment is, that the immediate death of the deceased, within the meaning of the statute, was caused in the manner described.

By R. S., c. 26, § 26, as amended by ch. 89, Stat. of 1891, the duty of providing and maintaining suitable fire-escapes upon a building, to which the statute is applicable, is imposed upon the owner, notwithstanding the building is in the possession of a tenant, or, being in the possession of a tenant, is so used as to bring it within the application of the statute.

The court does not decide, because apparently the question does not arise, whether or not this would be so, if a building, not itself belonging to one of the classes specified, and not let by the owner for any purpose mentioned in the section, should come within the provisions of the law by reason of its use by the tenant for any of such purposes, without the knowledge and consent of the owner.

This duty thus imposed upon the owner of a building coming within the designated classes does not depend upon the action of the municipal officers or fire engineers, or upon their failure to take action.

If the defendant's failure to perform a duty imposed upon him by statute, for the benefit of persons lawfully employed in the building, was the proximate cause of the death of the plaintiff's intestate, and if her death

was the natural and ordinary consequence of this failure upon the part of the defendant, then it is, at least, evidence of actionable negligence upon his part to be submitted to a jury.

Exceptions by plaintiff. Sustained.

Action under Stat. 1891, c. 124, to recover for the death of plaintiff's intestate, who was burned to death in the defendant's building, on October 16, 1901. It was claimed that the defendant was liable because he had not provided any fire-escape on the building. The defendant filed a general demurrer to the declaration which was sustained by the court below.

At the hearing upon the demurrer at nisi prius the defendant contended that the plaintiff's declaration was defective for the following reasons:

First, that there was no allegation in the declaration that the death of the plaintiff's intestate was immediate.

Secondly, that it is a condition precedent to any liability of an owner of a building for failure to provide it with suitable fire-escapes that said owner should first receive from the municipal officers or fire engineers written notice of their determination as to the sufficiency of said fire-escapes, as provided in R. S., c. 26, § 28, and that no liability is incurred for failure to provide fire-escapes until sixty days after the receipt of said notice, and that there was no allegation in the plaintiff's declaration of the performance of this condition.

Thirdly, that under the statute, the duty to provide a building with fire-escapes rests upon the tenant or occupant and not upon the owner.

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

C. H. Bartlett, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, POWERS, PEABODY, SPEAR, JJ.

WISWELL, C. J. This is an action under ch. 124, Public Laws of 1891, to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the fault of the defendant. The

defendant filed a general demurrer to the declaration, which was sustained, pro forma, by the court at nisi prius, and the case comes here upon the plaintiff's exception to this ruling. It will only be necessary to consider the objections to the declaration that are urged by counsel in support of his demurrer.

I. It is contended that the declaration contains no such sufficient allegation of the immediate death of the deceased as is necessary in actions under this statute, under the construction thereof by this court in *Sawyer* v. *Perry*, 88 Maine, 42, and *Conley* v. *Portland Gas Light Company*, 96 Maine, 281. The negligence complained of was the failure of the defendant to provide and maintain suitable fire-escapes upon a building owned, controlled, and under the management of the defendant, by reason whereof, it is alleged, the deceased, being properly in the third story of the building at the time that the fire broke out therein, and without fault upon her part, lost her life. The allegation is that the deceased, by reason of such fault of the defendant, "was then and there burned to death and consumed by said fire, and then and thereby lost her life."

It is, of course, well settled that the statute under which this action was brought gives only a right of action to the personal representative of a deceased person, whose immediate death was caused by the negligence or fault complained of, and it necessarily follows that the declaration must contain a sufficient averment of such immediate death. But it is not necessary that any particular words should be used if it necessarily appears from the averment that the death of the deceased was immediate. Even in criminal pleading, it is well settled, that a statutory offense may be sufficiently set out, without using the precise language of the statute, by the employment of language which is the full equivalent thereof. In this case we think that the necessary meaning of the allegation above quoted is that the immediate death of the deceased, within the meaning of the statute, was caused in the manner described. Not that the deceased received injuries from which she subsequently, however shortly thereafter died, but that she then and there lost her life by being "burned to death and consumed."

II. The action is against the defendant as owner of the building described. The declaration contains sufficient averments as to the defendant's ownership, that the building was one in which a business was carried on, "requiring the presence of workmen above the first story," that it was the duty of the defendant to provide and maintain suitable fire-escapes for such building, that the defendant failed to perform this duty, and that, by reason thereof, the deceased, without fault upon her part, lost her life. The contention of the defendant is, that this building was at the time of the fire in which the deceased lost her life, in the possession of a tenant, that it was the duty of the tenant, if of anybody, to provide fire-escapes, and that therefore this action cannot be maintained against the owner. Strictly, the question does not arise upon demurrer, because it does not appear from the declaration that the building was in the possession of a tenant at the time of the fire. But, as the question will necessarily arise later, if such was the case, and as both sides have fully argued it, we deem it proper and advisable to decide the question now, in view of our conclusion.

The duty of maintaining fire-escapes upon certain buildings was created by statute. By R. S., c. 26, § 26, as amended by ch. 89, Public Laws of 1891, "every building in which any trade, manufacture, or business is carried on, requiring the presence of workmen above the first story," as well as certain other classes of buildings, "shall at all times be provided with suitable and sufficient fire-escapes, outside stairs, or ladders from each story or gallery above the level of the ground, easily accessible to all inmates in case of fire or of an alarm of fire." The next two sections of the chapter provide that in towns having no organized fire department, the municipal officers, and in cities, towns and villages having an organized fire department, the board of fire engineers, shall annually make an inspection of the safe-guards required by the preceding section, pass upon their sufficiency and state of repair, and direct such alterations, additions and repairs as they adjudge necessary, and shall give written notice to the occupant of such building, "also to the owner thereof, if known," of their determination as to the sufficiency of the precautions and safe-guards required, and as to the alterations,

additions and repairs that they adjudge necessary. By the next section a penalty is provided for any owner or occupant who neglects to comply with such order of these officers, within the time allowed, and for any owner who lets or occupant who uses such building in violation of this order.

The question is whether, by these sections of the Revised Statutes, the duty of providing and maintaining sufficient fire-escapes, upon buildings to which the statutes are applicable, where the building is in possession of a tenant, or where, being in the possession of a tenant, it is so used as to bring it within the application of the statutes, is imposed upon the owner. The question is by no means free from difficulty, and little assistance can be obtained from the decisions of the courts of other states, construing statutes of the same general nature, because the statutes of the different states upon this subject differ in respects more or less essential as bearing upon this question.

It will be noticed that the first section relating to the subject does not specifically enjoin the duty upon any particular person. It simply requires that the classes of buildings enumerated, and the buildings used for the purposes specified, "shall at all times be provided with suitable and sufficient fire-escapes." The next two sections relate to the enforcement of this requirement by certain officers. Section 28 provides that such officers shall give "written notice to the occupant of such building, also to the owner thereof, if known," of their determination as to the sufficiency of such fire-escapes and as to the changes that they adjudge necessary. We think that this section throws some light upon the legislative intent. Why, when such a building is in the possession of some one other than the owner, should the statute require notice to the owner, unless it was the intention of the Legislature to impose this duty upon him?

The next section, as we have seen, imposes a penalty upon "any owner or occupant who neglects to comply" with the order of the designated officers within the time limited, and further provides that, "if the owner or occupant of said building lets or uses the same in violation of such order," he shall be subject to a penalty. If it is made an offense, and subjects the owner to a penalty, for him to

let a building without complying with the order relative to the sufficiency of the fire-escapes, it would seem to follow that the duty in relation thereto enjoined by the first section was imposed upon him.

In *Lee* v. *Smith*, 42 Ohio St. 458, 51 Am. Rep. 839, where the court in the construction of a statute which imposed upon the owners of factories and work-houses the duty of providing fire-escapes, held that the statute was not applicable to the owners of premises in the possession of lessees, the court bases its reasoning and conclusion, to a considerable extent, upon the fact that by the language of the statute the duty is not imposed upon the owner of a building, but upon the owner of a factory or work-shop, and that a factory or work-shop is not synonymous with a building. And *Schott* v. *Harvey*, 105 Penn. St. 222, 51 Am. Rep. 201, in which the court reached the same conclusion, in construing a similar statute, is based upon the same reasoning. But the language of our statute is entirely different in this important respect. These safe-guards are not merely required upon factories and work-shops, but upon any building in which any trade, manufacture or business is carried on, "requiring the presence of workmen above the first story."

In Illinois the statute in relation to this subject is somewhat similar to the one in this State. One section requires that certain buildings shall be provided with fire-escapes, without more specifically imposing the duty of providing such fire-escapes upon any particular person; another section provides for notice to be given by the designated authorities to "the owners, trustees, lessee or occupant or either of them." The court held in *Landgraf* v. *Kuh*, 188 Ill. 484, 59 N. E. Rep. 501, that the owners of a building were not relieved from liability for a failure to perform this duty, because a part of the premises was in the possession and under the control of tenants of the owners instead of being directly in their possession. It is said in the opinion: "The injunction being in the alternative, the notice may be given to the one as well as to the other, and therefore to the owner, as well as to the lessee, or occupant." In *Arms* v. *Ayer*, 192 Ill. 601, 61 N. E. Rep. 851, this construction of the statute is re-affirmed.

By our statutes, as we have seen, the penalty for failure to comply with the order of the municipal officers or fire engineers is imposed,

in the alternative, upon the owner or occupant. And the provision in regard to the notice in writing, especially applicable to cases where the owner is not in possession, requires that, notwithstanding that fact, such notice must be given to the owner if known. Upon the whole, we are of the opinion that the statutes which we have referred to impose the duty upon the owner of a building, within the application of these sections, or which by reason of its use is brought within their application, to provide and maintain suitable and sufficient fire-escapes upon such a building, notwithstanding it is in the possession of a tenant. We do not decide, because apparently the question does not arise, that this would be so if a building, not itself belonging to one of the classes specified, and not let by the owner for any purpose mentioned in the section, should come within the provisions of the law by reason of its use by the tenant for any of such purposes, without the knowledge or consent of the owner.

If the defendant's failure to perform a duty imposed upon him by statute, for the benefit of persons lawfully employed in the building, was the proximate cause of the death of the plaintiff's intestate, and if her death was the natural and ordinary consequence of this failure upon the part of the defendant, then it is, at least, evidence of actionable negligence upon his part to be submitted to a jury.

III. Finally, it is contended by counsel for defendant that by these sections of the statutes no duty is imposed upon either owner or occupant until after action shall have been taken by the municipal officers or fire engineers and notice given as provided therein. We do not think that this is so. The first section imposes the duty to provide certain buildings with fire-escapes. The provisions of the subsequent sections show, we think, that it was the intention of the Legislature to impose this duty upon the owner even if the building was in the possession of a tenant. It is undoubtedly true that under the provisions of the subsequent sections relative to the enforcement of the law and to penalties for failures to comply with it, the owner is not subject to the penalty provided by § 29 until he shall have failed to comply with the orders of the officers designated for a space

of sixty days. But the very language of the section which makes it the duty of the municipal officers or fire engineers to "annually make careful inspection of the precautions and safe-guards provided in compliance with the foregoing requirements, and pass upon their sufficiency as to arrangement and number, and upon their state of repair," presupposes that these safe-guards are to be provided before such inspection, and that their duty is to inspect safe-guards already supplied and pass upon their sufficiency in number and other respects.

Under these sections it is not the duty of the officers named to determine what buildings shall be provided with fire-escapes, that is done by the statute itself, but to see that the requirements of the law are complied with and to pass upon the sufficiency of safe-guards already provided. The duty of an owner to place fire-escapes upon the buildings designated does not depend upon the action of the municipal officers or fire engineers, or upon their failure to take action. Such has generally been the construction of similar statutes in other states. *Willy* v. *Mulledy*, 78 N. Y. 310, 314, 34 Am. Rep. 536; *McRickard* v. *Flint*, 114 N. Y. 222; *Arms* v. *Ayer*, supra; *Rose* v. *King*, 49 Ohio St. 213, 15 L. R. A. 160. The Massachusetts Statute, construed by the court in *Perry* v. *Bangs*, 161 Mass. 35, is so different from the one in this State in this respect, that that case, somewhat relied upon by counsel for defense, is not an authority upon this question.

For these reasons we think that the demurrer should have been overruled.

Exceptions sustained. Demurrer overruled.

HYMAN BLUMENTHAL *vs.* BOSTON & MAINE RAILROAD.

Cumberland. Opinion January 1, 1903.

Railroad. Crossing. Contributory Negligence. Nonsuit.

While the plaintiff was attempting to drive over the defendant's railroad at a highway grade-crossing, he was struck by a freight train of the defendant and sustained serious bodily injury. The collision occurred upon the last, as the plaintiff was driving, of the railroad company's three tracks at this crossing. The southerly rail of this last track was about twenty-five feet northerly of the northerly rail of the first track.

Giving the plaintiff the benefit of the most favorable construction possible to the evidence, it may be assumed that, as he was approaching the crossing, his view of the track, in the direction from which the train was coming, was entirely obstructed by buildings, and, perhaps, by a board fence which extended along the southerly side of the railroad, until he reached a point inside of this board fence. But the end of this fence, at the street, was thirty feet southerly of the southerly rail of the track upon which the collision occurred. From this point he had an unobstructed view of the railroad in the direction from which the train was coming, for a distance of at least three hundred feet, and from the first of the three tracks his view was unobstructed, in the same direction for nearly four hundred feet.

The plaintiff was driving, as he says, at a fast walk, and the speed of the freight train, as estimated by plaintiff's witnesses, was from fifteen to twenty miles an hour. Consequently when the plaintiff was upon the first track, with an unobstructed view of between three and four hundred feet, the train was in plain view and only from one hundred and twenty-five to one hundred and fifty feet distant from the crossing, since the speed of the train was only five or six times that of the plaintiff, and they came into collision after the plaintiff had traveled a distance of twenty-five feet.

Held; that as there was no controversy as to any of these facts, it was proper for the presiding justice to refuse to submit the case to the jury and to order a nonsuit. That from these uncontroverted facts one of these two conclusions is irresistible; either the plaintiff failed to take such precautions as to looking and listening before attempting to cross the third track as have been laid down by all authorities as indispensable to his right of recovery; or else, he did look and saw the approaching train and

took his chance of safely crossing in front of it. That in either event his negligence contributed to the accident, and, in accordance with the well settled law of this State, will prevent his recovery.

Although the question of negligence, either of plaintiff or of defendant, is one of fact for the jury, when the facts and circumstances are in controversy, and even when they are not, if fair-minded and unprejudiced persons may reasonably differ in the conclusions to be drawn from such facts, it is not a question of fact for the jury, but one of law for the court, when the facts are undisputed and but one inference can properly be drawn therefrom.

It is undoubtedly true, that where the determination of an issue of fact depends upon the credibility of witnesses, and where a jury would be justified in coming to a conclusion either way as to the credence to be given to the witnesses upon the one side or the other, it is the duty of the court to submit such an issue to the jury, however firmly convinced the presiding justice may be that there is no doubt as to where the truth lies. And even where the surrounding circumstances merely make the story of a witness improbable, it is still the right of the litigant to have the issue thereby raised submitted to the tribunal created by the constitution and the laws for the determination of such questions. But this is not so when the undisputed circumstances show that the story told by a witness, upon a material issue, cannot by any possibility be true, or when the testimony of a witness, necessarily relied upon, is inherently impossible.

Under the circumstances of this case it does not help the plaintiff that he testified that he did look and did not see the approaching train; nor did this testimony, under the circumstances of the case, raise an issue of fact which should have been submitted to the jury.

Exceptions by plaintiff. Overruled.

Case to recover damages sustained by the plaintiff when driving over the defendant's railroad at a highway grade-crossing at Central Street in Westbrook. The plaintiff claimed that the collision was caused by the negligence of the defendant's employees in the management of its train.

The presiding justice ordered a nonsuit and the plaintiff took exceptions.

The case appears in the opinion.

Wm. Lyons; E. Foster and O. H. Hersey, for plaintiff.

J. W. Symonds, D. W. Snow, C. S. Cook and C. L. Hutchinson, for defendant.

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

WISWELL, C. J. While the plaintiff was attempting to drive over the defendant's railroad at a highway grade crossing, he was struck by a freight train of the defendant and sustained serious bodily injury. Claiming that this collision was caused by the negligence of the defendant's employees in the management of the train, he brought this action to recover damages for the injuries sustained by him. At the trial, upon the conclusion of the plaintiff's testimony, the court ruled that a prima facie case had not been made out and ordered a nonsuit. The case comes to the law court, upon the plaintiff's exception to this ruling.

In accordance with familiar principles, which have been so frequently laid down by this court that reference to the authorities is unnecessary, it was incumbent upon the plaintiff, in order to entitle him to have the case submitted to the jury, to introduce testimony tending to affirmatively prove two propositions, the negligence of the defendant in some of the respects complained of, and that no failure upon his part to exercise due care contributed to the accident; and it was as essential for him to affirmatively prove the exercise of due care upon his part as to show negligence upon the part of the defendant.

So far as the first proposition is concerned, it is sufficient to say that we think that the evidence introduced by the plaintiff, uncontradicted, was sufficient to justify a jury in finding that there was negligence upon the part of the defendant's employees. It therefore becomes necessary to consider whether, in accordance with the well established rules as to when the question of negligence is one of fact for the jury and when one of law for the court, the uncontradicted evidence in behalf of the plaintiff in support of his second proposition, that no want of due care upon his part contributed to the accident, was sufficient to entitle him to have this question submitted to a jury.

The plaintiff was a dealer in junk; upon the morning of the day of the accident, April 30, 1900, he had driven with his own horse and express wagon from Portland to Westbrook; during the greater part

of the forenoon he had gone about from house to house in the latter city, plying his trade; shortly before noon he turned into Central Street and drove northerly along that street towards the grade crossing of the defendant's railroad, his destination being a grain store beyond the railroad crossing, where he intended to buy grain for his horse.

At this highway crossing there were three tracks of the defendant's railroad. A board fence extended along the southerly side of the railroad from Brackett Street to the easterly line of Central Street, a distance of about three hundred and ninety feet. The end of this fence at the Central Street line was thirty feet southerly from the southerly rail of the third or last track at the crossing, and the northerly rail of the first track, in the middle of the street, was about twenty-five feet southerly of the southerly rail of the third track. The plaintiff crossed the first two tracks safely and was struck while attempting to cross the third and last track.

As the plaintiff drove northerly along Central Street, from the point where he entered that street, until nearly to the first track, his view of the railroad, on the easterly side of the street, the direction from which the train was coming, was more or less obstructed by buildings, and some of the witnesses think that it might also have been obstructed by the board fence above referred to. Giving the plaintiff the benefit of the most favorable construction possible to the evidence in regard to these obstructions to his vision, it may be assumed that the plaintiff's view of the track in this direction was entirely obstructed until he reached a point inside of this board fence.

But it is made absolutely certain by the plan which was furnished by the defendant, but which was used by the plaintiff and brought to the law court as a part of the case, and as to the accuracy of which no question is raised, that after the plaintiff reached a point inside of this fence, he had an unobstructed view of the railroad easterly for a distance of at least three hundred feet. The plaintiff himself repeatedly testified, upon cross-examination, that from both of the first two tracks that he crossed he could see easterly along the railroad for several hundred feet. The plan shows that the view from the first track easterly was unobstructed nearly, if not quite, to

Brackett Street, a distance of about three hundred and ninety feet, without any portion of the fence, even if that was high enough to be an obstruction, coming within the line of vision.

The plaintiff, according to his own testimony, was driving at a fast walk, and witnesses for the plaintiff testified that in their judgment the speed of the freight train was from fifteen to twenty miles an hour. Assuming these estimates to be correct, when the plaintiff was upon the first track, with an unobstructed view of the railroad easterly for a distance of between three hundred and four hundred feet, the train was only from one hundred and twenty-five feet to one hundred and fifty feet distant from the crossing, because the speed of the train was only five or six times that of the plaintiff, and they came into collision after the plaintiff had travelled a distance of twenty-five feet. Consequently when the plaintiff was upon the first track, twenty-five feet distant from the place of collision, he had an unobstructed view of the approaching train which was not more than one hundred and fifty feet distant on the track from the crossing. If the relative speed of the freight train was not as great as the witnesses have estimated, then of course the train was still nearer the crossing at the time the plaintiff was upon the first track.

There is no controversy about these facts. They are shown by the testimony introduced by the plaintiff and by the plan which the plaintiff used and which is made a part of the case. From these facts one of these two conclusions is irresistible, either the plaintiff failed to take such precautions as to looking and listening before attempting to cross the third track as have been laid down by all authorities as indispensable to his right of recovery, or else, he did look and saw the approaching train and took his chance of safely crossing in front of it. In either event his negligence contributed to the accident, and in accordance with the settled law of this State, that negligence will prevent his recovery. When upon the first track, where his view of the railroad was unobstructed for a much greater distance than was necessary to see the approaching train, he had ample opportunity to stop his horse or to turn aside. Instead of affirmatively proving due care upon his part, he has conclusively proved a want of such care which contributed to the accident.

Although the question of negligence, either of plaintiff or of defendant, is one of fact for the jury, when the facts and circumstances are in controversy, and even when they are not, if fair-minded and unprejudiced persons may reasonably differ in the conclusions to be drawn from such facts, it is not a question of fact for the jury, but one of law for the court, when the facts are undisputed and but one inference can properly be drawn therefrom. The following are a few of the very numerous authorities in support of this principle. *Romeo* v. *Boston & Maine Railroad*, 87 Maine, 540; *McQuillan* v. *City of Seattle*, 10 Washington, 464, 45 Am. St. Rep. 799; *Kilpatrick* v. *Grand Trunk Railway Company*, 72 Vt. 263, 82 Am. St. Rep. 939; *Tully* v. *Philadelphia, Wilmington, and Baltimore Railroad Company*, 2 Penne. (Delaware) 537, 82 Am. St. Rep. 425; *Heimann* v. *Kinnare*, 190 Ill. 156. As we have already seen, this case belongs to the latter class, because from the undisputed facts the inference of contributory negligence upon the part of the plaintiff is the only one that can be drawn. It was, therefore, the duty of the court at nisi prius to take the case from the jury and order a nonsuit.

But it is urged that the above doctrine is not applicable to this case because the plaintiff testified that before attempting to cross the railroad track, he both looked and listened for an approaching train, and did not see or hear the one that came into collision with him until he was on the last track and just before the train struck him. It is claimed that by reason of this testimony of the plaintiff an issue of fact was raised which he was entitled to have passed upon by a jury.

It is undoubtedly true that where the determination of an issue of fact depends upon the credibility of witnesses, and where a jury would be justified in coming to a conclusion either way as credence be given to the witnesses upon the one side or the other, it is the duty of the court to submit such an issue to the jury, however firmly convinced the presiding justice may be that there is no doubt as to where the truth lies. And even where the surrounding circumstances merely make the story of a witness improbable, it is still the right of the litigant to have the issue thereby raised submitted to the

tribunal created by the constitution and the laws for the determination of such questions.

But this cannot be so when the undisputed circumstances show that the story told by a witness, upon a material issue, cannot by any possibility be true, or when the testimony of a witness, necessarily relied upon, is inherently impossible. In this case, as we have seen, the plaintiff, when he was twenty-five feet distant at least from the place of the collision, and when he had ample opportunity to stop or turn aside, could have seen the approaching train if he had looked, as was his duty. As we have already said, he either did not look, or did look and saw the approaching train, but attempted to cross regardless of it. Under these circumstances it does not help him that he testified that he did look and did not see the train; nor did this testimony, under the circumstances of the case, raise an issue of fact which should have been submitted to the jury.

Exceptions overruled.

LEWISTON AND AUBURN RAILROAD COMPANY

vs.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Androscoggin. Opinion January 1, 1903.

Lease. Railroads. Tax. Franchise. Contract. Spec. Laws, 1872, c. 88. Stat. 1897, c. 75. R. S., c. 6, §§ 41, 42; c. 51, § 60.

In determining the intention of the parties to a contract, the interpretation which they themselves by their own acts put upon it is justly entitled to great weight.

The court will not adopt a construction of a contract which does not comport with the interest of either party at the time it is made, unless expressed in clear terms.

The plaintiff agreed with the defendant to construct and build the plaintiff's road as described in its charter in a substantial and permanent manner,

with suitable station grounds and buildings, and with the necessary sidings at its terminus in Lewiston. By a subsequent indenture the defendant agreed to construct and complete the railroad as already located and partially constructed in a substantial manner, and in all respects in accordance with the previous agreements of the plaintiff. The next day the plaintiff leased the road to the defendant for ninety-nine years with full power to finish and complete it as previously agreed between the parties, and to make and construct any new buildings and tracks necessary and beneficial to be used for the working of the railroad. A rental of nine thousand dollars was to be paid every six months, and the lease provided that all taxes which might lawfully be assessed upon the corporate property or franchise of the lessor, during the period of the lease, might be paid by the lessee and deducted from the rent. Within a few months after the execution of the lease the defendant purchased for ninety-two thousand two hundred and fifteen dollars and ten cents ($92,215.10) certain parcels of land in Lewiston adjoining, but without the location of the plaintiff's road. On this land railroad sidings have been constructed and buildings erected, either leased to the patrons of the road or built upon portions of the premises leased to said patrons. The defendant took the title to this real estate in its own name, enjoys the income from it, and for twenty-three years paid the taxes upon it without making any claim to deduct such taxes from the rent.

Held; that construing the two indentures and lease together the defendant was not bound to acquire this land for the plaintiff; that it is not the corporate property of the plaintiff within the true intent and meaning of the lease, and that the taxes so paid cannot be deducted from the rent therein reserved.

For eighteen years the defendant paid taxes lawfully assessed upon the corporate property of the plaintiff, but did not deduct them from the rent.

Held; that they cannot be deducted now; that the true intent and meaning of the lease is, that as fast as the taxes are paid they should be deducted from the installment of rent falling due next after such payment, and if not deducted then they cannot be taken out at all.

The defendant has paid an annual franchise tax to the State, assessed upon the basis of the gross earnings of all the leased lines operated by it within the State divided by the total number of miles so operated.

Held; that this is not a tax upon the franchises of such leased roads alone; that it is either a tax upon the franchise of the defendant alone, or upon its franchise and the franchise of its leased roads. If the latter, it is incapable of apportionment in this case, and no part of the tax so paid can be deducted from the rent reserved.

On report. Defendant defaulted. Damages to be assessed at nisi prius.

Action by the Lewiston & Auburn Railroad Company, plaintiff,

to recover the sum of eighteen thousand dollars, with interest, alleged to be due from the defendant to the plaintiff as rental for the plaintiff's railroad, station grounds, buildings, sidings, etc., and the property and estate of every kind belonging to the plaintiff, appurtenant to, and designed for the purposes of maintaining and operating the plaintiff's railroad; the allegation being that the rental is due under the terms of a lease from the Lewiston & Auburn Railroad Company to the Grand Trunk Railway Company, dated March 25, 1874.

The defense was based upon a provision in the lease that "all taxes which may be lawfully assessed upon the property or franchises of the lessors during the period of their lease may be paid by the lessee, and if so paid shall be deducted from the rent herein covenanted to be paid by said lessee." The defendant claimed to have paid taxes and to be entitled to deduction of taxes of the nature referred to in the lease to an amount considerably in excess of any rentals claimed to be due, and that with such deductions made, no balance was due the plaintiffs.

The case appears in the opinion.

H. W. Oakes, J. A. Pulsifer, F. E. Ludden; W. H. Newell and W. B. Skelton, for plaintiff.

C. A. and L. L. Hight; J. W. Symonds, D. W. Snow, C. S. Cook, C. L. Hutchinson, for defendant.

SITTING: EMERY, STROUT, POWERS, PEABODY, SPEAR, JJ.

POWERS, J. Assumpsit for two semi-annual installments of rent, of $9000.00 each, from June 10, 1898, to June 10, 1899, under a lease from the plaintiff to the defendant.

The plaintiff corporation was organized under a special charter, Laws of 1872, c. 88, approved Feby. 10, 1872, which empowered it to locate, construct, and complete a railroad from some point in the City of Lewiston to a point of connection with the Atlantic and St. Lawrence Railroad, otherwise known as the Grand Trunk Railroad, within the limits of the City of Auburn. It was also authorized to lease its road, either before or after its completion, upon such terms

as it might be able to agree with the Grand Trunk Railway Company. August 27, 1872, the plaintiff and defendant entered into an indenture, by which, in consideration of the defendants agreeing, among other things, to take a lease of the road when completed for the term of ninety-nine years, the plaintiff agreed to proceed with all diligence to construct and build the road, in a substantial and permanent manner, with suitable station grounds and buildings and with the necessary sidings at the terminus at Lewiston. March 24, 1874, the parties entered into another written agreement by which the defendant, in consideration of $220,000 in cash and bonds paid to it by the plaintiff, agreed to "proceed with all diligence to construct and complete the railroad, known as the Lewiston and Auburn Railroad, as already located and partially constructed, in a substantial manner, and in all respects in accordance with the obligations, promises, and agreements" of the plaintiff contained in the indenture of August 27, 1872, to which reference is expressly made.

The next day, March 25, 1874, the lease was executed. By it the plaintiff leased to the defendant "the railroad of the said Lewiston and Auburn Railroad Company as now chartered, located and constructed, extending from the City of Lewiston to its point of junction with the Atlantic and St. Lawrence Railroad in the City of Auburn, together with all its station grounds and buildings, and all its rights of way and other easements and rights, and all the property and estate of every kind belonging to said Lewiston and Auburn Railroad Company, appurtenant to and designed for the purpose of maintaining and operating said railroad, ... with full power and authority to finish and complete said railroad, as heretofore agreed between the respective parties hereto." The lessee was further authorized "to make or construct any new buildings or tracks necessary and beneficial to be used for the working of said railroad." The lease provided that all taxes which might lawfully be assessed upon the corporate property or franchise of the lessor during the period of the lease, might be paid by the lessee; and if so paid they should be deducted from the rent covenanted to be paid by the lessee.

Immediately upon the execution of the lease the Grand Trunk Railway Company took possession of the property and franchises of the Lewiston and Auburn Railroad Company, and proceeded to construct and complete said railway, in accordance with the agreement and obligation existing between the parties. While the work of construction was in progress, and before the completion of the road, the Grand Trunk Railway Company on July 17, 1874, purchased for the sum of $2215.10 certain parcels of land, and on November 20, 1874, another parcel of land for the sum of $90,000.00, all situated in the City of Lewiston adjoining the original location of the Lewiston and Auburn Railroad Company. The defendant took and still retains the title to all land so purchased. On this land certain railroad sidings have been constructed, and certain buildings erected. Some of these buildings have been built by the defendant and leased to the patrons of its leased road, the Lewiston and Auburn Railroad; others have been built by the patrons of said leased road upon portions of said premises leased to them by the defendant. The lease and the two written contracts named are all parts of the same transaction, and are to be construed together.

I. During the period of the lease, and previous to the date of the writ, the defendant has paid taxes to the amount of $31,427.75, legally assessed by the City of Lewiston, from 1875 to 1898 inclusive, upon the land so purchased in July and November, 1874. These taxes the defendant claims the right to deduct from any rental accruing under the lease. The question is, are they taxes upon the corporate property of the plaintiff. In other words, is the land so purchased by the defendant, the title to which is now held by it, and of which it has the exclusive use, benefit, and control, the corporate property of the plaintiff within the true intent and meaning of the lease. We cannot believe that such was the intention of the parties. It is true that by the indenture of Aug. 27, 1872, the plaintiff agreed to construct and build the road, with suitable station grounds and buildings, and with the necessary sidings at the terminus at Lewiston, and that it was necessary to acquire a part at least of the land purchased in order to provide suitable station grounds and

necessary sidings and terminal facilities. When, however, this obligation to so construct and complete the road passed from the plaintiff to the defendant, as it did by the indenture of March 24, 1874, it was therein confined to the road "as already located and partially constructed." In the first indenture there is no reference to any location, and being executed but a few months after the granting of the charter, it is probable that none had been made. The road is therein described in general terms, following the language of the charter, which at that time afforded the best and only description of it. When however the second indenture was entered into, the road had been located and partially constructed. By it the defendant was to construct and complete the road, not in the vague and general terms of the charter, but specifically "the Lewiston and Auburn Railroad as now located and partially constructed." These words "as now located" modify all that follows, including the reference to the prior agreement, and must have been used for the purpose of limiting the obligation of the defendant within some bounds capable of being readily ascertained and accurately defined. If not so intended they are meaningless. The construction contended for by the defendant wholly ignores them, and makes its obligation apply to the road as described in the prior agreement. The same may be said of the lease. It is "the railroad of the said Lewiston and Auburn Company as now chartered, located and constructed" that is leased to the defendant. There is no claim that the lands purchased are within the location of the plaintiff's railroad, or covered by any plans for its construction and completion in existence at the time that the lease was executed.

Again, it is difficult to believe that the parties ever understood or intended that the defendant was bound to acquire for the plaintiff land of the value of $92,000.00. If such an onerous obligation were intended to be imposed, we should expect to find it set forth in clear and specific terms, and not left to inference from general language relating to other subjects. By giving force to the words "as already located" the rights and duties of the parties become fixed, certain, definite, the very object we have no doubt for which the words were used. By disregarding them, and adopting the construc-

tion for which the defendant contends, its obligations would be vague, uncertain, indeterminate, a fruitful source of litigation, the very things which such solemn indentures are intended to avoid.

Perhaps, however, the most satisfactory as it is the most conclusive answer to the defendant's contention is found in its own conduct. In determining the intention of the parties to a contract, the interpretation which they themselves by their own acts put upon it is justly held entitled to great weight. The defendant purchased the land with its own money. It took and still retains the title in its own name. For twenty-three years it paid taxes upon this land, aggregating in all nearly thirty thousand dollars, without making any claim that it was entitled to have them deducted from the rental under the lease. The first tax was assessed in 1875. The terms of the contract must then have been fresh in the minds of the parties. Yet this claim was allowed to slumber for twenty-three years, until the amount paid in taxes on the property aggregated many times the amount of the semi-annual rental. Such conduct can be accounted for on only one rational theory, that the parties never intended that this land should be considered the corporate property of the plaintiff within the true intent and meaning of the lease.

II. It is admitted that from 1880 to 1898 inclusive, the defendant paid annual taxes lawfully assessed by the City of Auburn upon the corporate property of the plaintiff to the amount of $1585.25. The defendant claims that it should be permitted now to deduct these taxes, that its right to make such deduction is a continuing one, and may be exercised at any time during the period of the lease. We do not think such was the intention of the parties. They must have known that the taxes would be assessed and payable annually. The lease states that if the taxes are paid by the lessee they "shall be deducted from the rent herein covenanted to be paid by said lessee," and the lessee covenants to pay the rent semi-annually. We think this plainly imports that as fast as the taxes were paid they should be deducted from the installment of rent falling due next after such payment, and if not deducted then they could not be taken out at all. The defendant could have desired at the time no other contract,

for the sooner the tax was deducted the better it would be for the lessee. The plaintiff must have desired and intended to secure from the rental some kind of a fixed and certain income for its stockholders. The lease was for ninety-nine years, and if the taxes could be allowed to accumulate for half a century more or less, and be deducted any time at the will and pleasure of the lessee, it is evident that such great uncertainty in regard to the amount to be received on any pay day, in fact in time as to whether anything at all would be received at the time for the next semi-annual payment of rent, would most seriously and injuriously affect the market value of the defendant's stock. Such an intention, which does not comport with the interest of either party to the lease at the time it was executed, should be expressed in clear terms. It cannot be deduced from the language here used. The case does not clearly show whether any of these taxes were paid after the last payment of rent was made on June 10, 1898. If so, they should be deducted from the amount of the rental which fell due next after this payment.

III. From 1889 to 1893, the State assessed a franchise tax against the plaintiff corporation, which was paid by the defendant. The construction already given to the lease above, in regard to the taxes in Auburn, renders it unnecessary to determine whether this tax was lawfully assessed. Not having been deducted from the rental falling due next after their payment they cannot be deducted now.

From 1894 to 1898, both inclusive, the State tax has been assessed directly against and paid by the defendant. In making up the taxes for these years the gross earnings of all the lines operated by the Grand Trunk in this State, the Atlantic and St. Lawrence Railroad, the Norway Branch Railroad, and the plaintiff's road, have been taken together, and divided by their total mileage in Maine, to get the gross earnings per mile upon which to base the tax.

The question presented is, whether the defendant's proportionate part of the tax constitutes a tax upon its franchise within the intent and meaning of the lease. It is settled that the tax is a franchise tax. *State* v. *M. C. R. R. Co.*, 74 Maine, 376; *Maine* v. *Grand*

Trunk Ry. Co., 142 U. S. 217. Whose franchise is taxed, that of the lessor or of the lessee, of the plaintiff who owns the road, or of the defendant who operates it? Under the statute the tax can only be assessed against the corporation, person or association operating the road. "Every corporation, person or association, operating any railroad in the State under lease or otherwise, shall pay to the Treasurer of the State for the use of the State, an annual excise tax, for the privilege of exercising its franchises and the franchises of its leased roads in the State." R. S., c. 6, § 41; Laws of 1897, c. 75. This tax was assessed against the corporation operating the road "for the privilege of exercising its franchises and the franchises of its leased roads." It is as plain as language can make it that this is not a tax upon the franchises of the leased road alone. The most that can be contended for is, that it is a tax upon the franchises of both the lessor and the lessee, because the tax is assessed for the privilege of exercising the franchises of both. By what rule can it be apportioned in the present case? Not pro rata by the mileage, for upon that basis, after deducting the tax upon franchises of the plaintiff, the Atlantic and St. Lawrence Railroad, and the Norway Branch Railway, no tax would remain against the Grand Trunk for the privilege of exercising its franchises. Neither would it be just that the tax upon the franchise of one road should be increased or diminished, as would be the case here, by the amount of business done by other roads, in which it has no interest and over which it has no control, simply because they are all operated by the same lessee. The manner in which the amount of the tax is determined precludes the conclusion that the franchises of the lessor and lessee are or can be taxed separately. Every railroad corporation must annually make a return to the railroad commissioners "of its operations." R. S., c. 51, § 60. Its gross transportation receipts thus returned are to be divided by "the number of miles of railroad operated," R. S., c. 6, § 42, and from the result thus obtained the amount of the tax is determined by a scale of varying percentages on the gross receipts per mile operated. No distinction is made between the receipts of one leased line and of another, or between these and those of the operating road. They all go in together to make up the total of gross

receipts, which in like manner is divided by the total number of miles operated to get the one sum which fixes the rate of taxation. In short, there is but one tax. It is assessed against the operator upon the basis of all its operations on all its operated roads within this State. Where the operator is a corporation it must be regarded either as a tax upon its franchises alone, or as a tax upon its own franchises and those of its leased roads, and in the last case it is incapable of apportionment. In either event the defendant's contention cannot be sustained.

As the case leaves it uncertain whether the defendant has paid any taxes to the City of Auburn since June 10, 1898, and prior to June 10, 1899, which it is entitled to have deducted, the defendant should be defaulted, and damages assessed at nisi prius in accordance with this opinion.

So ordered.

FRED M. COOMBS *vs.* WILLIAM W. MASON.

Sagadahoc. Opinion January 1, 1903.

Negligence. Instructions to Jury. Expression of Opinion.

1. In an action for personal injuries alleged to have been caused by the defendant's negligence, the question of the plaintiff's contributory negligence is to be determined by the jury and not by the court.
2. The negligence of the plaintiff cannot be considered as proximately contributing to the injury, if it is independent of and precedes the negligence of the defendant, and when the defendant by the exercise of ordinary care might have avoided the injury.
3. A requested instruction which withdraws that question from the jury, or which is not applicable to the facts of the case on trial, may properly be refused.
4. When the jury have been instructed in full and appropriate language as to what constitutes due care and contributory negligence, it is not error to decline to instruct them further upon those subjects.

5. It is not an expression of opinion upon an issue of fact arising in the trial of a case for the presiding justice to state his recollection of the testimony. He has the same right to call the attention of the jury to the existence and non-existence of testimony. If he is wrong in his recollection, his attention should be called to it and the error corrected at the time.

Motion and exceptions by defendant. Overruled.

Action on the case to recover damages of defendant for injuries received by plaintiff while he was riding upon the forward step of a street car in the City of Bath, on the evening of the 29th day of December, 1900. The plaintiff claimed that as he was so riding, his left foot resting upon the forward platform, his right foot resting upon the lower step leading to that platform, the hub of the hind wheel of a jigger belonging to the defendant and under the care of a servant of the defendant, caught a portion of the calf of plaintiff's right leg which was then and there exposed by reason of its resting upon said lower and projecting step, and crushed a portion of the muscles of his leg against the end of the projecting horn, or end of cross-beam which forms the extreme end of said platform and projects beyond the car fender which it supports, thereby causing an injury to the exposed limb.

The defense was two-fold: First, it was not the defendant's cart which caused the injury. Second, the plaintiff, by voluntarily riding in such an exposed position and remaining there when he knew, or should have known of the proximity of the cart, and the natural dangers of his position, was guilty of such contributory negligence as to bar his recovery.

F. E. Southard, for plaintiff.

C. W. Larrabee and E. C. Plummer, for defendant.

SITTING: WHITEHOUSE, SAVAGE, POWERS, PEABODY, SPEAR, JJ.

POWERS, J. Case for negligence. The evidence establishes the following facts. On Dec. 29, 1900, at about 4.40 P. M., the plaintiff boarded an electric car in Bath for the purpose of going to his home. At the time the seats, aisle, front and rear platforms of the car were full of passengers. The plaintiff secured a position at the

forward end of the car, and stood with his left foot on the platform, and his right foot upon the single step of the car, facing the motorman. A few minutes later, while the car was standing upon the straight part of a siding opposite the Phoenix Hotel, waiting to pass another car, a heavily loaded team of the defendant, consisting of a span of horses and double jigger driven by his employee, passed, going in the same direction as the car, and between it and the sidewalk. The hub of the left hind wheel of the jigger scraped along the side of the car, and, the plaintiff still remaining in the same position, caught the calf of the plaintiff's right leg, pushing it against the fender of the car, and inflicting serious injuries. The car was a cut-under, and the step on which the plaintiff's foot rested was about three inches inside the extreme outside edge of the car, but projected about five and three-fourths inches beyond the outside of the car at the sills. The extreme width of the hind wheels of the jigger was eight feet from nut to nut, and the driver was seated twelve feet forward of the rear axle. From the outer edge of the step upon which the plaintiff was standing to the edge of the sidewalk there was over eleven feet of the wrought and travelled way, unobstructed and in good condition.

Exceptions. The defendant requested the following instructions:

I. "The objective point of the horses and jigger was to pass the car, then standing on the siding, and if, while they were passing the car, plaintiff exposed his person or his limbs beyond the lines of the body of the car, he was guilty of contributory negligence and cannot recover."

The presiding justice said: "I give you that, but the testimony does not sustain the proposition. If he put himself in a position of danger as the horses were passing, so that it became a part of the act of collision, and it was impossible to tell whether the collision was caused by the act of the plaintiff or the defendant's servant, and the plaintiff's change of position was a negligent act, that would be contributory negligence. But the evidence here, as I understand it, and you will remember it, was that he kept the same position that he occupied from the time he got on the car, and that there was no sud-

den change,—but that is for you to say,—just as the horses were passing." The requested instruction might well have been refused, as the question whether the plaintiff was guilty of contributory negligence was to be determined by the jury and not by the court. It is urged, however, that by giving the instruction, and then stating that "the testimony does not sustain the proposition," the presiding justice invaded the province of the jury, and expressed an opinion upon an issue of fact arising in the case. This language was qualified however by that which immediately followed. The presiding justice, after defining what would constitute contributory negligence, and stating his recollection of the evidence in regard to any change of position on the part of the plaintiff, expressly told the jury "you will remember it, but that is for you to say." The jury must have understood from the entire language of the charge that all questions as to the plaintiff's position and movements at the time of the injury were submitted to their determination, and that the presiding justice was not expressing any opinion upon an issue of fact, but simply stating his recollection of the evidence. If he was wrong in this it was the duty of defendant to call his attention to it at the time, and have the error rectified then and there. A party cannot sit by in silence, and afterwards avail himself of such a misstatement of the evidence as ground for exception. An examination of the case, however, shows that the presiding justice was right in his recollection. There is not in the case either testimony, or circumstance from which it can be inferred, that the plaintiff changed his position as the team was passing. The uncontroverted evidence is that he was, at the time of the injury, in the same position as when he originally boarded the car. There was therefore no issue of fact arising in the case in regard to it. The statement that the evidence did not support the proposition did not require the qualification of it which the presiding justice immediately gave. He had the same right and duty to call the attention of the jury to the existence and non-existence of evidence. If a party request instructions not applicable to the facts of the case he cannot complain that the jury is told that there is no evidence upon which to base them.

II. "A passenger who rides upon the platform of a car, necessarily takes upon himself the duty of looking out for and protecting himself against the obvious and usual perils of his position; while a person standing upon the steps of a car is obligated to a still greater degree of care, since in such a position he is subject not only to the same dangers as when standing upon the platform of a car, but is liable also to injury from collision with vehicles." This instruction was properly refused. Whatever may be thought of it in an action against a street railway company who, when its cars are full, permits, and in legal effect invites passengers to ride upon its platforms, it would have been misleading in the present case. That a team, with ample and unobstructed room to pass, and three feet to spare, going at a walk, would be driven against the plaintiff's person, was not an obvious and usual peril. Wherever he was riding the plaintiff was bound to prove affirmatively that he was in the exercise of due care at the time, such care as persons of ordinary prudence exercise under similar circumstances, and that no negligence on his part proximately contributed to cause the accident, no more and no less. The jury were so instructed in full and appropriate language.

Motion. It is urged that the plaintiff in riding with his foot upon the step of the car was guilty of contributory negligence, and therefore cannot recover. Even if it be admitted that the plaintiff's conduct was negligent in this respect, still it cannot be considered as contributing to the injury, if it was independent of and preceded the negligence of the defendant, and the defendant by the exercise of ordinary care might have avoided the injury. *Atwood* v. *Bangor, Orono & Old Town Railway Co.*, 91 Maine, 399. That the plaintiff's negligence, if he was guilty of negligence, preceded and was independent of the negligence of the defendant cannot be questioned. It was light enough to plainly distinguish persons and objects. The defendant's team had ample room in which to pass. The teamster was seated twelve feet in front of the hub of the wheel which struck the plaintiff. He was driving at a walk. He could see the car, the people upon the platforms, and the step. Before his horses' heads reached the front platform his jigger was scraping against the car.

He could have seen the whole situation and avoided the accident by the exercise of ordinary care. Instead of that he kept sturdily on his way, smoking his pipe, his reins hanging loosely in his hands, and apparently relying upon the strength of his jigger to sweep all obstructions from his path.

Motion and exceptions overruled.

STATE OF MAINE *vs.* ALPHONSE NADEAU.

Androscoggin. Opinion January 7, 1903.

Intox. Liquors. Illegal Transportation. Arrest. R. S., c. 27, §§ 31, 39, 40.

Intoxicating liquors were seized while being illegally transported on Sept. 17, 1901, and a complaint was made against the defendant therefor six days later, when a warrant was issued for his arrest. The defendant was arrested on Oct. 16, twenty-nine days after the seizure, and twenty-three days after the warrant for his arrest was issued.

Held; that the warrant was served within a reasonable time.

The provisions of the statute, R. S., c. 27, known as the search and seizure process and requiring an immediate arrest, do not apply to a case like this.

On report. Judgment for the State.

Prosecution under R. S., c. 27, § 31, for the illegal transportation of intoxicating liquors. The defendant was convicted of the offense in the Lewiston Municipal Court and took an appeal to this court at nisi prius, sitting January, 1902. After the evidence was taken out in the court below, it was agreed to report the case to the law court for determination of the question as to whether the arrest of the defendant was not unreasonably delayed.

The facts appear in the opinion.

W. B. Skelton, County Attorney, for State.

J. G. Chabot, for defendant.

Counsel cited: *B. & M. R. R.* v. *Small,* 85 Maine, 463; *State* v. *Riley,* 86 Maine, 145; *State* v. *Guthrie,* 90 Maine, 448.

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

SPEAR, J. This case comes to the law court on report, and grows out of a complaint for the illegal transportation of liquors, and the proceedings following therefrom.

It is admitted that the respondent, at the time alleged in the complaint, was engaged in the illegal transportation of liquors. The liquors described in the warrant were seized on the 17th day of September, 1901. The complaint, charging the respondent with the illegal transportation of the liquors seized, was made on the 23rd day of September, 1901, six days after the seizure, and the warrant for his arrest was issued on the same day. The respondent was arrested on the 16th day of October, twenty-nine days after the seizure, and twenty-three days after the warrant for his arrest was issued.

The stipulation of the parties is: "If the law court are of opinion that the warrant was served within a reasonable time, judgment is to be rendered for the State, no other question being in issue; otherwise complaint quashed."

The State must prevail.

The report of the evidence does not warrant the finding that the officer was either dilatory or negligent in obtaining or serving the warrant. The case shows that the offense, with which the respondent was charged, comes within the general principles of law applying to criminal offenses. The respondent had violated the criminal law of the State. His offense was not barred by the statute of limitations. He was properly apprehended, tried, convicted and fined. The cases cited in the defendant's brief do not apply to the case at bar. The warrant in each case was issued under the statute relating to search and seizure. The search and seizure process is in a class by itself. The constitution of the State has so placed it. The Bill of Rights, § 5, provides that the people shall be secure in their persons, houses, papers and possessions from all unreasonable search and seizure; and that no search warrant shall issue without a special designation of the place to be searched and the thing to be seized. In alluding

to the constitutional prohibition our court, in *State* v. *Guthrie,* 90 Maine, 448, say: "The danger of its abuse has been so clearly apprehended in this country that constitutional barriers have been erected against it. . . . "Nothing in the complaint or warrant or in law concerning them indicates that, after complaint is made, the warrant is to be held by the magistrate or officer as a weapon to be used at his discretion. The very nature of the search warrant indicates that when complaint is made the warrant (if issued at all) should be promptly issued and executed. The purpose is to seize the thing, alleged to be at that time, in the place to be searched to prevent its removal or further concealment. . . . "Especially is this so when complaint is made for a warrant to issue to search for intoxicating liquors. The complaint is against the particular liquors or deposits at the date of the complaint, and the warrant, under the Declaration of Rights, Art. 5, can be issued against these liquors only." *Weston* v. *Carr,* 71 Maine, 356; *State* v. *Riley,* 86 Maine, 144. . . . "The officer is expressly directed by the warrant and the statute to 'make immediate return of said warrant' and to have the respondent 'forthwith' before the magistrate for trial." *State* v. *Guthrie,* supra.

The reason that underlies the prohibition of unreasonable search and seizure, the protection of the people against oppression, is the very reason that urges the issue of a warrant for the apprehension of a person, charged with the commission of a criminal offense.

Judgment for the State.

ALTON C. ABBOTT, Applt. from decree of Judge of Probate.

Knox. Opinion January 9, 1903.

Probate. Right of Appeal. Pleading. R. S., c. 63, § 23.

The right of appeal from any decree or order of the probate court is conferred by statute, and is, therefore, conditioned upon a compliance with all its requirements.

No person has the right of appeal unless he has a pecuniary interest in the subject matter of the decision or decree by which he claims to be aggrieved.

In order to establish by proof, if denied, such interest as entitles the appellant to appeal, it must be alleged in his petition or reasons of appeal.

The statement that he is interested as brother in the estate of the deceased is not a sufficient averment of legal interest, as there may be classes of nearer kindred entitled to the whole estate.

Held; that the court under this allegation had no authority to consider the merits of the case, and the appeal in this case should be dismissed, because the record of the proceedings fails to show that the appellant has the right of appeal.

Exceptions by appellee. Overruled. Appeal dismissed.

Motions by the appellee to dismiss an appeal taken by the appellant from a decree of the Judge of Probate granting an allowance to the widow of C. B. Abbott, deceased.

The case is stated in the opinion.

J. H. Montgomery, for appellant.

R. I. Thompson and E. K. Gould, for appellee.

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

PEABODY, J. This case is on exceptions by the appellee, Hattie N. Abbott, to the ruling pro forma of the presiding justice overruling two motions to dismiss the appellant's appeal from a decree of the judge of probate for the County of Knox, granting her an allowance as widow of Calvin B. Abbott, deceased.

I. The ground of the first motion is that the appeal recited that

the appellant, Alton C. Abbott, appealed from said decree of the Probate Court "To the Supreme Judicial Court, being the Supreme Court of Probate, to be held at Rockland within and for the County of Knox, on the third day of September, A. D. 1901." There is no term of said court held on the third day of September, but the term of said court at which the appeal, if valid, was cognizable was held on the third Tuesday of September.

II. The ground of the second motion for dismissal is, that neither the appeal nor the reasons of appeal show any right of appeal on the part of the appellant, and that they are, therefore, insufficient in law.

We think it unnecessary to decide the technical point presented in the first motion. The appellee was in court, and seasonably made the second motion, and the conclusion we reach upon the question thereby raised is decisive of the case.

The statute provides with reference to appeals from decrees of the Probate Court as follows:

"Any person aggrieved by an order, sentence, decree or denial of such judge . . . . may appeal therefrom to the Supreme Court to be held within the county, if he claims his appeal within twenty days from the date of the proceeding appealed from." R. S., c. 63, § 23.

The right of appeal from any decree or order of the Probate Court is conferred by statute and is therefore conditioned upon a compliance with all its requirements. *Bartlett, Appellant,* 82 Maine, 210; *Moore* v. *Phillips,* 94 Maine, 421; 2 Woerner's Am. Law of Adm. § 543.

No person has the right of appeal unless he has a pecuniary interest in the subject matter of the decision or decree by which he claims to be aggrieved. This interest must be shown or the appeal will be dismissed. *Briard* v. *Goodale,* 86 Maine, 100, 41 Am. St. Rep. 526; *Pettingill* v. *Pettingill,* 60 Maine, 411; *Deering* v. *Adams,* 34 Maine, 41; *Norton's Appeal,* 46 Conn. 527; *Cecil* v. *Cecil,* 19 Maryland, 72, 81 Am. Dec. 626; 2 Woerner's Am. Law of Adm. § 544.

In order to establish by proof, if denied, such interest as entitled

him to appeal, it must be alleged in his petition or motion claiming an appeal. *Zumwalt* v. *Zumwalt*, 3 Mo. 265; *Jenks* v. *Howland*, 3 Gray, 536; *Briard* v. *Goodale*, 86 Maine, 100, 41 Am. St. Rep. 526.

In *Deming's Appeal*, 34 Conn. 201, it is held that the interest of the appellant must either appear on the face of the proceedings in the Probate Court, or it must be averred in the notice of appeal.

In *Veazie Bank* v. *Young*, 53 Maine, 555, BARROWS, J., says: "It is the duty of every appellant from a decree of a Probate Judge, as the preliminary proceeding, to establish his interest in the subject matter of the decree from which he claims an appeal."

The appellant has not, either in his reasons of appeal or notice, affirmatively alleged such facts as if proved would show that he is aggrieved within the meaning of the statute as construed by the decided cases. In his reasons of appeal he states that "any allowance is an injury to the balance of the estate," but he does not show that he is interested in the estate. In his notice of appeal he states that "he is interested as brother in the estate" of the deceased, but this is not a sufficient averment of a legal interest, as there may be several classes of nearer kindred.

At the hearing on the appeal the appellant offered to show that he was an heir to the estate, but the presiding justice upon this motion to dismiss properly declined to consider evidence affecting the validity of the decree of the judge of probate. The court had no authority under the allegation to proceed to consider the merits of the case. The appeal should be dismissed because the record of the proceedings fails to show that the appellant has the right of appeal. *Moore* v. *Phillips*, 94 Maine, 421; *Briard* v. *Goodale*, 86 Maine, 100, 41 Am. St. Rep. 526, supra; *Gray* v. *Gardner*, 81 Maine, 554; 2 Woerner's Law of Adm. § 544.

We do not decide whether the reasons of appeal might be amended, in accordance with the reasoning of the court in *Smith* v. *Chaney*, 93 Maine, 214, for that question is not presented. No amendment was offered.

Exceptions to ruling on the second motion sustained.
Appeal dismissed with costs for appellee.

THOMAS HAUGH, In Equity, *vs.* CARRIE E. PEIRCE.

Waldo. Opinion January 10, 1903.

Dower. Vested Rights. Equity. R. S., c. 65, § 3.

1. While before assignment a widow's right of dower is a mere right, to be enforced in such manner as the law should prescribe; after assignment in any legal mode, whatever is lawfully assigned to her as her dower becomes a vested estate, vested in form as well as in substance, which she cannot be compelled to sell or commute.
2. Where there is lawfully assigned "in a special manner" to a widow as her dower out of a parcel of real estate "the sum of two hundred dollars to be paid annually from the rents and profits of that parcel" as a third part of the rents and profits under R. S., c. 65, § 3, she thereby acquires a vested right to an annuity of two hundred dollars from that real estate which she cannot be compelled to release for any consideration.
3. The owner of the real estate out of which dower has been so assigned, cannot maintain a bill in equity to have the real estate sold free of the widow's dower and the present worth of the widow's annuity appraised and paid to her out of the proceeds.

On report. Bill in equity. Dismissed.

Bill in equity praying to have real estate sold free of the widow's dower, to have the present worth of the dower appraised and paid to her out of the proceeds. The dower was assigned in a special manner to wit: the sum of two hundred dollars annually from the rents and profits, under R. S., c. 65, § 3.

The defendant besides her answer filed a demurrer and the case was reported to the law court.

J. S. Harriman and Peregrine White, for plaintiff.

The parties are tenants in common. Under our statute, the tenant in dower, where dower is assigned of the rents and profits, becomes tenant in common with the other owners of the estate. R. S., chap. 103, § 23.

Tenants in common have an absolute right to partition. *Wood* v. *Little,* 35 Maine, 111; *Nash* v. *Simpson,* 78 Maine, 148.

This court has declared that it now has the power to decree a sale

and division of the proceeds of land, in such a case, "whenever in its judgment, a division of the property cannot be made without greatly impairing its value, and whenever a sale of the whole property would be much more beneficial, or less injurious to the parties." *Williams* v. *Coombs*, 88 Maine, 185, and cases cited; *Nash* v. *Simpson*, 78 Maine, 152, 3 Pom. Eq. § 1390.

W. P. Thompson, for defendant.

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

EMERY, J. The case is this: Robert F. Peirce died in 1892 seized of a parcel of real estate in Belfast upon which was a brick block. It appearing to the commissioners appointed by the Probate Court in November, 1892, to assign the widow's dower that a division of said parcel by metes and bounds could not be conveniently made, they assigned to the widow, (the defendant in this case) her dower therein "in a special manner as of a third part of the rents and profits," and fixed as such third part "the sum of two hundred dollars to be paid annually from the rents and profits of said brick block." R. S., c. 65, § 3. This action of the commissioners we assume was confirmed by the Probate Court.

The plaintiff afterward, in 1896, acquired title to this parcel of real estate by purchase, "subject (in the language of the deed to him) to an annuity of two hundred dollars to the widow of Robert F. Peirce deceased, during her life." Later still, in 1899, the brick block on the lot was destroyed by fire, since which time the lot has remained vacant and incapable in its present condition of yielding any income. The plaintiff, the owner, has now brought this bill in equity against the defendant, the widow, praying (1) that the said real estate be appraised and the interest of the defendant therein be ascertained; (2) that the real estate be sold and the proceeds be divided between the plaintiff and the defendant according to their rights in the premises. The defendant demurred and also answered saying, among other things, that she did not wish to part with her rights as assigned to her.

The bill cannot be sustained. Its plain purpose is to compel the defendant to commute her annuity for a present specific sum, and release the land from the charge thus imposed upon it. There is no law in this State requiring her to do so. Before assignment her dower was a mere right to be enforced in such reasonable manner as the law might prescribe. After assignment in any statutory manner, whatever was lawfully assigned to her as her dower, whether one-third of the land, or one-third of the rents and profits, or, as in this case, a special sum per year, payable out of the land as one-third of the rents and profits, became hers absolutely for her life, her vested estate for life, vested in form as well as in substance. She cannot be compelled to sell it, or change its form against her will. It must remain in its present form a charge upon the land until extinguished by her death, or by her voluntary release, whatever the inconvenience to the land owner. This the plaintiff should have known when he bought the land. Any legislation since this dower was assigned cannot affect her estate which then vested.

Bill dismissed with costs.

CHARLES V. LOOK *vs.* MARTIN HORN, and others.

Somerset. Opinion January 21, 1903.

Mortgage. Rents and Profits. Payment by one Joint Mortgagor. Reimbursement. Equitable Lien.

Where a mortgage is discharged on payment made by one of the joint mortgagors, or his successor in interest, it may be treated in equity as still subsisting for the protection of the party making payment; or the delinquent's share in the mortgaged premises may be regarded as subject to a lien for the amount paid on the mortgage for his benefit.

In no event can the grantee of the delinquent recover rents and profits until the parties making payment of the mortgage have been re-imbursed the amount paid for the delinquent, either from the rents and profits of the delinquent's interest in the premises or in some other manner; and the net profits received may be held towards re-imbursement.

On report. Judgment for defendants.

Assumpsit for rents and profits of one-half of a farm in Fairfield formerly occupied by Benjamin Horn as a homestead, for the six years immediately preceding January 26, 1901.

The facts are fully stated in the opinion.

F. L. Ames, for plaintiff.

Counsel cited: R. S., c. 73, § 7; c. 95, § 20; *Buck* v. *Spofford*, 31 Maine, 34; *Cutler* v. *Currier*, 54 Maine, 81; *Soutter* v. *Atwood*, 34 Maine, 153, 56 Am. Dec. 647; *Soutter* v. *Porter*, 27 Maine, 405; *Taylor and Wilson* v. *Porter*, 7 Mass. 354, 355; *Wade* v. *Howard*, 6 Pick. 492; *Goodall* v. *Wentworth*, 20 Maine, 322; *Moulton* v. *Edgecomb*, 52 Maine, 31; *Tinkham* v. *Arnold*, 3 Maine, 120; *Thornton* v. *York Bank*, 45 Maine, 158; *Hudson* v. *Coe*, 79 Maine, 83, 1 Am. St. Rep. 288.

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

Counsel cited: *Thomas* v. *Pickering*, 13 Maine, 337, 353; *Bigelow* v. *Jones*, 10 Pick. 161; *Richardson* v. *Richardson*, 72 Maine, 403; Jones on Mortgages, Vol. 2, §§ 1089, 1090; *Gibson* v. *Crehore*, 5 Pick. 145, 146; *Parkman* v. *Welch*, 19 Pick. 231, 238; *Watkins* v. *Eaton*, 30 Maine, 529, 535, 50 Am. Dec. 637; *Hurley* v. *Hurley*, 148 Mass. 444, 447, 2 L. R. A. 172; *Winslow* v. *Young*, 94 Maine, 145.

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

STROUT, J. On March 31, 1876, Benjamin Horn and Oliver R. Horn received conveyance of a farm in Fairfield from Samuel Kimball, and on the same day the Horns mortgaged the farm to Kimball to secure the payment of five hundred and thirty-four dollars and fifty cents of the purchase money. Benjamin occupied the farm thereafter, except a piece conveyed to his son Calvin, till his conveyance to his son Martin, one of the defendants, on May 12, 1898, since which time Martin has been in possession. Benjamin and his son paid the mortgage to Kimball, and had it discharged of record on January 23, 1895. Oliver never paid anything and never occu-

pied the farm. Oliver R. Horn, by deed of January 27, 1881, undertook to convey one-half of the farm to the plaintiff, but the mortgage to Kimball being then in force, Oliver's deed conveyed only his one-half of the equity of redemption from that mortgage.

The plaintiff seeks in this action to recover one-half of the rents and profits of the farm from January 26, 1895, to January 26, 1901.

Benjamin Horn and his sons having paid that portion of the Kimball mortgage which should have been paid by Oliver, are entitled in equity to have Oliver's one-half of the farm subjected to its payment. This right is unaffected by the discharge of record of the mortgage. It may be treated in equity as still subsisting for the protection of Benjamin and Martin, or Oliver's one-half may be regarded as subject to a lien for the amount paid on the mortgage for Oliver's benefit. In no event can the plaintiff, as Oliver's grantee, recover rents and profits until Benjamin and Martin have been re-imbursed their payment for Oliver, either from the rents and profits of Oliver's one-half, or in some other manner.

It is very clear from the evidence that the net profits from the farm for the time covered by plaintiff's claim have been little, if anything, in excess of necessary repairs and taxes—certainly wholly insufficient to re-imburse the payment for Oliver on the mortgage. Whatever net profits defendants may have received from one-half of the farm, they are entitled to hold towards their re-imbursement. Until that is accomplished plaintiff can have no claim upon the rents and profits.

Judgment for defendants.

HENRY M. SMALL, Executor, *vs.* ALBERT H. ROSE.

Cumberland. Opinion January 29, 1903.

Bills and Notes. Evidence. Statute of Limitations. Partial Payments. Indorsements. Books of account. Entries against Interest. R. S., c. 81, § 100.

The provisions of R. S., c. 81, § 100, do not prevent the admission, in accordance with established rules, of evidence of payments to take actions on bills and notes or other writings out of the statute of limitations; but merely exclude indorsements or memoranda made thereon by or in behalf of the party to whom the partial payments purport to have been made.

Entries in account-books of a deceased testator of payments received by him on bills or notes supported by the executor's suppletory oath, but made after the statute of limitations has run, are not entries against testator's interest, it being to his advantage to show a part payment on the note. Such entries are not admissible to prove the fact of payment.

Exceptions by defendant. Sustained.

Assumpsit on a promissory note given by defendant to plaintiff's testator. Defendant plead the general issue and the statute of limitations, by way of brief statement. At the trial in the Superior Court of Cumberland County the plaintiff introduced, supported by the suppletory oath of the executor, a small account-book, found among the effects of the deceased, which contained among other entries in his handwriting, under the head of money received, an item of $25 from A. H. Rose, March 25, 1897. To the introduction of this evidence the defendant seasonably objected, but the same was admitted and the defendant alleged exceptions.

The facts are fully stated in the opinion.

F. H. Haskell and A. F. Moulton, for plaintiff.

Counsel cited: *Coffin* v. *Bucknam,* 12 Maine, 471; 7 Am. & Eng. Ency. of Law, 1st ed. p. 72; 1 Phillips on Ev. *p. 307; 1 Greenl. on Ev. § 150; *Holbrook* v. *Gay,* 6 Cush. 215; R. S., c. 82, § 98; *Hancock* v. *Cook,* 18 Pick. 30; *McKenney* v. *Waite,* 20 Maine, 349; 1 Greenl. on Ev. § 119, and notes; Stat. of 1864, c. 230.

F. W. Brown, Jr., for defendant.

Counsel cited: *Richards* v. *Maryland Ins. Co.*, 8 Cranch. 84; *Townsend Bank* v. *Whitney*, 3 Allen, 454, 455; 1 Greenl. on Ev. 14th ed. pp. 165, 171, note 1; *Dunn* v. *Whitney*, 10 Maine, 9; *Maine* v. *Harper*, 4 Allen, 115; *Waterman* v. *Burbank*, 8 Met. 352; *Clapp* v. *Ingersol*, 11 Maine, 83.

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

PEABODY, J. This case is on exceptions of defendant to the admission of evidence. It was an action on a promissory note, bearing date December 21, 1882, given by the defendant to one O. W. Small, plaintiff's testator.

The defense is the statute of limitations. There were certain indorsements on the note but not in the handwriting of the defendant, and it does not appear that evidence was introduced tending to show any payment on the note prior to March 25, 1897. As evidence of a payment made by the defendant on that date, the plaintiff introduced, supported by his suppletory oath, the small account-book found among the effects of the deceased in which was written in the handwriting of the deceased under the heading of money received and under the date of March 25, 1897, the following words: "A. H. Rose $25.00." This corresponded in date and amount to one of the indorsements on the back of the note. To the admission of this evidence the defendant seasonably objected and excepted.

Revised Statutes, ch. 81, § 100, provides that, "No indorsement or memorandum of such payment made on a promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment is made or purports to be made, is sufficient proof of payment to take the case out of the statute of limitations." This statute does not affect the admissibility of other evidence tending to show such payment, where the admission of such evidence does not conflict with the established rules. *Sibley* v. *Lumbert*, 30 Maine, 253.

The entry in question was part of a private cash account in the back of a small diary. The account was kept with apparent regularity, and the entry would have probative force to remove the statute bar if it was apparently made by the testator against his interest.

So far as appears from the case as presented, there was no evidence to overcome the presumption which arises from the date of the note that it had become outlawed long prior to the date of the memorandum of March 25th, 1897; so that in considering the effect of a cash entry of that date we must have in mind that at that time a payment on account of the note would have the effect not merely of reducing the indebtedness, but also of reviving the note and making it enforceable against the defendant.

Had the entry in the cash-book been made a reasonable time before the note became outlawed, its effect being an admission of the reduction of the debt, it might have been admissible if offered in evidence by the plaintiff as an entry made by a person since deceased apparently against his interest. *Taylor* v. *Witham*, 3 Ch. D. 605; 1 Greenl. Evidence, § 147. But after the statutory bar had become complete it was clearly not against his interest, but on the contrary, to his great advantage to show a part payment on the note. This destroys entirely the probative force of the written memorandum and makes it inadmissible in evidence to prove the fact of the payment. *Rose* v. *Bryant*, 2 Camp. 321; Wood on Limitations, § 115; 1 Greenl. Evidence, § 149; *Libby* v. *Brown*, 78 Maine, 492.

Exceptions sustained.

STATE OF MAINE *vs.* CLARENCE EATON.

Franklin. Opinion February 5, 1903.

Intox. Liquors. Illegal Sales. Knowledge and Belief. Intent. R. S., c. 27.

If a person, other than those having statutory authorization, sells liquors which are in fact intoxicating, but which he believes and has good reason to believe are not intoxicating, he nevertheless violates the statute prohibiting the sale of intoxicating liquors, and is subject to the statutory punishment therefor. The prohibition is not limited to knowingly selling without authority. It is absolute, without exception.

Exceptions by defendant. Overruled.

Indictment for a single sale of intoxicating liquor.

The defendant after conviction was allowed a bill of exceptions as follows:—

There was evidence tending to show, that on July 3, 1902, the respondent put up a case of beer, of some kind, and sent it to one Augustus H. Bradford; also that Bradford delivered a bottle of the same to his son, who delivered the same to one Nelson Gould, who delivered the same to Prof. W. G. Mallett, who claimed to analyze the same, and found it contained 5.44 per cent alcohol. Respondent testified that the beer he sent to Bradford was what is known in the market as Uno beer—that it was not intoxicating, and that if Mallett made a correct analysis of a bottle of beer which contained 5.44 per cent alcohol, which came from that case, there must have been some mistake in putting up the beer, that he did not intend to sell anything but Uno beer, which is not intoxicating.

On this point the presiding justice instructed the jury as follows:

"It is unnecessary, I presume, to instruct you, but I will do so, that if there was any misapprehension or error on the part of the defendant or any of his agents in delivering a strong beer, a beer unadulterated, when he intended to deliver an adulterated beer, that would not relieve him from the responsibility of selling liquor which was intoxicating, if you find it to be intoxicating in fact."

H. S. Wing, County Attorney, for State.

Where an act in itself not criminal is prohibited by statute on grounds of public policy, and the statute does not make the criminality of the act depend upon its being wilfully, or maliciously, or knowingly done, it has frequently been held that the criminal intent is immaterial. A statute may throw on the defendant the burden of keeping within its requirements, and may make the doing of the prohibited act criminal without regard to the intent. 1 McLain on Crim. Law, par. 128.

The argument urged in behalf of defendant is founded on the erroneous theory that the guilty intent necessary to constitute the offense which the law prohibits must include a knowledge of the quality of the article as well as a purpose to sell it. Such a construction of the statute would contravene its whole scope and object. *Com.* v. *Goodman*, 97 Mass. 119.

Knowledge by the defendant as to the character of the liquor, either as to what it is or whether it is intoxicating, is wholly immaterial. *State* v. *Moulton*, 52 Kan. 69; *State* v. *Tomasi*, 67 Vt. 312; *King* v. *State*, 66 Miss. 502; *People* v. *Kibler*, 106 N. Y. 321, 393; *State* v. *Smith*, 10 R. I. 258; *Barton* v. *State*, 99 Ind. 89; *Barnes* v. *State*, 19 Conn. 393; *State* v. *Stanton*, 37 Conn. 421.

If defendant has kept and sold a kind of beer, which he supposes not to contain sufficient alcohol to render it intoxicating, his mistake in that respect, though honest, would constitute no defense. *Com.* v. *Savery*, 145 Mass. 212; *Com.* v. *Daly*, 148 Mass. 428.

H. L. Whitcomb, for defendant.

In order to constitute a crime or misdemeanor there must be a union or joint operation of act and intention, or criminal negligence.

"Where a man, in the execution of one act, by misfortune or chance, and not designedly, does another act, for which, if he had wilfully committed it, he would be liable to be punished:—in that case, if the act he was doing were lawful, or merely malum prohibitum, he shall not be punishable for the act arising from misfortune or chance; but if malum in se, it is otherwise." 1 Archibold's Crim. Pract. & Plead. 9.

Selling Uno beer, which is held not intoxicating within the meaning of our statute, is lawful. The prohibition against the sale of intoxicating liquor is purely statutory. The common law does not prohibit the sale of beer or spirituous liquors of any kind—such sale is merely malum prohibitum.

Defendant though he was disposing of beer, the sale of which was not even malum prohibitum, and the claim of the State is, that a bottle, after going through the possession of five persons, was found to contain 5.44 per cent alcohol.

If the statute was violated, the case shows that there was nothing done on the part of respondent to give the color of an act malum in se.

Professor Greenleaf says, "Ignorance or mistake of fact may in some cases be admitted as an excuse; as, where a man, intending to do a lawful act, does that which is unlawful." 3 Greenl. Ev. § 21.

Blackstone states the law in this manner: "Ignorance or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately there is not that conjunction between them, which is necessary to form a criminal act." 4 Black. Com. 27; 1 Russell on Crimes, 25.

The intent to commit the crime, is of the essence of the offense; and to hold that a man shall be held criminally responsible for an offense, of the commission of which he is ignorant at the time, would be intolerable tyranny. *Duncan* v. *The State*, 6 Humphreys, 148.

There is no pretense of gross carelessness which would create responsibility.

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

EMERY, J. The defendant was convicted of selling intoxicating liquor without any lawful license or authority therefor. He claimed that he did not know the liquor (beer) was intoxicating, had good reason to believe it was not intoxicating, and did not intend to sell

anything intoxicating. The presiding justice ruled that this claim, if established, was no defense. The defendant excepted.

The question presented is practically this:—is a person permitted by the statute to sell without license intoxicating liquor if he believes, and has reason to believe, that it is not intoxicating? Certainly not. The prohibition is not limited to knowingly selling without license. It is absolute, without exception. While many statutes make knowledge or wicked intent, or both, essential to constitute the offense forbidden, the statute forbidding the sale of intoxicating liquor does not. It is like those statutes considered in *State* v. *Goodenow*, 65 Maine, 30, and *State* v. *Huff*, 89 Maine, 521, where the act was held to constitute the offense, though the defendants did not think they were violating the statute.

A person proposing to sell liquor must make sure at his peril that it is not intoxicating. If it be in fact intoxicating, his erroneous belief that it is not intoxicating, however sincere and apparently well founded, will not save him from punishment. It has been repeatedly so held in Massachusetts under similar statutes. *Com.* v. *Boynton*, 2 Allen, 160; *Com.* v. *Hallett*, 103 Mass. 452; *Com.* v. *O'Kean*, 152 Mass. 584.

Exceptions overruled. Judgment for the State.

ABRAHAM RICH *vs.* ALVAH R. HAYES, Admr.

Kennebec. Opinion February 5, 1903.

Evidence,—Admissible and Inadmissible on same Paper. Private Memoranda. Practice. Juries. New Trial.

1. A written statement of a third party containing material evidence against one of the parties to a suit is not admissible in evidence.
2. If such a written statement, though not admitted in evidence, is allowed at the close of the trial to be taken by the jury to their room with other papers it is prejudicial error and a new trial will be granted.
3. That such written statement is upon the same paper as a statement which is admissible and was formally admitted in evidence and which may properly be allowed to be taken to the jury room, it must nevertheless be withheld from the jury, either by separation, or complete obliteration, or in some other effectual mode.

Exceptions by defendant. Sustained.

Action of assumpsit on a promissory note. Besides the count on the note there was a money count with a specification making reference to the note.

The plea was the general issue with a brief statement of special matter of defense upon which, however, the decision in no way turned.

In addition to his bill of exceptions the defendant also filed and argued a general motion for a new trial.

The case is fully stated in the opinion.

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

G. W. Heselton, for defendant.

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

EMERY, J. This was an action against an administrator representing the deceased partners of the late firm of Dingley Bros. One of the issues was whether certain indorsements or entries in the hand-writing of the plaintiff upon the back of a $3000 note given to

him by the Dingley Bros. were made accidentally and erroneously. The plaintiff claimed they were and that he had written and personally delivered to the Dingley Bros. in their lifetime, a letter stating that the indorsements or entries were erroneous and explaining how they happened to be made, and that they orally assented to the statement and explanation as correct and satisfactory. A copy of this letter was admitted in evidence, the original not being produced in response to due notice to do so.

At the top of this copy of letter was the following memorandum signed by R. W. Rich, a son of the plaintiff, viz:

"The original letter from Abraham Rich to Dingley Brothers of this date of April 18th, 1895, of which this is a true copy, was handed by Abraham Rich to Fuller Dingley of Dingley Brothers in their (Dingley Brothers) office in Gardiner, Maine, in my presence at about three o'clock p. m., of this 'afternoon' of April 18th, 1895. Fuller Dingley read the letter and said, 'your explanation in this letter of your erroneous entries on our $3000.00 note is satisfactory to and agreed to by us, Captain.'

Attest: R. W. RICH."

The plaintiff was known as "Captain Rich." It does not appear that this memorandum was read or offered in evidence, or used at the trial by any witness to refresh his memory.

When at the close of the trial the various documentary exhibits admitted in evidence were about to be passed to the jury to take to their room for use in their deliberations, the defendant objected to the above memorandum signed by R. W. Rich going to the jury with the copy of the letter, but, the plaintiff insisting, it was allowed to be taken by the jury to their room with the copy of the letter. The defendant excepted.

The written memorandum was merely a private one not even made in the course of business. It contained a statement of material and damaging admissions of the defendant's intestate, yet it was allowed to go to the jury not only as evidence, but as documentary evidence, with practically more probative force than the oral testimony of R. W. Rich to the same admissions would have had. It should need

no argument to show that this was error so prejudicial to the defendant as to require a new trial.

Exceptions sustained. New trial granted.

JOSEPH H. POOR *vs.* ALBERT W. CHAPIN.

Piscataquis. Opinion February 9, 1903.

Attachment. Corporations. Levy and Sale on Execution. Vested Rights. Practice. Stat. 1821, §§ 2, 13. Stat. 1899, c. 115. R. S., 1840, c. 76, § 17, c. 94, § 34, c. 99, c. 114, c. 117. R. S., 1857, c. 46, § 32, c. 81, § 28. R. S., 1871, c. 46, § 32, c. 81, § 54. R. S., 1883, c. 46, § 20, c. 76, §§ 33, 42.

By R. S., c. 46, § 20, the real and personal property of any corporation is liable to attachment on mesne process, and levy on execution, however it may have been under the earlier statutes.

By the repeal of the former limitations upon the right of attachment and seizure and sale on execution of lands of corporations, and the substituted provisions in R. S., of 1883, it is evident that the legislature intended to subject corporate lands to the same liability to attachment on mesne process as those owned by natural persons.

After a first, valid attachment of real estate has been made, followed by subsequent proceedings to judgment and sale according to law, a second attaching creditor takes nothing by purchase on his execution at a sheriff's sale, unless perhaps the right of redeeming from the sale on execution under the first attachment.

It is more necessary that the name of the party whose estate is attached should be correctly shown, by the records in the registry of deeds, than that of the attaching creditor.

Where the officer's return of an attachment of real estate filed in the registry of deeds gave the name of the defendant correctly, but gave only the initials to the plaintiff's name, *held;* that this was a sufficient compliance with the statute to create an attachment lien.

After an action has been defaulted and continued for judgment and is continued on the docket from term to term for several subsequent terms after judgment has been entered and so remains on the docket in fact, it will be presumed that there is sufficient reason for it so remaining on the docket.

There is no vested right in a particular form of remedy. There can be no cause of complaint, if a substituted remedy is given which does not abridge the usefulness of that existing at the time the right accrued. *Held;* that a sale of land on execution under Stat. of 1899, c. 115, is valid although the action was brought and the attachment made in 1896.

The plaintiff claimed title to land by virtue of a sale on execution in favor of the National Hide and Leather Bank against the Monson Maine Slate Company, made Feby. 9th, 1900. Real estate was attached on the writ in that case on March 23, 1898.

The defendant claimed title to the same land by virtue of a sale on execution in favor of Rodney C. Penney against the Monson Maine Slate Company, made June 11th, 1900. Real estate was attached on the writ in that case on September 14, 1896.

As the attachment in the Penney suit had not been lost at the time of the sale on execution in that case, the sale related back to the attachment and operated to carry the title then existing; and as the attachment antedated that in the bank suit, *held;* that the defendant acquired title superior to that of plaintiff.

On report. Judgment for defendant.

Real action in which plaintiff and defendant each claim title to the property by sale upon executions against the Monson Maine Slate Company a corporation under the laws of Maine.

J. B. Peaks, for plaintiff.

At the time the attachments in this suit were made, there was no authority for the attachment of the real estate of manufacturing corporations on mesne process. At common law real estate of corporations could not be attached upon the writ. It, therefore, can only be done by virtue of a statute which authorizes such attachment. Counsel cited: *Gue* v. *The Tide Water Canal Co.*, 24 How. 257; *E. Ala. R'y Co.* v. *Doe, ex. dem. Visscher*, 114 U. S. 340. Counsel traced the statutory enactments of this State relating to attachment of interests in corporations and sales of land of manufacturing companies, beginning with Stat. 1821, c. 60, and in this connection cited: Stat. 1823, c. 221; Stat. 1831, c. 519, § 19; Stat. 1845, c. 143; R. S. of 1857, c. 76, § 38.

If any one of the requirements mentioned in R. S., c. 81, § 59, is neglected, then no lien is created by the attachment. The title to the suit in which was made the attachment under which defendants claim title, is Rodney C. Penney v. Monson Maine Slate Company.

Plaintiff claims that the names of the parties to that action were not properly returned to the registry of deeds by the officer, and further that no notice was given to the public of any existing attachment in favor of Mr. Penney. The officer merely states the name of plaintiff to be R. C. Penney. The writ gives it as Rodney C. Penney. In *Shaw* v. *O'Brion*, 69 Maine, 501, the officer in making his certificate of attachment named one of the parties as "Augusto" Moulton when the name of the corresponding party in the writ was Augustus Moulton, and the court there held that no valid lien was created by the attachment. It cannot be argued that R. C. Penney is identical with Rodney C. Penney, for it is a well settled principle of law that the name of every person consists of one given name and one surname, and it will not be presumed that the initial letters of a name prove ipso facto identity of that person with another whose full name begins with the same initial letters. In *Ellsworth* v. *Moore*, 5 Iowa, 486, the court say: "Whilst the Supreme Court knows judicially the judges of the different judicial districts of the State, and will presume in the absence of any showing to the contrary that the courts of the District Court are held by such judges, it cannot know that the attorney J. D. Thompson and the Honorable J. D. Thompson, Judge of the 13th Judicial District, are one and the same person." To the same effect in principle is *Enewold* v. *Olsen*, 39 Neb. 59, 22 L. R. A. 573.

It was held in *Dutton* v. *Simmons*, 65 Maine, 583, that the certificate of the officer to the registry of deeds of the attachment of the real estate of Henry M. Hawkins, when the name of the defendant in the writ is Henry F. Hawkins, is such a misdescription of the person sued as will render the attachment void.

The object of the filing the certificate by the officer in the registry of deeds is to give notice to the public of the attachment, and an invalid or incomplete notice is the same as no notice. *Swift* v. *Guild*, 94 Maine, 436.

It may be argued that it has been held by this court that the sale of real estate upon execution of Bertha J. Reynolds, where the defendant was named in the suit and in the attachment as Bertha Reynolds, was valid. *Hill* v. *Reynolds*, 93 Maine, 25, 32. But

in that case it was proved that Bertha Reynolds and Bertha J. Reynolds were the same person, by evidence aliunde. The rights of no third parties intervened, the suit in the real action being against the same party as the suit in the writ. No false notice was given to the defendant, she having been a party to both suits. And besides this, it has always been held that the middle name is no part of the name of a person, and that its omission is never fatal. 16 Am. & Eng. Ency. of Law, p. 114, Note 3. But using the initial of the given name is the same as though a false name had been used.

In *Bessey* v. *Vose*, 73 Maine, 217, the officer's return on the writ was dated October 5, 1876, at one o'clock P. M., and the certified copy returned to the registry of deeds is of return bearing date of October 18, 1876. The court held that the attachment created no lien.

The cases of *State* v. *Taggart*, 38 Maine, 298, 300, and *Commonwealth* v. *Gleason*, 110 Mass. 66, are where the foreman of a grand jury signed his name by initials, and are in principle like the case of *Ellsworth* v. *Moore*, supra.

The cases of *Collins* v. *Douglass*, 1 Gray, 167, and *Hubbard* v. *Smith*, 4 Gray, 72, are cases involving simply a question of identity where no innocent parties' rights are concerned.

The Supreme Court of Pennsylvania in *Crouse* v. *Murphy*, 140 Penn. 335, 12 L. R. A. 58, decided in 1891, that the record of a judgment against Daniel Murphy was not notice to one who took a conveyance from the debtor as Daniel J. Murphy. Although in that case it was admitted that Daniel and Daniel J. was the same person. The court in that case say: "As between Murphy and his creditor it would be a question simply of personal identity, but it is a purchaser who bought after a search of the records, and with no actual notice, who claims protection." And the court say: "In order to see the practical operation of such a holding we have looked into the city directory, and find that the name of Daniel Murphy, with various middle letters, and without any, occurs twenty times; but D is the initial of David, of Dennis, and of many other first names besides Daniel. To exhaust the possibilities as to D. Murphy would require searches running into the hundreds."

The presumption would be that the deputy sheriff made his return according to the statute, and according to the writ then in his hands, and when this plaintiff found no such writ in the court at Bangor, but did find a writ in favor of Rodney C. Penney, even if he supposed they were the same man, the presumption would still be that the first action wherein R. C. Penney was plaintiff was dropped and a new one commenced.

The doctrine of presumption is very strong in this case. The presumption is that public officers do their duties truthfully, legally and according to the record which they make; and when a person finds a return in the office of the register of deeds, made by an officer who says that the plaintiff in the writ was R. C. Penney, such person has no right to suppose, much less is he obliged to suppose, that a writ, which he finds in the clerk's office, where Rodney C. Penney is plaintiff, is the one upon which the certificate is returned into the office of the register of deeds. *Smith* v. *Smith*, 24 Maine, 555, 559; *Treat* v. *Orono*, 26 Maine, 217.

Counsel also contended that the name of the defendant corporation was not properly stated in the officer's return in the Penney suit. The officer names the defendant as "The Monson Maine Slate Company." He does not state that it is a corporation, nor that its place of business is at Monson. The Monson Maine Slate Company may be a copartnership as in *Haggett* v. *Hurley*, 91 Maine, 542, where a copartnership was called "The Rockland Lime Company." It is a very common thing for persons to do business as a copartnership under some such name.

Prior to the enactment of Stat. 1845, c. 143, it is impossible to find any authority for the sale of real estate of corporations in general on execution in this State. This statute is carried along unchanged through the various revisions and is incorporated into revision of 1883, c. 46, § 50, substantially as it was first enacted, and remained the same down to 1899, when the power to attach and sell real estate on execution was further extended by chapter 115 of the statutes of that year.

As appears by the case, the Penney attachment was made prior to 1899, to wit, on September 14, 1896. The execution sale, made in

attempted furtherance of this attachment, however, was on the 11th of June, 1900. Now had the Stat. of 1899, c. 115, never been enacted, it is certain that this attachment could have created no lien unless the officer in selling had followed strictly the provisions of R. S., c. 46, § 50; that is, the officer could not have sold the real estate of this or any other corporation on execution unless he had failed to find personal property sufficient to satisfy the execution and so certified in his return thereon.

The object of attaching property on mesne process is that it may be held to be seized and sold on the execution after judgment. Hence property which cannot be lawfully seized on execution cannot be lawfully attached. *Nichols* v. *Valentine*, 36 Maine, 322, 324; *Pierce* v. *Jackson*, 6 Mass. 242; *Badlam* v. *Tucker*, 1 Pick. 389; *Davis* v. *Garrett*, 3 Ir. (N. C.) 459.

No subsequent acts of legislature could render an attachment valid which was invalid when made, for the only statutes of this kind which could relate back to pending actions would be those affecting remedies merely, and not affecting rights.

Counsel also cited: R. S., c. 76, §§ 1, 43; c. 1, § 5; *Packard* v. *Richardson*, 17 Mass. 121, 122; *Rogers* v. *Goodwin*, 2 Mass. 475; *Holmes* v. *Hunt*, 122 Mass. 505; *Cummings* v. *Everett*, 82 Maine, 260; Stat. 1881, c. 80; *Dyer* v. *Belfast*, 88 Maine, 140; *Deake's Appeal*, 80 Maine, 50; *Glenburn* v. *Naples*, 69 Maine, 68; *Folsom* v. *Clark*, 72 Maine, 44; *Torrey* v. *Corliss*, 33 Maine, 333; *Rockland* v. *Rockland Water Co.*, 86 Maine, 55; *MacNichol* v. *Spence*, 83 Maine, 87; *Chipman* v. *Peabody*, 88 Maine, 282; *Phinney* v. *Phinney*, 81 Maine, 450; *Peabody* v. *Stetson*, 88 Maine, 273.

Henry Hudson and *J. F. Sprague*, for defendant.

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

STROUT, J. This is a writ of entry to recover several parcels of land. Demandant claims title by virtue of a sale on execution issued upon a judgment in favor of the National Hide and Leather Bank against the Monson Maine Slate Company, made on the ninth

day of February, 1900. Real estate was attached upon the writ on March 23, 1898. Defendant claims title to the same lands by virtue of a sale on execution issued upon a judgment in favor of Rodney C. Penney against the Monson Maine Slate Company, made on the eleventh day of June, 1900. Real estate was attached upon the writ on September 14, 1896. The right of redemption from this sale had expired before the present suit was instituted. If the attachment in the Penney suit was duly perfected, and is valid, and the subsequent proceedings were according to law and while the attachment was subsisting, the demandant took nothing by his purchase from the sheriff, unless perhaps the right of redemption from the subsequent sale on the Penney execution.

It is very ably argued by the plaintiff's counsel that the statute in force when these attachments were made did not authorize an attachment of real estate of a mining and manufacturing company, which the Slate Company is.

The right to attach real estate upon a writ is purely a statutory right. Chapter 60, § 2, of the laws of 1821, provided that "rights in equity of redeeming lands mortgaged, reversions or the remainders" and the lands of "any turnpike, bridge, canal or other company incorporated by law with power to receive toll," might be attached on mesne process, but that statute included no other corporation, and by section 13, lands of incorporated banks could be taken on execution and sold, but an attachment of these on mesne process was not authorized. By the general repealing act in 1840, this statute was repealed, and in the chapter relating to corporations, R. S., of 1840, c. 76, § 17, it was provided that "the corporate property of any company incorporated in this State"—"shall be liable to attachment on mesne process, and to be levied upon by execution" in the manner provided by chapters 99, 114 and 117. Chapter 94, § 34, provided that "the lands belonging to any manufacturing corporation"—"may be seized and sold on execution." Chapter 114, § 30, provided that all real estate liable to be taken on execution according to c. 94, may be attached on mesne process.

In the revision of 1857, all these statutes were repealed, and it was then provided that "all real estate liable to be taken on execution"

may be attached on mesne process. R. S., 1857, c. 81, § 28. But in the chapter on corporations, c. 46, § 32, it was provided that an officer having an execution against a corporation, could not levy upon its real estate, until he certified thereon that he was unable to find personal property of the corporation. Under these provisions it may well be doubted whether an attachment of the land could be made on mesne process. These provisions appear in substantially the same language in R. S., of 1871, c. 46, § 32, and c. 81, § 54.

But these provisions were repealed in the revision of 1883, and by c. 46, § 20, on corporations, it is provided that "the property of any corporation"—"are liable to attachment on mesne process and levy on execution for debts of the corporation in the manner prescribed by law." This statute was in force when these attachments were made. By the repeal of the former limitations upon the right of attachment and seizure and sale on execution of lands of corporations, and the substituted provision couched in such broad language, it is evident the legislature intended to subject corporate lands to the same liability to attachment on mesne process, as those owned by natural persons. This intention is so manifest that we are not authorized to import into the language any of the conditions or limitations contained in previous statutes.

It is urged that the officer's return of attachment to the registry of deeds was insufficient to create a lien upon the land. The suit was in favor of Rodney C. Penney. The return to the registry followed the statute in every respect, except that it gave the name of the plaintiff as R. C. Penney. The object of the return is to give notice to parties investigating title of an attachment. This return showed an attachment of the real estate of the Monson Maine Slate Company—the important fact to the party examining the title of the Slate Company. When the examiner went to the clerk's office to ascertain if the suit on which the attachment was made was pending, he would find a suit against the company in favor of Rodney C. Penney. It can hardly be conceived that in such case the seeker would be deceived. On the contrary, he would have ample notice of the attachment of the real estate of the Slate Company, and a pending action. This is all the statute contemplates, and all that is useful to the investigator.

The cases cited are of wrong names of the defendant. It is much more necessary that the name of the party whose estate is attached should be correctly shown by the records in the registry of deeds, than that of the plaintiff. Whose estate is attached is the vital question—it is immaterial by whom it was attached, if enough is stated to enable the suit to be understandingly traced on the docket of the court. We think this condition was met by the return here, and that the attachment was perfected.

Judgment in the Penney suit was rendered at the April term of the Supreme Judicial Court, 1900. Execution duly issued, and the officer seized the lands on the fourth day of May, 1900, within thirty days after the rendition of judgment, and after giving the notices required by law, sold them to the defendant on the eleventh day of June, 1900, and gave a deed thereof in due form which was duly recorded.

It is objected that as the defendant was defaulted at the January term, 1897, and the action was thence continued for judgment to the succeeding term in April, and no docket entry of farther continuance for judgment at that term, the judgment should have been rendered then. If it had been, the lien of the attachment would have expired before the seizure was made on the execution in 1900. The docket shows that the action was upon it at the January term, 1900, and thence continued for judgment to the April term, following, when judgment was in fact entered. The statute preserves an attachment for thirty days after judgment. For what reason the action remained on the docket from the April term, 1897, to the April term, 1900, does not appear, but it must be presumed that there was a sufficient reason for it. It did in fact so remain, for which various legal causes may be supposed. We cannot assume that it improperly remained.

It is also objected that the sale on the execution was made under c. 115 of the laws of 1899, which was not in force when the attachment was made, and it is urged that the remedy existing at the time of the attachment was a vested right in the plaintiff, which must be preserved on the final process. It is sufficient to say that the officer in making the sale followed the direction of R. S., c. 76, § 33. The

sale of land on execution was authorized by sect. 42 of the same chapter.

But if the sale had been under the act of 1899 it would be good. There is no vested right to a particular form of remedy. If a substituted remedy is given, which does not abridge the usefulness of that existing at the time the right accrued, there is no cause for complaint. The act of 1899 in no way defeated, limited or abridged the creditor's remedy existing under the law when his attachment was made. *Somerset Railway* v. *Pierce*, 88 Maine, 91; *Atkinson* v. *Dunlap*, 50 Maine, 116; *Oriental Bank* v. *Freese*, 18 Maine, 109, 112, 36 Am. Dec. 701.

The sale on the Penney execution related back to the date of attachment on the writ, which was long prior to the attachment on the writ of the Hide and Leather Bank. Under it, the defendant acquired title and the demandant has none.

Judgment for defendant.

ALLEN M. SMALL *vs.* DANIEL H. CLARK.

Waldo. Opinion February 10, 1903.

Forcible Entry and Detainer. Lease. Forfeiture. Eviction. Damages. R. S., c. 17, § 3; c. 94, §§ 1, 8, 9.

1. If the forfeiture of a lease by using the premises for the unlawful sale or keeping of intoxicating liquors, as provided by R. S., c. 17, § 3, be not taken advantage of by the lessor, the lessee's continued occupation is lawful, and the subsequent grantee of the lessor cannot maintain forcible entry and detainer based upon such forfeiture.
2. It is the owner of the premises at the time of the forfeiture who may bring forcible entry and detainer, and he alone.
3. Such a lease will remain in force, until he who is owner at the time of forfeiture determines the right of possession, by entry, or notice, or suit within seven days under R. S., c. 94, § 1.

4. The word "forfeited" in R. S., c. 17, § 3, has the same meaning and effect which the common law gives the same word in leases. Hence, if a a lessee "forfeits" his lease under R. S., c. 17, § 3, the lease is not ipso facto absolutely void, but is voidable at the option of the lessor or owner.
5. When a lease for a term of years provides that "if either party should see fit to terminate this lease before it expires he shall pay the other fifty dollars," *held;* that either party has a right to terminate the lease by paying fifty dollars to the other.
6. *Held;* that the evidence in this case fails to show that the lease in question was so terminated.
7. *Also*; that the lessor after he had conveyed the premises had no power to terminate the lease, unless he in some way still had an interest in the lease, or acted by authority of the owner, of neither of which facts is there any proof.
8. The plaintiff obtained judgment in the lower tribunal against the defendant, and the defendant having recognized to the plaintiff as provided in R. S., c. 94, § 8, the plaintiff recognized to the defendant as provided in section 9 of the same chapter, whereupon a writ of possession was issued and the defendant was removed from the premises. Subsequently the buildings which were the subject of the lease were destroyed by fire. *Held;* that a writ of restoration ought not to issue.
9. *Held;* that the defendant is entitled to recover as damages for his unwarrantable eviction the difference between the rental value of the premises and the rent reserved, from the date of the eviction to the end of the term, or to the termination of the lease otherwise.

On report. Judgment for defendant. Damages for defendant to be assessed according to the opinion. Forcible entry and detainer before a Trial Justice in Waldo County, for the purpose of obtaining possession of a hotel called the Lake House, in Freedom, in that county.

The Trial Justice found for the plaintiff, issued a writ of possession upon which the defendant was ejected from the premises. From the proceedings of the Trial Justice the defendant appealed to this court sitting at nisi prius and, after the testimony before the jury had been taken out, the case was by agreement of the parties reported to this court.

The facts are stated in the opinion.

R. F. Dunton, for plaintiff.

As late as June 14, 1901, the defendant used the premises for the illegal sale and keeping of intoxicating liquors, contrary to the pro-

visions of R. S., c. 27, § 1. He thereby forfeited all his right to the premises; his lease became absolutely void, and can afford him no defense to this action. R. S., c. 27, § 3.

Such use annuls and makes void the lease, and without any act of the owner, causes the right of possession to revert and vest in him. *Prescott* v. *Kyle*, 103 Mass. 381.

The statute of 1858, c. 45, § 3, was not enacted for the benefit of the owner of the property, but that part of it applicable to this case was enacted as a part of the settled policy of the State to outlaw the liquor traffic. The forfeiture is in the nature of a penalty for the violation of law, and to hold that it may be waived by the owner so that it cannot be invoked to invalidate the lease, or affect the tenant's rights to the premises, is equivalent to holding that an individual may waive the penalty for violation of a criminal law.

The rights of the defendant are no better under a lease of premises which he actually took and used for the illegal sale and keeping of intoxicating liquors in violation of both the terms of his lease and the law, than they would be under a lease which in terms permitted him to keep and sell intoxicating liquor on the premises.

When a lease is terminated under its own provisions, no notice to quit will be necessary, in order to dissolve the relation of landlord and tenant; for both parties are apprised of their rights and duties, the lease terminates ex vi termini pursuant to the contract, and the lessor may at once enter upon the lessee, and resume the possession of his premises, while the latter becomes a wrongdoer if he withholds such possession. Taylor's Landlord and Tenant, § 465.

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

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

SAVAGE, J. Action of forcible entry and detainer. April 3, 1901, J. I. Watts, then the owner of the premises in question, leased them to the defendant for the term of four years at a rental of $130 a year. The lease contained the following stipulations, among others: "Be it understood and agreed that if either party

should see fit to terminate this lease before it expires he shall pay the other fifty dollars and the said Clark shall have the first refusal when sold"; also, "be it further understood that said house shall not be used for any other purpose than a hotel, and no intoxicating liquors shall be sold on the premises." The other provisions in the lease are unimportant here. Watts conveyed the premises to the plaintiff July 8, 1901. On July 10, 1901, the plaintiff gave notice to the defendant in writing that his tenancy in the premises would terminate August 10, 1901. This action was commenced August 19 following, was heard before a trial justice, and judgment was rendered for the plaintiff. The defendant appealed to the Supreme Judicial Court, and the case is now before us on report.

The plaintiff seeks to maintain this action, notwithstanding the defendant was occupying the premises under a lease for a term of years, upon two grounds.

I. He contends that the defendant's right to the premises as tenant or occupant had been forfeited by him, prior to the commencement of the action, by using it or a part of it as a liquor nuisance, contrary to the provisions of R. S., c. 17, § 1. The lease itself stipulated that no intoxicating liquors should be sold on the premises, and that the lessor might enter and expel the lessee if he should violate any of the covenants of the lease. Revised Statutes, ch. 17, § 3, provides that "if any tenant or occupant, under any lawful title, of any building or tenement not owned by him, uses it or any part thereof for any purpose named in section one, he forfeits his right thereto, and the owner may make immediate entry, without process of law, or may avail himself of the remedy provided in chapter ninety-four," which is forcible entry and detainer.

Waiving the questions whether the plaintiff's pleadings should not have set forth specifically the statutory ground on which his claim is based, and whether proof of forfeiture under the statute is not a fatal variance from the allegations in the declaration before us, *Eveleth* v. *Gill,* post, p. 315, we are of opinion that the plaintiff must fail upon this statutory ground for want of proof. The only evidence in the case having any tendency to prove that the defendant

used any part of the premises as a liquor nuisance relates to June 14, 1901, while Watts was still the owner, and twenty-five days before the plaintiff purchased the hotel. After that, and while Watts continued to own the premises, the latter did no act to terminate the tenancy, either under the provisions of the lease or under the statute.

The remedy by forcible entry and detainer given by the statute may be maintained, without notice, if commenced within seven days from the forfeiture of the term. R. S., c. 94, § 1. But the plaintiff does not seek to maintain the action under that clause. The only other provisions in chapter ninety-four which can by any construction of its terms afford a lessor a remedy in cases of this sort is that which relates to tenants at will, and of these we shall speak hereafter.

Assuming that the defendant forfeited the lease as claimed, while Watts was the owner, unless he became ipso facto a mere tenant at will, Watts alone could take advantage of the forfeiture, and his right would not pass to his grantee by conveyance of the premises. *Fenn* v. *Smart*, 12 East, 444; *Bennett* v. *Herring*, 3 C. B. (N. S.) 370; *Trask* v. *Wheeler*, 7 Allen, 109; *Rice* v. *Stone*, 1 Allen, 566. The statute says, the tenant "forfeits his right thereto." The more explicit language of the original act, Stat. 1858, c. 54, § 3, says, "such use shall annul and make void the lease or other title under which said occupant holds, and without any act of the owner shall cause to revert and vest in him the right of possession thereof." The earlier phrase means no more, we think, than the later one. In either case it is the "owner" who may make immediate entry,—entry immediately upon the forfeiture, that is, when the forfeiture becomes effective; it is the "owner" at the time of the forfeiture, not his subsequent grantee. It is the "owner" who may make immediate entry or may have the alternative remedy of forcible entry and detainer. The statute does not read that the "owner" may make immediate entry or his grantee may resort to forcible entry and detainer. It is the owner at the time of forfeiture all the way through. This appears to be so from the language of the statute. Extraneous considerations support this position. The statute we are discussing was enacted in pari materia with that other which makes the lessors of buildings used

as liquor nuisances liable under some conditions to indictment, fine and imprisonment. And one purpose of section three undoubtedly was to enable the landlord to dispossess his liquor-dealing tenant immediately upon discovery, and thereby avoid the risk of prosecution himself. *Way* v. *Reed*, 6 Allen, 364. And this reason would not apply to a subsequent grantee.

Moreover, although the lease is forfeited or annulled and made void by the act of the tenant, the owner is not compelled to take advantage of it. He is not compelled to act. He is not obliged to make immediate entry. He may never resort to the remedy by forcible entry and detainer. He may waive the forfeiture, and waive the privilege of ousting the tenant. He may be content that the tenant shall remain, and if he is content, no one else can complain. And if he permits the tenant to remain, the tenant's occupation is lawful. The tenant's occupation is at no time unlawful, unless and until the "owner" determines the right of occupation.

At this point it becomes necessary to examine with more particularity into the precise status of the lease after forfeiture. Thus far we have assumed that it remains in force until the owner, during his ownership, takes advantage of the forfeiture, and determines the right of possession. We have said that the owner may waive the forfeiture. But the statute says the right under the lease is forfeited. The old statute said that it is annulled and made void. Is the statute to be construed as making the lease absolutely void and of no effect whatever, whether the owner takes advantage of it or not? If so, it may follow that if the tenant remains after the forfeiture, with consent express or implied of the landlord, he remains as tenant at will, and that forcible entry and detainer will lie, after thirty days' notice, such as was given in this case. And if the tenancy becomes thus a tenancy at will, by force of the statute forfeiture, and the lease is no longer in effect, then of course the grantee of the landlord, finding a tenant at will in occupation of the premises, may elect to regard the tenancy as terminated by the alienation, and bring forcible entry and detainer without giving the thirty days' notice, *Seavey* v. *Cloudman*, 90 Maine, 536; or he may give the notice and then bring his action. The plaintiff in this case seems to

have proceeded upon the theory that the defendant was a tenant at will merely, at the time of the alienation, and he gave the statutory notice.

If this construction of the statute is the correct one, what will be some of the consequences? The first and foremost one, and the only one we need to notice, will be to deprive the statute of much of its apparent beneficial effect, so much so that the court may well pause and inquire whether the Legislature intended such an effect. Unless the forfeiture becomes effective only by some act of the lessor taking advantage of it, such as entry, or notice, or suit within seven days, under chapter ninety-four, it must become effective by some act of the tenant, and that act must be the act causing forfeiture. If that be so, the lease is forfeited and the rights under it are ended by the act of forfeiture. The only summary remedy of the landlord, however, the only remedy which involves no notice and no delay, is forcible entry commenced within seven days after the forfeiture. But it is safe to say that innocent landlords, for whose benefit, in part at least, the statute was enacted, ordinarily do not and cannot know within seven days that forfeiture has been incurred. They are, therefore, remitted to a slower and waiting process. If not able to bring action within seven days after forfeiture, they must give thirty days' notice before suit, unless the forfeiting tenant can be regarded as a disseizor, and we think he cannot be so regarded merely because of the forfeiture. This construction certainly robs the statute of much of its supposed efficacy.

The inquiry suggests itself in this connection, whether the Legislature did not intend to give to the word "forfeited" and the phrase "make void" the same meaning and effect which the common law gives to similar expressions in leases. We think such was the intent. "The modern decisions," says Mr. Taylor in work on Landlord and Tenant, § 492, "establish that the effect of a condition, making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege." The editor of the Am. & Eng. Ency. of Law lays down the doctrine, Book 18, p. 380, 2d ed., which seems to be supported by the authorities cited,

that the construction of provisions for forfeiture of a lease for non-performance by the lessee, of conditions, is that the lease is voidable only at the election of the lessor, and is not rendered absolutely void though it provides that it shall be null and void in case of such breach. And this rule applies to leases by the crown, and when the provision is by statute, p. 381.

That such a construction is the one properly to be given to a statute like the one under consideration has been decided by the courts of other states in well considered opinions. In Rhode Island a statute phrased in almost the identical language used in our Act of 1858 was under consideration. The court said: "We think that under Gen. Stat. R. I., chap. 73, § 4," the statute in question, "a mere use of leasehold premises for the purposes prohibited in section 1" (like R. S., c. 17, § 1) "does not, ipso facto render the lease absolutely void, but that sect. 4 was intended for the benefit of the lessor, and that he alone can take advantage of the avoidance, at least unless he has been cognizant of the illegal use and has consented to it." *Almy* v. *Greene*, 13 R. I. 350. The case of *Trask* v. *Wheeler*, 7 Allen, 109, is on all fours with the one at bar. In it the lessor had conveyed the premises after forfeiture had been incurred, under a statute like our R. S., c. 17, § 3, and the grantee sought to take advantage of the forfeiture in his action to recover possession. The court said: "If it were to be held that the lease is thus made void, against the will of the landlord, any tenant desiring to get rid of his lease might do so simply by violating the statute. The provision must be regarded as made for the benefit of the landlord, who may avail himself of it, but is not obliged to do so. Though the lease is declared void, yet it belongs to the class of things which are said to be void only as to some persons. Bac. Ab. Void and Voidable, B. The landlord had a right to treat it as void, and to enter and expel his tenant. But he might also refrain from this exercise of his rights, and so long as he did so refrain, the lease would continue to be valid against the tenant, and all other persons; and it would continue valid till he should do some act to avoid it."

We are entirely satisfied with this exposition of the law. We think it is the only reasonable and proper interpretation of the statute. It

follows that the lease was in force at the time of the sale to the plaintiff and he could not oust the defendant for a forfeiture under R. S., c. 17, § 3, which occurred before he became owner, and of which the former owner had taken no advantage. The same result would follow were we to consider the provision in the lease concerning the sale of intoxicating liquors. The lessor might have had the right to enter and expel the lessee, and terminate the tenancy, but he did not do so.

II. The plaintiff also contends that the lease was terminated by the parties to it under that clause which stipulated that "if either party should see fit to terminate this lease before it expires he shall pay the other fifty dollars." It is not denied that by a proper construction of this clause, either party had a right to work a termination of the lease by paying fifty dollars to the other. The only question is whether the lease was so terminated. And here also the plaintiff fails in proof. Watts, the lessor, testified that he paid the defendant fifty dollars for the purpose of terminating the lease. This is now denied. It is true the defendant was not asked to testify upon this point. But we think that he might be well content to stand upon the evidence put in by the plaintiff. A careful examination of the evidence leads us to conclude that whatever payment Watts made to the defendant was made August 22, three days after this suit was commenced, when Watts and the defendant settled their mutual accounts, and that it is highly improbable, notwithstanding the testimony of Watts, that any payment was then made to terminate the lease. If the payment was made August 22, though in other respects made as claimed by the plaintiff, it would not support an action brought August 19. But however this may have been, Watts then was not the owner of the premises, and so far as appears had no interest in the lease. Unless he had such interest, or unless he was acting for the owner, of which there is no proof, he no longer had authority to terminate the lease by payment. He could not, by his acts, control or affect the lease. It should be said also that we do not think the evidence shows that the defendant assented to any termination of the lease.

The defendant therefore is entitled to judgment. That being so

it is agreed by the parties that the law court shall assess the damages, and determine whether justice requires a writ of restoration to issue. The case shows that after the trial justice had rendered judgment for the plaintiff, and the defendant had appealed and recognized to the plaintiff as provided in R. S., c. 94, § 8, the plaintiff recognized to the defendant as provided in section 9 of the same chapter. Thereupon the trial justice issued a writ of possession, which was executed, and the defendant and his property by means of the writ removed from the premises August 27, 1901. It also appears that subsequently, in August, 1902, the hotel which was the subject of the lease was destroyed by fire. It is clear, therefore, that justice does not require a writ of restoration to issue, but the contrary.

In assessing damages for the unwarrantable eviction of the defendant, it must be considered that his legal rights under the lease now exist in full force, and will continue for the full term of the lease or until April 3, 1905, unless sooner terminated in accordance with the provisions of the lease. The court may suppose that the plaintiff, upon being advised of his liability, will avail himself of his contract right to terminate the lease by the payment of fifty dollars, but we cannot know judicially that he will do so. The damages, therefore, should be assessed in the alternative.

The measure of damages is what the use of the premises may be deemed reasonably worth from the date of eviction to the end of the term, or to the termination of the lease otherwise. The ordinary rule is to allow the difference between the rental value of the premises for the term and the rent reserved. 3 Sedgwick on Damages, §§ 944, 1022. The burden is upon the defendant. He can recover no more damages than he has proved. In this case, for want of data, it is difficult to estimate what was the reasonable worth of the legitimate use of the premises.

The defendant, perhaps to his disadvantage now, kept no books of account. He relies upon estimates chiefly. Into these estimates have crept, we think, some elements not proper for consideration, such as the income he received for carrying the mail, under an independent contract, and his own personal labor and the labor of others in his family, which belonged to him, and it may be other matters. It

is to be presumed that he still has the benefit of his own labor, and that of his family, so far as it belongs to him.

Taking into account all the considerations which arise in the case, the court is of opinion that the defendant is entitled to recover damages at the rate of twenty dollars a month.

No allowance is to be made on account of the burning of the hotel. Non constat that it would have burned if the defendant had been allowed to retain possession. The plaintiff took the responsibility of ousting the defendant. He took the possession of the property into his own hands, and he must now be held accountable for the use of it as it was when he took it.

Judgment for defendant. No writ of restoration to issue. If the plaintiff shall, within thirty days after rescript is filed, terminate the defendant's tenancy by paying fifty dollars to the clerk for the use of the defendant for that purpose, defendant's damages are assessed at twenty dollars a month from August 27, 1901, to the time the tenancy is so terminated; otherwise defendant's damages are assessed at twenty dollars a month from August 27, 1901, to April 3, 1905. Judgment and execution accordingly.

HATTIE EVELETH, Appellant, *vs.* LOUIS GILL.

Piscataquis. Opinion February 11, 1903.

Forcible Entry and Detainer. Pleading. Forfeiture. Nuisance. R. S., c. 17, §§ 1, 3; c. 94. R. S., 1841, c. 128, §§ 2, 5.

1. In a case reported to the law court on the pleadings and the evidence, judgment cannot be rendered for the plaintiff unless the declaration contains allegations showing a cause of action and the evidence amounts to proof of the particular cause of action alleged.
2. R. S., (1883) c. 17, § 3, authorizing the owner of a building or tenement to maintain the summary process of forcible entry and detainer to eject a lawful tenant or occupant because of his using the premises for any purposes denominated a common nuisance in section 1 of the same chapter, is a statute penal in its nature and requires strictness of allegation and proof in the use of such summary process.
3. A mere general statement in the declaration in a forcible entry and detainer process, that the defendant had lawful entry into the lands and tenements of the plaintiff and that his "estate in the premises was determined" on a given date, is not a sufficient statement of a case under the statute above cited.
4. Even if the evidence adduced under such a defective declaration amounts to proof of a case under the statute, it cannot be given effect for want of necessary allegations in the declaration.

On report. Plaintiff nonsuit.

Forcible entry and detainer begun in the Dover Municipal Court to recover possession of the St. Germain House in Greenville. The defendant pleaded the general issue and by way of brief statement that he held a lease of the land upon which the rent had been fully paid, and was owner of the building; and, second, that Rebecca W. Crafts was owner of two-thirds of the real estate, and that he was occupying under her. Judgment having been given for the defendant, the plaintiff appealed to this court sitting at nisi prius. The case with the pleadings and evidence was reported to this court. The facts are stated in the opinion.

C. W. Hayes and W. H. Powell, for plaintiff.

Henry Hudson, for defendant.

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

EMERY, J. The case is this: John H. Eveleth in his lifetime executed to the defendant Gill a written agreement to sell and convey to him a building in Greenville for $1628, to be paid in monthly instalments with interest, and also to lease to him the land upon which the building stood for fifteen years at a rental of ten dollars per year. Also, by the terms of the agreement, Mr. Gill was to have possession of the premises until he failed to perform the conditions of the agreement. Mr. Gill immediately entered into possession of the premises under this agreement, which was dated May 1, 1895, and had made all the payments called for by the agreement up to the beginning of this litigation.

John H. Eveleth died Nov. 7, 1899, and the plaintiff Hattie Eveleth became the owner of one-third of his interest or title in said building and land. February 21, 1900, the plaintiff began this process of forcible entry and detainer against Gill in the Dover Municipal Court to remove him from the premises. Judgment was rendered for the defendant in that court, and the plaintiff appealed and the whole case with the pleadings and evidence is reported to the law court for determination.

The plaintiff's declaration is as follows: "In a plea of forcible entry and detainer, for that the said Louis Gill, at said Greenville, on the fifteenth day of February A. D. 1900, having before that time had lawful and peaceable entry into the lands and tenements of the said Hattie Eveleth, situated in said Greenville, to wit: a certain building situated on the south side of West Street in said Greenville, and known as the St. Germain House, and the land on which said building stands, and whose estate in the premises was determined on the fifteenth day of February A. D. 1900, then and still does forcibly and unlawfully refuse to quit the same."

The plaintiff thus acknowledges that the defendant was originally in lawful possession under a lawful estate, but alleges that his estate was terminated on Feby. 15, 1900. To prove such estate and termination thereof, the only evidence adduced by her was that on the

day named the defendant was using the building or tenement or some part thereof for one of the purposes forbidden by section 1, of c. 17, R. S., (the Nuisance Act). The plaintiff contends that upon such evidence she is authorized to make immediate entry without process, or to avail herself of the process of forcible entry and detainer provided by R. S., c. 94, and cites section 3, of c. 17, R. S., as follows:

"If any tenant or occupant, under any lawful title, of any building or tenement not owned by him, uses it or any part thereof for any purpose named in section one, he forfeits his right thereto, and the owner thereof may make immediate entry without process of law, or may avail himself of the remedy provided in chapter ninety-four."

Granting her contention as to her rights under section 3, c. 17, we think it clear that in resorting to the legal process authorized only by the statute, she must state, as well as prove, a case within the terms of the statute, and this she has not done.

The summary process of forcible entry and detainer at common law was a criminal, or quasi criminal, process and was only allowed where the entry and detainer were with force, the strong hand. The legislature of this state has devised a process of the same name, but now purely civil in form and nature, for the cases specified in the statute. It follows under the general law of pleading that the plaintiff in such a process should allege in his declaration the facts declared by the statute to be an occasion where the process may be used. Thus it was said by this court in *Treat* v. *Bent*, 51 Maine, 478, "This process of forcible entry and detainer is one created and regulated by the statutes, and in order to be maintained, must come clearly within their provisions." In that case the process was quashed because it did not "disclose enough upon its face to give the court jurisdiction." In *Woodman* v. *Ranger*, 30 Maine, 180, the second section of R. S., (1841) ch. 128 authorized the process for a forcible entry, or forcible detention: the fifth section authorized the process for a landlord whose tenant unlawfully refused to quit after his tenancy had been terminated by a thirty days' notice in writing.

The plaintiff apparently alleged a case under the second section, but was unable to prove that case. He then offered to prove a case under the fifth section, but was nevertheless nonsuited because he had not alleged a case under that section.

In the case at bar it is clear that the plaintiff has not alleged a case under § 3, of c. 17, R. S., which is the only case she has adduced any evidence of. There is in her declaration, no allegation that the defendant is a "tenant," or "occupant," no allegation of what particular purpose named in section one he had used the building for, and indeed no allegation that he had used it for any of those purposes. There is no allegation to apprise the court or the defendant that evidence will be offered of a case under that statute. The statute is highly penal. It works a forfeiture of possibly valuable rights purchased by large expenditure. There should, therefore, be full particularity and certainty of allegation in all legal proceedings to enforce it. The statutory case should be fully and clearly stated. Want of allegations necessary to show a case within the terms of the statute is as fatal as want of evidence of such a case.

True, the language of the statute is "may avail himself of the remedy provided in chapter ninety-four", but the language quoted only designates the process. It does not prescribe the allegations to sustain it. It does not imply that the process provided in chap. 94, may be framed to describe the cases heretofore named in that chapter, and yet be sustained upon evidence of an entirely new and different case not named in that chapter. On the contrary, the effect of the language is to make section 3, c. 17, an addition to chap. 94. By the new section thus added, the process is authorized upon another state of facts different from all those before specified. As stated in *Woodman* v. *Ranger*, supra, there must be allegations of these facts to authorize evidence of them and a judgment thereon, and this even though the case is reported to the law court on the evidence. *Loggie* v. *Chandler*, 95 Maine 220, 229.

It should be observed that the variance is not a mere technical one which would ordinarily be waived by reporting a case to the law court. *Pillsbury* v. *Brown*, 82 Maine, 450, 9 L. R. A. 94. The variance here is wide and substantial. The declaration, if of any case

at all, is of a case under one statute; the proof is of a different case under a different statute.

For want of necessary allegations to which the evidence can be applied, the entry must be,

Plaintiff nonsuit.

ABBIE D. RAMSDELL, Admx., *vs.* JAMES B. GRADY.

Washington. Opinion February 13, 1903.

Physician. Negligence. Damages.

1. A physician who fails to exercise reasonable care and diligence in the treatment of his patient is liable for malpractice, and in finding the defendant thus liable in this case, it is not clear to the court that the jury erred.
2. The defendant undertook the case of the plaintiff's intestate on Monday. The patient died on the following Saturday. The only damages of any amount which the deceased sustained were those resulting from mental and bodily pain; in an action by his administratrix, it is *held*, that under the evidence in this case, a verdict of $3,000 is unmistakably too large.
3. Only such damages can be allowed as the deceased sustained in his lifetime. Nothing can be allowed for his loss of life, nor for what he might have earned had he lived longer.
4. Damages in such a case can include only such loss, expense and suffering as was due to the defendant's default in excess of what they would have been had the case been properly diagnosed and treated.

On motion. Motion overruled.

Action on the case brought to recover damages on account of the negligence of the defendant, a physician, in the treatment of the plaintiff's intestate, Henry F. Ramsdell, during his last sickness, which commenced on Saturday, November 24, 1900, and terminated fatally on Saturday, December 1, A. D. 1900.

The plaintiff's contention was that the disease from which Mr. Ramsdell suffered and died was diphtheria; that it was a typical case, having all the characteristic symptoms; that it was not a disease

difficult to diagnose; that it should have been discovered by physicians of ordinarily good standing as to their qualifications, and who, in the care and treatment of the case exercise that diligence, care and attention that the seriousness of such a case called for and required; that the defendant, as a physician, treated plaintiff's intestate, Mr. Ramsdell, from Monday, November 26, until the latter part of the following Friday afternoon, and although he saw Mr. Ramsdell seven times during the five days that he treated him, did not discover the presence of diphtheria, and consequently did not treat him for diphtheria; that on Friday night, after having treated him for five days, he sent him from Eastport to the Eastern Maine General Hospital in Bangor, a distance of 135 or 140 miles, in the night time in the winter, unattended by a physician or nurse, for the purpose of having a surgical operation performed upon his throat; that on account of his failure to discover the disease from which he was suffering and to administer the proper treatment for it, and on account of sending him from Eastport to Bangor in such condition, that he not only suffered great pain, but that he suffered a great deal more than he otherwise would, had the defendant discovered the presence of diphtheria when he should have discovered it, and administered the proper and well recognized and universally adopted remedy for that disease.

The case was tried to a jury who returned a verdict for the plaintiff of three thousand dollars.

F. J. Martin and H. M. Cook; G. M. Hanson and A. St. Clair, for plaintiff.

W. R. Pattangall; L. D. Lamond; G. A. Curran, for defendant.

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

SAVAGE, J. Case against physician for negligently and unskilfully diagnosing the disease with which the plaintiff's intestate was ill, and of which he died, and for negligent and unskilful treatment of the same. After a verdict for the plaintiff the case comes here on motion for a new trial. The grounds relied upon are that the ver-

dict is contrary to the evidence and that the damages awarded are excessive.

I. The plaintiff contends that her intestate was ill with diphtheria; that the defendant was called as attending physician, that he should by the exercise of reasonable skill and care have diagnosed the case as diphtheritic, but that he negligently and unskilfully failed to do so, or to administer proper treatment, in consequence of which the patient became increasingly ill and died five days after the defendant was first called. It appears that the defendant was first called on Monday and treated the case during the week until Friday afternoon, when the patient, upon his recommendation, was taken from his home in Eastport to a hospital in Bangor, where he died Saturday afternoon. It is claimed that even the removal of the patient was improper under the circumstances.

The defendant contends that the disease was not diphtheria, or if it was, that it did not present any apparent symptoms of diphtheria that if it was diphtheritic at all, it was laryngeal, and of a kind the distinctive symptoms of which might not be discoverable by the diagnosis of an ordinarily skilful and careful physician and the defendant contends that in all respects he exercised reasonable care and skill.

No questions of law are in dispute. The liability of a physician for malpractice is based upon his implied agreement with his patient that he possesses the ordinary skill of a physician under like conditions, that he will use his best skill in determining the nature of the malady and the best mode of treatment, and that he will exercise reasonable care and diligence in the treatment. *Patten* v. *Wiggin*, 51 Maine, 594, 81 Am. Dec. 593; *Cayford* v. *Wilbur*, 86 Maine 414. The facts are seriously in dispute. There is much evidence upon both sides. An analysis of it here would not be useful. It is sufficient to say that it has not been made to appear that the jury manifestly erred concerning the defendant's liability. The verdict in that respect must stand.

II. But the amount of damages awarded is, we think, unmistakably too large. The counsel do not disagree as to the rule of

damages. Only such damages can be allowed as the deceased sustained in his lifetime. Nothing can be allowed for his loss of life nor for what he might have earned had he lived longer. The administratrix is entitled to recover, for the benefit of the estate, such damages as the deceased suffered up to the last moment of his life, and no longer. These principles are regarded as well settled, notwithstanding some dicta apparently to the contrary in *Welch* v. *Maine Central R. R. Co.*, 86 Maine, 552. See *Bancroft* v. *Boston & Worcester R. R. Corp.*, 11 Allen, 34; *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90; *Clark* v. *Manchester*, 62 N. H. 577. This rule may include loss of earnings, though in this case that was inconsiderable. It does include expense to which the deceased was put, or for which he became liable, on account of the wrong of the defendant. It also includes mental and bodily suffering up to the moment of death. It only includes, however, such injury, expense and suffering as was due to the defendant's default in excess of what they would have been had the case been properly diagnosed and treated.

It is very difficult for the non-professional mind to grasp and apply the distinction between a loss which ends at death, and a loss which ensues in consequence of death, or to exclude loss of life as an element of damages, no matter how well it may have been instructed. It is believed that the jury in this case erred in this respect. The only damages of any amount which the deceased sustained were those resulting from mental and bodily pain, and for these five hundred dollars a day were awarded. It is conceded that there is no precise way by which the pecuniary compensation for pain can be estimated, and that latitude in judgment must be allowed to the tribunal which determines it. Yet it is the duty of the court to see that what should be regarded as the ultimate bounds are not greatly overstepped.

The deceased was ill and under the defendant's care from Monday morning until Friday afternoon. He died the next day. He was unable to lie down or to sleep much. He found difficulty in breathing, and occasionally had strangling spells. He was very weak. He could eat or drink only with great difficulty. There is a strong

probability that at times he was in apprehension of death, though the evidence bearing upon this point is chiefly inferential. These are some of the chief features presented in the evidence. We need not particularize further. Taking into account all of the evidence, viewed as liberally in support of the verdict as it may properly be, we think the verdict should not be allowed to stand for more than fifteen hundred dollars.

If, within thirty days after rescript is filed, the plaintiff remits all of the verdict in excess of $1500, motion overruled; otherwise motion sustained, new trial granted.

STATE OF MAINE *vs.* WILLIAM W. DAMON.

Cumberland. Opinion February 23, 1903.

Indictment. Pleading. Polygamy. R. S., c. 124, § 4.

In an indictment for polygamy, it is sufficient to show jurisdiction, to aver that the crime was committed at some town within the county, or that the offender resided in the county at the time of indictment, or that he was apprehended within the county.

In such an indictment, the statutory exception is sufficiently and properly negatived, by the use of the following language:—"the said Rose Hoff Damon" [the lawful wife] "not having been continuously absent for seven years previous thereto and not known to him, the said William W. Damon to be living within that time."

Exceptions by defendant. Overruled. Judgment for the State.

Indictment for polygamy in the Superior Court for Cumberland County, to which the defendant demurred. The demurrer was overruled and the defendant took exceptions.

R. T. Whitehouse, County Attorney, for State.

D. A. Meaher, for defendant.

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

SAVAGE, J. Demurrer to indictment for polygamy. The indictment was found in the Superior Court for Cumberland County.

I. The respondent claims that the indictment does not allege that he resided in Westbrook, or that he resided or had been apprehended in Cumberland County. The indictment describes him as "late of Westbrook in the County of Cumberland," and then alleges that the polygamous marriage took place "at said Westbrook." There is no doubt but that by virtue of the statutes creating it, the Superior Court for Cumberland County has general jurisdiction of indictable offenses committed "at Westbrook" in that county, including polygamy, unless the statute defining and affixing a punishment for polygamy in some way affects and changes that jurisdiction. We understand the counsel for the respondent to claim that it does so.

Revised Statutes, c. 124, § 4, after defining polygamy concludes as follows:—"and the indictment for such offense may be found and tried in the county where the offender resides, or where he or she is apprehended." And the respondent's contention is that in order that the indictment should show the jurisdiction of the Superior Court, it must be averred in substance that at the time of the indictment the respondent resided, or had previously been apprehended within the County of Cumberland. We do not think so. Usually an indictment must be found in the county in which the criminal act was committed, and the court in a county has general jurisdiction over such crimes. But the Legislature may give the court in one county jurisdiction over crimes committed in another. It has provided that the crime of polygamy is indictable and punishable in any county where the offender may be found residing, or within which he has been apprehended. But this is not exclusive. It is merely an enlarged or special jurisdiction. It by no means ousts the court of the county in which the polygamy was committed of its general jurisdiction. The offender is not merely indictable in that county, but also in the county in which he resides, or in which he is apprehended.

An indictment is sufficient in this respect if it alleges that the crime was committed at some town within the county, or that the offender resided in the county at the time of indictment, or that he was apprehended within the county. The first objection to this indictment therefore fails.

II. It is averred in the indictment that the lawful wife was Rose Hoff Damon, and the respondent objects that the averment in the indictment, "the said Rose Hoff Damon not having been continuously absent for seven years previous thereto and not known to him, the said William W. Damon to be living within that time" is self-contradictory and uncertain. We do not think so. The defendant would read it as two separate and distinct averments, one that Rose Hoff Damon had not been continuously absent for seven years previous to the marriage complained of, and the other that she was not known to the respondent to be living within that time. We read it as a negative averment of a single statutory exception. The statute, R. S., c. 124, § 4, so far as relates to this question, reads as follows:— "If any person except . . . . one whose husband or wife has been continually absent for seven years and not known to him or her to be living within that time, having a husband or wife living, marries another married or single person . . . . he or she shall be deemed guilty of polygamy." The rules of pleading required the pleader to aver that the respondent was not within the excepted class. *State* v. *Godfrey*, 24 Maine, 232, 41 Am. Dec. 382. Who was within the excepted class? One whose wife had been continually absent for seven years and not known to him to be living within that time. Embodied in the exception is the affirmative proposition of seven years absence, limited by a negative proposition, not known to be living. The latter proposition is not an independent one. It is a modification of the prior one. That his wife was not known to be living was of no consequence, except in case of seven years absence. Not all cases of seven years absence were within the exception, but only his whose wife was not known to him to be living within that time. The two clauses must be taken together. Together they define only one excepted class, in which was included

only that one whose wife had been absent for seven years, *and* not known to him to be living within that time. When the affirmative element of absence is limited by the negative element of knowledge to be living, a case is brought within the exception in the statute. The pleader ought to aver that the respondent was not within the exception. How did he do it? He employed the statutory definition of the excepted class and placed the word "not" before it. He negatived the entire excepting clause. How could it have been done better? That the result at first sight may seem uncertain, chiefly because it furnishes an instance of the double negative, is not the fault of the pleader. It is simply the consequence of negativing an exception, which contains an affirmative limited by a negative. We think the indictment is sufficient.

Exceptions overruled. Judgment for the State.

ANGUS AMBURG, pro ami, *vs.* INTERNATIONAL PAPER CO.

Androscoggin. Opinion February 23, 1903.

Negligence. Master and Servant. Fellow-Servant.

1. The master's duty to provide reasonably safe appliances and instrumentalities with which the servants are to do their work is fully discharged if he has furnished a sufficient supply of suitable appliances, with competent men to use them, and it was understood that the servants themselves were to select such appliances from time to time as the particular occasion demanded.
2. In such case, if by use or lapse of time an appliance becomes unfit for use, the master has a right to assume that the servants will use the means for renewal and repair which the master has placed at their hands, or that other appliances will be selected in the place of those which have become unfit, out of the supply furnished by the master.
3. If the servant whose duty it is to make the selection is negligent in so doing, it is not the negligence of the master, but of a servant for which the master is not responsible.
4. *Held;* that there is no evidence to support the contention that the rope in question, the breaking of which caused the plaintiff's injury, was actually furnished by the defendant for the specific use to which it was put. But if it were a fact that it had been so used by servants before the time it broke, the master would be no more responsible for its condition and use, at the time of the injury than if it had then been so used for the first time. It would simply be a case where the foreman, who was a fellow-servant of the plaintiff, having the right and being under the duty of selecting a suitable rope, selected one lying on the floor, instead of a larger and stronger one placed at his command by the defendant; and if there was any negligence in its selection and use, it was not the negligence of the defendant, but of the plaintiff's fellow-servant. Upon the evidence, this raises an insuperable bar to the plaintiff's right to recover.

On motion by defendant. Motion sustained.

Action for personal injuries sustained by the plaintiff while in the employ of the defendant corporation. The jury returned a verdict of $587.50 for the plaintiff.

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.

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

SAVAGE, J. The plaintiff, a servant of the defendant, was injured in the following manner: The defendant's foreman with a crew of men of whom the plaintiff claimed to be one, were engaged in the defendant's machine shop removing a heavy iron press-roll from a lathe to the floor. The roll was first lifted by the use of double chain falls, or a chain fall at each end, until it cleared the lathe. Then the foreman tied an inch rope, which he says was found lying there on the floor, around the middle of the roll, and attached it to a single chain fall which hung about four feet from the lathe. By operating this single fall, the roll, still suspended by the double falls, was pulled away from the lathe so far that practically one-half of the weight of the roll was sustained by the single fall and inch rope. While the roll was being lowered to the floor, the inch rope broke, the roll swung back towards the lathe, hit another roll lying upon the floor and forced it against the plaintiff, causing the injury complained of.

The plaintiff's sole contention is that the defendant was negligent in not providing a reasonably safe, strong and suitable rope for use with the single fall, in that the rope attached to that fall was "weak, defective and unsuitable" for the purpose for which it was used, and "suddenly broke because of its defective unsuitable condition." The defendant on the other hand contends among other things, that if the rope was weak and unsuitable, and if the use of it under the circumstances was an act of negligence, the negligence was not that of the defendant, but that of the foreman, the plaintiff's fellow-servant. And here is the only issue necessary to be considered.

It is the duty of the master to exercise reasonable care to provide reasonably safe machinery, appliances and instrumentalities with which the servant is to do his work. It was the duty of the defendant in this case to exercise that care in providing reasonably safe ropes to be used by its servants in handling the roll in question. But that duty was fully discharged if the defendant had furnished a sufficient supply of suitable ropes, with competent men to use them, and it

was understood that the servants themselves were to select such ropes from time to time as the particular occasion demanded. *Rounds* v. *Carter*, 94 Maine, 535; *Pellerin* v. *International Paper Company*, 96 Maine, 388. In such case the defendant could not be deemed to have assumed the responsibility of selecting suitable ropes for each occasion. That duty and responsibility would fall upon the servants who used the ropes. It would naturally be expected that by time and use, ropes would become worn and perhaps rotten, as it is claimed this one was, and that they would need to be replaced or renewed. It is to be assumed in such case, and the master has a right to assume, that the servants will use the means for renewal and repair, which the master has placed at their hands; and that if ropes become worn and unsuitable, others will be selected in their stead out of the supply furnished for them by the master. *Johnson* v. *Boston Tow-boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *Cregan* v. *Marston*, 126 N. Y. 568, 22 Am. St. Rep. 854. And if the servant whose duty it is to make the selection is negligent in so doing, and selects an unsuitable or unsafe one, it is not the negligence of the master, but it is the negligence of a servant for which the master is not responsible.

These general principles, however, are not in dispute. Nor is it disputed that they apply generally to the facts in this case, for the evidence is clear and undisputed that the defendant had furnished a sufficient supply of suitable ropes for the use of its servants, and that they were at liberty to make selections from them according to their own judgment. But notwithstanding this, the plaintiff contends that the rope in question was actually furnished by the defendant for the specific use to which it was put, and that there is sufficient evidence to warrant a jury in so finding; and if so, it is argued, the defendant was bound to use due care to supply a reasonably safe and suitable rope. But we do not think there is any evidence to support this contention. The only evidence is that the rope was found lying on the floor. There is no evidence that it was a part of the chain fall, or that it was designed to be used with the fall, or that it had ever been used with the fall before. But if we assume, as the plaintiff does, that it had been so used, the only proper inference to be drawn

under the circumstances is that some servant or servants of the defendant at some time or times had selected it for that use, and had so used it. But this will not aid the plaintiff. It would only be such a selection and use by servants as was to be expected by the master when it furnished a sufficient supply of suitable ropes. The single fact, if it is a fact, that it had been so used by servants before would no more make the master responsible for its condition and use, than if it had been so selected and used for the first time at the time when the plaintiff was injured.

The case then is simply one where the foreman, who was a fellow-servant of the plaintiff, having the right and being under the duty of selecting a suitable rope, selected one lying on the floor, instead of a larger and stronger one placed at his command by the defendant. If there was any negligence in its selection and use, it was not the negligence of the defendant, but that of the plaintiff's fellow-servant. Upon the evidence before us this raises an insuperable bar to the plaintiff's recovery. The verdict for the plaintiff is manifestly wrong.

Motion sustained. New trial granted.

STATE OF MAINE *vs.* CHARLES W. MULLEN.

Penobscot. Opinion February 24, 1903.

Lands Reserved for Public Uses. Plantations. Towns. Priv. and Spec. Laws, 1901, c. 377; Stats. 1824, c. 280; 1828, c. 393; 1832, c. 39; 1842, c. 33; 1845, c. 149; 1846, c. 217; 1848, c. 82; 1850, c. 196. R. S., 1883, c. 5, §§ 12-19; c. 12, §§ 40, 46.

By the Act of 1850, ch. 196, it was provided that in all townships or tracts of land unincorporated or not organized for election purposes, sold or granted by the State, in which lands have been reserved for public uses, the land agent should have the care and custody of such reserved lands until such tract or township is incorporated or organized for election purposes. And the land agent was directed to sell for cash the right to cut and carry away the timber and grass from off the reserved lands which have been located, the right to continue until the tract or township should be incorporated or organized for election purposes.

The lands so reserved for public uses in Indian Township were duly located, and the right to cut timber and grass thereon had been sold by the land agent and such right had vested in the defendant prior to the incorporation in 1901 of a portion of Indian Township as the town of Millinocket. The reserved lands as located are all within Millinocket as incorporated. The acts of trespass complained of were the cutting of trees on the reserved lands after the incorporation of Millinocket. *Held:*—

1. That the right of the defendant to cut timber on the reserved lands was terminated by the incorporation as a town of a portion only of Indian Township, but in which portion the reserved lands were located; and therefore that the acts complained of were trespasses.
2. But that, although the State is the trustee of reserved lands, and may maintain trespass for injury to them, it is such trustee only until the township is incorporated, and that in this case its interest in the reserved lands in question was terminated by the incorporation of Millinocket. Therefore it cannot maintain this action.
3. That when a portion of a township is incorporated, and no exception or provision is made with reference to the reserved lands, it is to be deemed that the legislature intended the reserved lands within the portion incorporated to follow that portion and vest in it; and that it did not intend the right to cut timber to continue in a grantee thereof, under the Act of 1850, ch. 196, after the title to the land itself had vested in the town by incorporation.
4. That the title to the reserved lands and the timber thereon, within the town of Millinocket, have vested in that town.

Agreed statement. Plaintiff nonsuit.

The case was submitted by the parties to the law court upon facts agreed as follows:

This was an action for trespass to real estate, with a count de bonis for certain beech, maple, birch and other trees, not suitable for any purpose but for fire-wood, cut and carried away by the defendant between the first day of August, 1901, and the date of the writ, March 18, 1902, from lands reserved for public uses in Indian Township numbered Three, in the County of Penobscot, and under the care of the Land Agent of the State.

A portion of said Indian Township numbered Three was incorporated into a town by the name of Millinocket by chapter 377 of the Private and Special Laws of 1901. Within the limits of the territory of such incorporated town, organization of which was had, under said Act of 1901, previous to the alleged trespasses, are included the aforesaid lands so reserved for public uses and duly located in said township prior to the incorporation and organization of said town.

By deed dated November 8, 1850, and recorded in the land office of said State, in vol. 1, page 18, of records of deeds of timber on reserved lands, Anson P. Morrill, as Land Agent of said State agreeably to the provisions of chap. 196 of the Laws of 1850, entitled: "An Act in relation to lands reserved for public uses," approved August 28, 1850, conveyed to one Henry E. Prentiss, the right to cut and carry away the timber and grass from the reserved lots in said Indian Township until such time as the said township or tract shall be incorporated, or organized for plantation purposes, and no longer, and at the times of the alleged trespasses the said right to cut and carry away said timber and grass had, by sundry mesne conveyances from said Prentiss, vested in the defendant and others as tenants in common.

If, upon the foregoing agreed statement of facts, the court should be of the opinion the action is maintainable, the case is to stand for trial, otherwise the plaintiff is to be nonsuit.

C. J. Dunn, for plaintiff.

C. F. Woodard, for defendant.

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

SAVAGE, J. This action is for trespass to real estate, with a count de bonis for certain beech, maple, birch and other trees, not suitable for any purpose but fire-wood, cut and carried away by the defendant between the first day of August, 1901, and the date of the writ, March 18, 1902, from lands reserved for public uses in Indian Township numbered Three, in the County of Penobscot, and under the care of the Land Agent of the State.

A portion of said Indian Township numbered Three was incorporated into a town by the name of Millinocket by chapter 377 of the Private and Special Laws of 1901. Within the limits of the territory of such incorporated town, organization of which was had, under said Act of 1901, previous to the alleged trespasses, are included the lands so reserved for public uses and duly located in said township prior to the incorporation and organization of said town. By deed dated November 8, 1850, and recorded in the land office of the State, the Land Agent of the State, agreeably to the provisions of chap. 196 of the laws of 1850, conveyed to one Henry E. Prentiss, the right to cut and carry away the timber and grass from the reserved lots in Indian Township until such time as the said township or tract shall be incorporated, or organized for plantation purposes, and no longer. At the times of the alleged trespasses, the right of Prentiss to cut and carry away timber and grass under the foregoing conveyance had vested in the defendant and others as tenants in common.

Upon the foregoing succinct statement of facts, as agreed to by the parties, the case is submitted to this court to determine whether or not the action is maintainable. The proper determination of it will depend upon the answer to one or more of the following questions:

1. Was the right of the defendant to cut timber on the reserved lands in Indian Township terminated by the incorporation as a town of a portion only of the township, but in which portion the reserved lands are included?

2. If so, has the State any interest in the reserved lands since the incorporation of the town, which entitles it to maintain this action?

3. If so, are beech, maple, birch and other trees, not suitable for any purpose but for fire-wood, to be regarded as "timber" within the meaning of chap. 196, of the laws of 1850?

If either the first or second question is answered in the negative, it will not be necessary to consider the third.

By the Act of 1850, chap. 196, it was provided that in all townships or tracts of land unincorporated or not organized for election purposes, sold or granted by the State, or by Massachusetts, or by both States jointly, in which lands have been reserved for public uses, the Land Agent should have the care and custody of such reserved lands until such tract or township is incorporated or organized for election purposes. And the Land Agent was directed to sell for cash the right to cut and carry away the timber and grass from off the reserved lands which have been located, the right to continue until the tract or township should be incorporated or organized for election purposes. The Land Agent did sell the timber and grass on the reserved lands in Indian Township to the predecessor in title of the defendant. The township was never organized for plantation purposes, but a portion of it, which included the reserved lands, was incorporated as the town of Millinocket, prior to the acts of trespass complained of.

Whether this incorporation was such an incorporation of the township as determined the defendant's right to cut timber and grass under the Act of 1850 is a question not without difficulty. It is evident from the context, that the word "tract" in the clause which contains the right to cut "until the tract or township shall be incorporated" does not refer to the reserved lands themselves, but to the larger territory sold or granted out of which lands are reserved. In terms the right is to continue until the larger territory or the township is incorporated.

Before determining what the State did do with reference to the reserved lands by incorporating the town, it will be useful to inquire

what the State might do. Prior to the separation of Maine from Massachusetts, the latter State, in making grants or sales of public lands, had generally pursued the policy of making reservations of lands for public uses from the lands granted. The beneficiaries of these public uses were not ordinarily in esse at the time of the grant. Massachusetts retained the legal title for the use of the beneficiaries when they should come into existence. After the separation, as held in *State* v. *Cutler*, 16 Maine, 349, this State by virtue of its sovereignty became entitled to the care and possession of these reserved lands until those should come into existence for whose benefit the reservation was made. The State became trustee and as such could maintain trespass for stripping the land of timber.

By Stat. 1824, c. 280, as revised by Stat. 1828, c. 393, the State by general law enacted that there should be reserved in every township, suitable for settlement, whether timber land or otherwise, one thousand acres of land to be appropriated to such public uses, for the exclusive benefit of such town, as the Legislature should thereafter direct. By this legislation, the State constituted itself a trustee, retaining as such the legal title, but subjecting the land to such future public uses, for the benefit of the town, as the State itself might afterwards direct, until the town should be incorporated, when, under the Statute of Uses, the title would vest in the town. *Dillingham* v. *Smith*, 30 Maine, 370. Until incorporation the reserved lands and the funds arising therefrom are therefore under the general control of the State. *Dudley* v. *Greene*, 35 Maine, 14. The State has placed no limitation upon its power to designate the uses, or to control thereafter the title vested in the beneficiaries, only that they are to be public and for the benefit of the town.

This court in *Union Parish Society* v. *Upton*, 74 Maine, 545, had occasion to consider the general character of the trusteeship of the State and its power even to change designated uses before the vesting of title in the beneficiaries, and it was held that the State might, as was provided by the Act of 1832, c. 39, direct that income from the proceeds of lands reserved for the use of the ministry should be applied to schools, if the fund or the land had not become vested in some particular parish.

By the Act of 1842, c. 33, the State first provided for the custody of funds derived from the timber and grass on lands reserved for public uses. This act authorized the seizure and sale of timber, grass or hay cut by trespassers on reserved lands, and directed that the proceeds should be covered into the county treasury, to be paid to the town rightfully owning it, when applied for. In 1845, c. 149, cutting of timber on reserved lands was authorized, the proceeds to be disposed of as the proceeds of grass on public lots are disposed of.

The first general designation of public uses was made in 1846 by c. 217, by which it was provided that the proceeds of the sale of timber, or from trespasses on the reserved lots in unincorporated places should be paid into the county treasury and constitute funds for school purposes, of which the income only was to be used. If there were no inhabitants of the township, the interest was to be added to the fund. If there were inhabitants, and they had become organized into a plantation, and had organized one or more school districts, the interest on the funds was to be applied to the support of the schools, and in proportion to the number of scholars, if more than one school district; and if a district or plantation consisted of parts of two townships, the interest was to be distributed according to the proportion of such funds arising in each township, for the support of schools in that township.

In 1848, c. 82, it was provided that the proceeds of sales of timber and grass on the reserved lots should be paid into the State treasury, instead of into the county treasuries. By c. 196 of the laws of 1850, under a provision of which this controversy has arisen, the State treasurer was directed, after deducting expenses, to pay the balance of proceeds received from sales of timber and grass on the reserved lands "to the authorities provided by law to receive the same, when they shall hereafter exist, until which time the funds arising from said reserved lands shall remain in the treasury." And the above named statute provisions, so far as they relate to the designated use of these funds, their creation, custody and manner of expenditure, remain practically unchanged down to the present time. R. S., c. 5, §§ 12 to 19 inclusive.

It would therefore appear that the State, according as it reserved to itself in the Act of 1828 the power to direct, has directed that the use for which reserved lands are to be held is the support of schools, and this use follows the proceeds of the sales of the lands themselves. R. S., c. 12, §§ 40, 46. *Harrison* v. *Bridgeton*, 16 Mass. 16. And while the funds arising from the reserved lands are used for school purposes the income is to be expended like other school moneys, section 46. But having been devoted to public uses, no doubt the State could more particularly direct its use. It might appropriate it to a particular school or a particular grade of schools. It might appropriate it to the schools in a particular part of a plantation or town. The only limitations expressed are that the use shall be public and for the benefit of the town. That the use of the fund for the support of schools is a public use goes without saying, and if the Legislature deems that any particular application of school moneys within the town is for its benefit, we think their determination is conclusive.

It follows that upon the incorporation of a township, or a part of a township, from which lands have been reserved for public uses, the State has the lawful power to make such provision as it sees fit for the vesting of the reserved lands, and for the application of the school moneys arising therefrom. If it divides the township and incorporates a part, it may divide the reserved lands, as was done in the case of *Argyle* v. *Dwinel*, 29 Maine, 29. It may, we think, expressly assign the reserved lands to the portion incorporated, or it may expressly reserve them for the part unincorporated. And it would have been competent for the Legislature, in the incorporation of Millinocket out of a portion of Indian Township, to declare that the reserved lands in the whole township should vest in the new town. But no such declaration was expressly made, and we are left to inquire whether in the absence of express declaration, any implication arises either way.

Bearing in mind that the reserved lands are within the geographical limits of the new town, is it or not to be presumed that the Legislature intended them to go with and belong to the new town? The newly-incorporated town embracing the reserved lands, was it

such an incorporation as was fairly within the contemplation of the Act of 1850, by which the defendant's right to cut timber was to be continued until the township was incorporated?

In cases of doubtful construction the legislative intent sometimes may be considerably illuminated by a consideration of the consequences which may follow one or another of varying interpretations. The State held the lands as trustee "until incorporation" of the township, just as the grantee of the right to cut timber held that "until incorporation." Stat. 1850, c. 196. The same phrase has the same meaning evidently in both places in the same Act. Suppose it were to be held that the Act of 1850 was only to be satisfied by an incorporation of the entire township. Then what has become of the reserved lands and the fund which has arisen from them? Of course they did not vest in Millinocket upon its incorporation, for it was not the entire township. Equally, of course, for the same reason, they will not vest in the remaining portion of the township, whenever, if ever, it shall become incorporated, or in any subdivision of the township, if it shall be further divided for the purposes of incorporation. And there is no ground for any presumption that the entire township will ever become incorporated as one town. If this view is the correct one, the State, by incorporating Millinocket, has left the title to the reserved lands and the school funds arising therefrom wholly indeterminate. There is no provision of law by which a dollar can be expended, although it will not be denied that the exigency has arisen within the township, which was contemplated by the reservation of the lands, namely the settling of inhabitants in sufficient numbers to require the expenditure of money for public schools. Can it be supposed that the Legislature still intended to hold these lands in trust, and, perchance, to vest them and their income wholly in the remainder of the township? Is it to be considered that the Legislature intended that the remainder of the township was ever to have any interest in the lands which were incorporated as a part of Millinocket? If so, it seems singular that it did not say so. When these lands were being incorporated together with the rest, if it was intended to make any reservation of interest in the State for the benefit of the remainder of the township, the burden is

certainly upon those who assert that intention to answer why it was not expressed.

Upon the whole, we are of opinion that it was the legislative intent that the reserved lots embraced within Millinocket, should pass to that town and be vested in it, and that that intent is made sufficiently apparent from the fact that the lands were within the limits of the town, and were not excepted from the results which ordinarily follow the incorporation of a township, including reserved lands. And we are also of opinion that when that portion of a township which includes reserved lands is incorporated, it is properly to be deemed, as to such lands, an incorporation of the township within the meaning of the Act of 1850. It is to be deemed that the Legislature intended the reserved lands within the portion incorporated to vest in that portion, unless otherwise expressed, and that it did not intend the right to cut and carry timber and grass to continue in a grantee thereof, after the title to the land itself had vested in a town by incorporation.

From this conclusion, it appears that the acts of the defendant done after the incorporation of Millinocket were trespasses; but it also appears that by that very incorporation, the State ceased to be trustee of the reserved lands, and now has no interest in them, by which it can maintain this action.

In accordance with the stipulation, the entry must be,

Plaintiff nonsuit.

CHARLES W. LEWIS *vs.* WASHINGTON COUNTY RAILROAD CO.

Washington. Opinion February 28, 1903.

Contributory Negligence. New Trial. Conflicting Testimony. Collision at Railroad Crossing. Verdict against Evidence.

Even when there is strong doubt of the actual occurrence or existence of a fact found by a jury, if the evidence is conflicting, their finding will not be disturbed on that ground.

But when, in an action to recover for the defendant's negligence, from the testimony of the plaintiff himself and the undisputed facts in a case, it is clear that the plaintiff failed to exercise that degree of care which common prudence as well as the law requires and that his negligence and want of care not only contributed to the injury but was its proximate cause, a verdict finding no negligence on the part of the plaintiff will be set aside.

Motion by defendant for new trial. Sustained.

Action on the case for injuries claimed by plaintiff to have been received by him in a collision between one of defendant's locomotives and plaintiff's team at a railroad crossing in Eastport, on the Washington County Railroad, on January 8, 1901.

There was no flag-man at the Washington Street crossing, where the accident is claimed to have occurred, to warn persons using the highway of the approach of trains.

The case appears in the opinion.

L. H. Newcomb; G. M. Hanson and A. St. Clair; W. R. Pattangall, for plaintiff.

G. A. and B. Y. Curran, for defendant.

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

STROUT, J. Plaintiff claims that he was injured by collision of a locomotive of defendant with his team, at the crossing of the railroad over Washington Street in Eastport. He had a verdict, and the case is here on motion to set the verdict aside as against evidence.

A careful examination of the evidence raises a serious doubt whether any collision in fact occurred, but the evidence on that point was conflicting. It was peculiarly within the province of the jury to determine that question, and we are not disposed to disturb the verdict on that ground.

Whether the negligence of the plaintiff contributed to the accident is a more serious question. He says he came up the county road from Perry, and turned into Washington Street; that he there saw a locomotive backing down on the eastern side track of defendant; that when he saw it, he slowed down his horse to a walk, and walked around the corner; that he drove along down Washington Street toward the crossing, and kept watching for a train; he started his horse into a trot of about six miles an hour, and kept on at that rate, without seeing or hearing the locomotive, till his horse was over the first two tracks, when he saw it approaching the street at a distance, he judged, of about ninety feet; he then started up his horse to get across.

It is important here to take into account the location of the tracks, certain distances, and the surrounding circumstances. From the turn into Washington Street to the western side track is two hundred and forty feet; next easterly of this track is the main line; next easterly the station, southerly of Washington Street and distant one hundred and five feet from the centre of the street at the main line crossing; next easterly is another track, on which this locomotive was running. Between the western rail of this latter track and the eastern rail of the main line is thirty-five feet in the centre of the street, and thirty-three feet on the northerly side of the travelled part. Standing in the centre of Washington Street, at the crossing of the main line, a person can see up the extreme eastern side track past the northeast corner of the station, a distance of seventy-five feet. These distances are given by the engineer from actual survey, and are not disputed.

When plaintiff was at the corner of the county road and Washington Street, and saw the locomotive backing up on the siding, he had reason to believe that it would soon return; that he did so regard it is evident, as he says, "he slowed his horse down to a walk and walked around the corner," and he "kept watching for a train," and

after he turned the corner which was two hundred and twenty-five feet from the main line, he started his horse into a trot of about six miles the hour, and kept that pace until he was on the main line. Here he was thirty-five feet from the siding on which the locomotive was, and he then saw it—at a distance probably of seventy-five feet, but which plaintiff estimated to be ninety feet. Instead of stopping, as he certainly could have done, if his horse was under control, and he says it was, or turning in the street, which at that point was eighteen to twenty feet wide in the travelled part, he says "I started my horse—hollered at my horse and started him up to get across." It is in evidence uncontradicted that the horse was a spirited one, had run away at least once before that, and was nervous and restless at a train. It is manifest that either from fear of his horse or a desire to save time, and a probable miscalculation of the distance of the locomotive or its speed, he rashly attempted to cross the track in advance. If he had been looking and listening, as he should have been, it is incredible that he would not have heard the engine before he saw it.

Under these circumstances we cannot doubt that the plaintiff failed to exercise that degree of care which common prudence, as well as the law, requires; and that his negligence and want of care not only contributed to the injury, but was its proximate cause.

This conclusion is reached from the evidence introduced by the plaintiff, and upon the theory that defendant was negligent. But in fairness it ought to be said that the positive evidence introduced by the defendant that the locomotive bell was ringing, and that it was running at a slow rate of speed, is hardly overcome by the opposing negative evidence of witnesses who say that they did not hear the bell, and the judgment of inexperienced persons as to the speed.

Motion sustained; verdict set aside; new trial granted.

JOHN J. McGRAW *vs.* GREAT NORTHERN PAPER CO.

Androscoggin. Opinion February 28, 1903.

Pleading. Declaration. Special Demurrer. Negligence. Machinery. Barker.

In a declaration to recover for injuries claimed to have been received by plaintiff in defendant's pulp-mill, while operating a machine called a barker, an allegation, "that said barker was then and there defective and dangerous, and was out of repair, so that the operation of said barker was then and there attended with great dangers and hazards," is too general and indefinite.

Where the injury complained of is charged to the falling of "the attachment" of the barker, the declaration should contain some allegation that the attachment was defective, or to show that falling was not its normal action.

Exceptions by defendant. Sustained.

Case brought by plaintiff to recover damages for an injury suffered by him while employed in defendant's pulp-mill at Madison, on or about September 13, 1901. At the return term of the writ defendant filed a special demurrer which was joined, but no hearing was then had thereon. At a succeeding term of the court at nisi prius, the demurrer was heard by the presiding justice and overruled; and defendant then noted an exception. In overruling the demurrer the presiding justice gave notice that, if requested, he should require the plaintiff to file a specification of what acts or omissions or conditions he relied upon as showing the defendant to be negligent. Subsequently the plaintiff filed a specification. The defendant, however, insisted upon its exceptions, and seasonably presented the same which were allowed and filed.

Plaintiff's declaration was as follows: —

"In a plea of the case, for that the said defendant corporation on the 13th day of September, 1901, and for a long time prior thereto was the owner and operator of a certain mill in said Madison, used for the manufacture of pulp and that in said mill at said time the said defendant corporation owned and operated certain machines and

machinery with their appurtenances and appliances run by water power, and particularly a certain machine called a barker which was used by said defendant for the purpose of peeling or shaving bark from certain sticks of wood, and the plaintiff avers that on the 13th day of September, 1901, and for a long time prior thereto he was an employee and servant of said corporation for wages and hire, and on said 13th day of September he was set to work by said defendant upon said barker to use and operate same in the shaving of bark as above described, and the plaintiff avers that he was then inexperienced in the use and working of said barker and that said barker was then and there defective and dangerous, and was out of repair, so that the operation of said barker was then and there attended with great dangers and hazards, all of which were well known to said defendant and was not known to said plaintiff, and the plaintiff further avers that he was set to work on said barker then and there by said defendant without any instructions as to how to operate said barker and without any warning or information as to the dangers and risks attending the operation of said barker and without any instructions, information or warning as to the defective condition of said barker and as to its being out of repair, and the plaintiff further avers that while he was there operating said barker and while in the exercise of due care and without fault on his part, the attachment on said barker suddenly fell and caught the right hand and arm of the said plaintiff and drew the same with great force and violence into certain revolving knives in said barker, thereby lacerating, cutting and mutilating the said plaintiff's hand, so that the hand and part of the said plaintiff's arm had to be amputated, whereby the plaintiff has suffered great pain and has been permanently injured in the loss of his hand and arm and has been put to great expense for medicine and medical treatment, whereby an action hath accrued to the plaintiff to have and recover from said defendant his damages in this behalf sustained, to the damage of the said plaintiff (as he says), the sum of ten thousand dollars."

Plaintiff's motion to amend was as follows:—

"And now comes the plaintiff in the above entitled action and asks leave to amend the declaration in his writ by adding after the word

"barker" in the thirty-first line of said declaration the following words, to wit: 'by reason of its defective condition and want of repair.'"

Defendant's special demurrer was as follows:—

"And now the defendant comes and defends and demurs to the plaintiff's declaration and says that said declaration is not sufficient in law, and for special cause of demurrer says:

That said declaration is insufficient for the following reasons:

Because the plaintiff does not allege what duty the defendant was under to the plaintiff or that it was under any duty.

Because the plaintiff does not allege wherein the machine of which he complains was defective, or out of repair, or wherein it was dangerous, or whether its danger was because of its defective condition.

Because the plaintiff does not allege wherein the defendant was negligent.

Because the plaintiff does not allege wherein the machine called a barker was dangerous or attended with great danger, or whether in perfect condition said machine was so dangerous.

Because the plaintiff does not allege that the injury to him was because of any negligence of the defendant.

Wherefore the defendant prays judgment and for its costs.

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

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

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

STROUT, J. This is an action on the case for an injury suffered by plaintiff while in defendant's employ. A special demurrer to the declaration was filed and overruled, and the case is here upon exceptions to that ruling.

The declaration alleged that plaintiff was set to work upon a machine called a barker, and the defendant is charged with negligence in "that said barker was then and there defective and dangerous, and was out of repair, so that the operation of said barker was then and there attended with great dangers and hazards."

It is objected that this allegation is too general, and fails to point out the defect in the machine, which caused the injury. We think the objection is well taken. There is no specification of any particular defect in the barker, nor of any special danger in its operation. It is alleged that while the plaintiff was operating it, "the attachment on said barker suddenly fell and caught the right hand and arm" of plaintiff, and inflicted the injury complained of. There is no allegation that this attachment was in any manner defective, nor that such falling was not its normal and intended action. For aught that is alleged, the attachment may have been in perfect order, and its fall may not have been the result of any fault in the barker, or the barker may have been defective in some particular, which did not cause or contribute to the fall of the attachment. The declaration fails to apprise the defendant of the particular fault complained of, or the specific negligence which resulted in the injury.

Good pleading requires in such case a definite statement of the particular defect, so far as it may be practicable to state it, which caused the injury, to the end that the defendant may know what claim he is to meet, and to which the evidence is to be directed. There may be cases of a complicated machine, where it may not be practicable or even possible to allege with certainty the identical defect causing the injury, but even in such case it may be stated in sufficiently specific terms to indicate to the defendant the charge he is called upon to meet,—or the difficulty may be obviated by several counts, with such variations as circumstances may require.

In this case the injury is charged to the falling of the attachment, and not to anything else, but it is not alleged that the attachment was in any manner defective. There certainly could be no difficulty in alleging, if true, in what respect this attachment was defective and out of repair, or whether it fell as the result of any imperfection in the barker itself. The declaration should state the facts, the actual condition of the machine and attachment, and from these facts the jury are to determine whether it was defective or not. The allegation here is too general and indefinite to comply with legal requirements. *Boardman* v. *Creighton*, 93 Maine, 23.

The exceptions are to the overruling the demurrer. Consequently

the specifications subsequently filed, or the amended declaration offered, but not allowed, cannot be considered.

Exceptions sustained; demurrer sustained; declaration adjudged bad.

LAURA HAYFORD, Trustee, *vs.* THOMAS H. WENTWORTH.

Penobscot. Opinion March 5, 1903.

Fixtures. Merger. Intention. Landlord and Tenant. Law and Fact. Water Closet.

1. The physical character of the annexation of a chattel to land or buildings does not alone determine the question whether the chattel annexed is merged in the realty.
2. To effect a merger of a chattel into realty there must be (1) an actual physical annexation, at least by juxtaposition, to the realty, (2) an adaptability for use with that part of the realty to which it is annexed, and (3) an intention by the party annexing to make it a permanent accession to the realty. This intention however is not the unrevealed, secret intention but the intention fairly deducible from all the circumstances.
3. The question of the existence of either of these requisites, including the intention, is a question of fact, or, at least, of mixed law and fact.
4. The burden of showing the existence of these requisites, including the intention, is upon the party claiming a merger.
5. A tenant of a building or of an office, in the absence of objection from the landlord, has the right to annex temporarily thereto chattels for his own comfort or convenience and may remove them during his term, if such annexation and removal do not materially injure the realty.
6. "A wash-down syphon water closet" and its appurtenances, put into a business office in the usual manner by a tenant at will for his own use and which can be removed without material injury to the realty, does not become merged in the realty unless it was so put in with an intention to make a permanent accession to the realty.
7. The fact that the water closet was connected with a soil pipe also put in by the tenant and left by him affixed to the realty, does not prevent his disconnecting and removing the water closet.
8. A tenant so putting in a water closet may transfer the same to his successor in the tenancy and the last tenant thus acquiring it may remove it during his term.

Exceptions by defendant. Sustained.

Trespass on the case for removing and carrying away from the plaintiff's premises a water closet bowl.

The evidence showed that on January 8th, 1897, upon an order of one Newcomb, then having a desk, assisted by a female stenographer, in the office described in the plaintiff's writ, occupied by the defendant and Judge Vose, and under their advice, they paying one-third each therefor, a skilled plumber put in a soil pipe and set up a "wash-down syphon water closet," in a small closet, a part of the occupied premises, into which the Holly water had previously been introduced for drinking purposes and for a wash bowl. Cost of closet set up, fifty-five ($55.00) dollars, and fourteen ($14.00) dollars for soil pipe and connections with sewer.

The evidence showed that said closet was set up in the usual manner, the flanges on the upper end of the soil pipe being flush with the floor of the closet, to which flange the bowl of the new closet was secured by bolts and nuts.

The evidence showed that said defendant and Vose were the tenants till December 31st, 1897, when the said Vose vacated, leaving said defendant sole tenant, he (the said defendant) having purchased the interest of said Newcomb and Vose in the said closet.

The evidence showed that the defendant's tenancy continued till July 1st, 1900, and that on the 28th day of June, 1900, he caused the said water closet to be removed in a manner which the plumber, called by the plaintiff, testified to be the customary, usual and safe method, by the same plumber who set it up, leaving the soil pipe intact but securely plugged with newspaper, (which said plumber testified was the customary method) to which said soil pipe the plaintiff attached another water closet.

The only evidence that the defendant did not intend the water closet to remain a permanent fixture was that he erected it upon premises which he might be obliged to quit at any time in thirty days, and the fact that before the expiration of his term of tenancy he did remove it.

The following instructions were requested by the defendant:

First. "Was this closet so attached that its removal caused

material damage to the realty? If it was not so attached, then you will come to the question of the intention of the party or parties when it was set up. Did they intend it should remain as a part of the realty or only for their better convenience and accommodation while occupying the premises?"

Second. "If the jury find that its removal did not cause material damage to the realty, and that it was not the intention of the party or parties to leave the closet after the expiration of their tenancy, then as a matter of law, the defendant had a right to remove it before the expiration of his term of tenancy."

The court refused to give the instructions asked for by the defendant and instructed the jury as follows:—

"I decline to give you these instructions, gentlemen, because it seems to me that there being no controversy, no question of fact, as to the method in which the closet, and the plumbing necessary for the closet were put there, I instruct you as a matter of law that that becomes a fixture, a part of the realty. So that this defendant, Mr. Wentworth, is liable for having removed that closet."

To which instructions and refusal to give instructions the defendant took exceptions.

J. R. Mason, for plaintiff.

L. A. Barker, for defendant.

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

EMERY, J. Under what circumstances articles once chattels lose their character as chattels and become merged into realty, has been a somewhat troublesome question, decided differently by different courts, and differently by the same court at different periods. The trend of judicial opinion, however, has been away from a tendency toward merger, till now there is tendency toward non merger. Without taking space here to trace the steps in this development of the law in such cases (a task which has been well done in some of the opinions below cited) it is sufficient to say, that courts now very generally discard the old test of the physical character of the annexation and hold

that a chattel is not merged in the realty, unless (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to and usable with that part of the realty to which it is annexed, and (3) it was so annexed with the intention, on the part of the person making the annexation, to make it a permanent accession to the realty. *Readfield T. & T. Co.* v. *Cyr*, 95 Maine, 287, 289, and cases there cited. For other authorities to the same effect, see *Baker* v. *Fessenden*, 71 Maine, 293; *Voorhees* v. *McGinnis*, 48 N. Y. 282; *Dana* v. *Burke*, 62 N. H. 627; *McMillan* v. *N. Y. Water Proof Paper Co.*, 29 N. J. Eq. 610; *Teaff* v. *Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 645; *Hill* v. *Wentworth*, 28 Vt. 428, 437; *Langston* v. *State*, 96 Ala. 44, (11 So. Rep. 334); *Hill* v. *Sewald*, 53 Pa. St. 271, 91 Am. Dec. 209; *Ames* v. *Trenton Brewing Co.*, 57 N. J. Eq. 347, 38 Atl. Rep. 858, affirmed in 45 Atl. Rep. 1090; *Seeger* v. *Pettit*, 77 Pa. St. 437, 18 Am. Rep. 452. Further, as said in *Readfield T. & T. Co.* v. *Cyr*, supra, "while it would be impossible to reconcile all the cases upon this subject, yet the modern and most approved rule appears to be to give special prominence to the intention of the party making the annexation."

An evident corollary of the modern rule thus established is, that the burden of showing the existence of these requisites for merger, including the intention, is upon the party claiming the chattel to have become merged in the realty. *Hill* v. *Wentworth*, supra; *Baker* v. *Fessenden*, 71 Maine, 293; *Munroe* v. *Armstrong*, 179 Mass. 165; *Knickerbocker Trust Co.* v. *Penn. Cordage Co.*, (N. J. Eq.) 50 Atl. Rep. 459.

As to the intention, of course it is not the unrevealed, secret intention that controls; it is the intention indicated by the proven facts and circumstances, including the relation, the conduct and language of the parties; the intention that should be inferred from all these. *Readfield T. & T. Co.* v. *Cyr*, supra. Thus in *Munroe* v. *Armstrong*, supra, where a plumber as sub contractor put plumbing material in a house in the course of its construction, it was held to be a necessary inference that he intended the materials to become a part of the realty. So where the chattel is so annexed that it cannot be removed without material injury to the realty, it would ordinarily be a neces-

sary inference that the intention was not to remove it. So where the chattel is annexed by a stranger having no interest nor right of occupancy in the realty, he will ordinarily not be heard to say that he intended a trespass. So a special agreement, or a known custom, may conclusively determine the question. Nevertheless, the intention is a fact which must be proved either directly or by inference from other proven facts. Whether there was such an intention is a question of fact, or at least of mixed law and fact, for the jury in an action at law where there is any conflict of evidence or more than one possible logical inference from undisputed facts. *Seeger* v. *Pettit*, 77 Pa. St. 437; *Turner* v. *Wentworth*, 119 Mass. 459; *Allen* v. *Mooney*, 130 Mass. 155; *Phila. M. & T. Co.* v. *Miller*, (Wash.) 44 L. R. A. 559. In *Ames* v. *Trenton Brewing Co.*, supra, the fact that the owner of the chattels, before annexing them to the building leased to him, had agreed to give a chattel mortgage of them to the person from whom he had bought them was held proper to be taken into consideration in determining the question of his intention as to permanency of annexation. In *Seeger* v. *Pettit*, supra, the tenant, for the purpose of negativing any inference of intention to make the articles annexed by him a part of the realty, was held entitled to show that he had included them as his property in his schedule of assets.

Turning now to the bill of exceptions in the case at bar, we think the practical effect of the ruling complained of was to wholly exclude from consideration the question of intention, and indeed all other questions except the effect of the undisputed method of the original physical annexation, and to hold as matter of law that this method alone as described in the bill of exceptions made the chattel a part of the realty and passed the title to the owner of the realty. Unless, therefore, it is a necessary inference from the method of annexation that the defendant and his associates and vendors intended to make the annexation permanent as a part of the realty, the ruling was clearly erroneous and prejudicial.

It does not seem to us that such an inference is necessary, even if permissible. The chattel was of substantial value in itself, having cost $55. The defendant and his associates were then tenants at

will to the plaintiff and liable to be deprived of the use of the leased office within thirty days after annexing the chattel. The law is now liberal to such tenants. The chattel (a "wash-down syphon water closet" and its appurtenances) was not annexed in the construction, enlargement or repairs of the office. It was not designed or made for this particular office, or place, nor for any particular place. It was a chattel already made for the general market, and kept in stock and separately by itself an object of sale and purchase in the general market. It could be placed and used in any room, or building, and transferred from building to building and from place to place in the same building. It had a market value before annexation and a market value after removal. Being such a chattel, the tenants brought it into the leased office and set it up, not to enlarge, strengthen or repair the office rooms, but exclusively for their own use and comfort. As one of the three vacated the premises he sold his interest in the water closet to those remaining and they purchased it during their occupancy. The last tenant removed it during his right of occupancy by merely unscrewing nuts and screws and withdrawing bolts and nails, without damage to the chattel or the realty so far as appears.

Taking into account all these circumstances and the rule that the burden of proof of showing the intention to make the annexation permanent, is upon the plaintiff, we think that reasonable men might be of the opinion (and not without reason) that an intention to permanently annex the chattel and make it a part of the realty was not shown and did not exist. This being so, the exceptions must be sustained and a new trial granted even if our own opinion were different.

The citation of some authorities may perhaps enforce our reasoning and make our conclusion more acceptable. In Tyler on Fixtures, 385, it is said: "As a rule any fixture made by a tenant for his own comfort, convenience or pleasure, may be removed by him during his term, provided the same can be removed without serious injury to the realty the same as in cases of fixtures for the purposes of trade, or manufactures." In Taylor on Landlord and Tenant (8th ed.) at the end of § 544 it is said: "In modern times the rule is understood to be

that upon principles of general policy a tenant whether for life, years or at will, is permitted to carry away all such fixtures of a chattel nature as he has himself erected on the demised premises for the purpose of ornament, domestic convenience, or to carry on trade, provided the removal can be effected without material injury to the freehold." In § 547 domestic fixtures are defined to be "such articles as a tenant attaches to a dwelling-house in order to render his occupation more comfortable or convenient and may be separated from it without doing substantial injury." This definition would seem to be as applicable to an office room as to a dwelling-house. In *Gaffield* v. *Hapgood*, 17 Pick. 192, 28 Am. Dec. 290, the court said that a fire frame fixed in a common fireplace with bricks on the sides laid in between the sides of the fire frames and the jambs of the fireplace and the facing plastered over, remained a chattel, which a tenant so affixing could remove during his term. In *Guthrie* v. *Jones*, 108 Mass. 191, gas fixtures screwed upon the gas pipes of a room were held to remain chattels as between landlord and tenant. In *Wall* v. *Hinds*, 4 Gray, 256, 64 Am. Dec. 64, a cistern and sinks fastened to the floor by nails or set in the floor by cutting away boards; water pipes fastened by hooks driven into the plastering and walls and passing through holes cut by the tenant in the floors and partitions; gas pipes passing from the street into the cellar and thence up through the floor and branching into different rooms through holes cut in the floor and partitions, and in some cases through ornamental ceiling centre-pieces, by the tenant for that purpose, the pipes being kept in place by metal bands fastened to the walls and ceilings; were all held to remain chattels. In *Towne* v. *Fiske*, 127 Mass. 125, 34 Am. Rep. 353, a portable iron furnace was set upon the earth in the middle of the cellar, and then the cellar bottom was covered with concrete up to and around the furnace; the furnace was connected by hot air pipes with registers in the various rooms set in soapstone collars; gas pipes were also screwed to gas pipes fixed in the house. All these having been put in the house by the person occupying under a verbal contract to purchase were held to remain chattels. In *Phila. M. & T. Co.* v. *Miller*, (Wash.) 44 L. R. A. 559, a mortgagor placed

in his dwelling-house a porcelain bath tub standing on four legs and connecting in the usual manner with the soil pipes, and also a hot water heater connected therewith by the usual methods of plumbing. The case was submitted to a jury who found that the articles remained chattels, and the court rendered judgment on the verdict. In the opinion stress was laid upon the circumstance that none of the articles were made or fitted for that particular house, but all were made up and kept in stock by dealers to be sold for and set up in any house. In *Seeger* v. *Pettit*, supra, gas fixtures, platform scales, a walnut railing, a stair case, and some banisters, a coal bin, and some shelving were put into leased premises by different tenants at different times, each outgoing tenant transferring his interest in them to his successor. A ruling that these articles could not be removed by the last outgoing tenant was held erroneous. The procedure in this case was much like that at bar. The landlord brought an action at law against the outgoing tenant for removing these articles from the building. The case was tried to a jury and evidence adduced pro and con. The presiding justice ruled as matter of law that the articles were not removable by the defendant. This was held to be error. The court said: "The matter of fixtures should have been left to the jury as a question of intention." In *Hanson* v. *News Pub. Co.*, ante, 99, (the latest expression of this court on this subject) partitions placed in a store by a tenant for his own convenience, and nailed to the floor and screwed to the walls were held not to have become a part of the realty.

It remains to notice a few other points made by the plaintiff in his brief.

1. He claims that the water closet was put in by Newcomb, a stranger and hence as a trespasser. It can be inferred, however, that Vose and Wentworth had hired the entire office room and its appurtenances and had let desk room therein to Newcomb without objection from the plaintiff, so that Newcomb was not a trespasser but a lawful occupant. It was not a case of a tenant at will undertaking to assign his tenancy without the landlord's permission. The three, Vose, Wentworth and Newcomb, were in lawful occupation under

the original lease or hiring. The water closet was put in by them jointly, though Newcomb may have been the only active agent. As to the want of express permission from the plaintiff to put in such a closet, it is enough to say that in the absence of notice to the contrary, as in this case, a tenant has implied permission to put into the leased tenement such articles as will conduce to his health, comfort or convenience without injury or danger to the realty. *Hanson* v. *News Pub. Co.*, supra.

2. The plaintiff urges that the chattel annexed was the water closet and soil pipe combined, that the soil pipe was certainly irremovable and was in fact left fixed in the building, and hence that the water closet must remain with it. It does not appear, however, that either the water closet or the soil pipe were made to order, the one for the other, or that they were especially adapted the one to the other. It is common knowledge that soil pipes and water closets are made in standard sizes and styles for the general market independently of each other. They are manufactured and dealt in separately. Any water closet can be used with any soil pipe of the proper size. Other water closets could have been connected with this soil pipe and, indeed, another was connected by the plaintiff after this one had been removed. We have no occasion to say whether the defendant could have removed the soil pipe also, but his leaving it did not preclude him from disconnecting and removing the water closet any more than leaving gas pipes in place precludes a tenant from removing the gas fixtures he had connected with them.

3. The plaintiff also urges that the removal of the water closet without the soil pipe in fact caused an injury to the realty in that the upper end of the soil pipe was not effectually closed. But the question of injury to the realty, if any such is suggested by the evidence, was excluded from consideration. The ruling was that the original mode of annexation determined the whole case.

The exceptions must be sustained and the case sent back for another trial.

Exceptions sustained.

EDWARD M. SAWYER *vs.* JOHN W. BEAL, and others.

Washington. Opinion March 10, 1903.

Shore Fisheries. Fish Weir. "In front of the shore or flats of another." Statutory Construction. R. S., c. 3, § 63; Stat. 1885, c. 334. Colonial Ordinance, 1641–7.

By chapter 3, § 63, of the Revised Statutes, it is provided that "no fish weir shall be erected or maintained in tide waters below low water mark in front of the shore or flats of another, without the owner's consent." *Held;* that the language "in front of the shore or flats of another," must be construed as subject to some limitation as to its meaning other than is therein expressed.

The criterion in determining whether or not a weir is "in front of the shore or flats of another," within the meaning of the statute, is whether such weir is so near or so situated with reference to the shore as to in some way injure, or injuriously affect, the shore owner in the enjoyment of his rights, as such owner.

On report. Judgment for defendants.

Action of debt to recover the penalty provided for in R. S., c. 3, § 63, as amended by Stat. 1885, c. 334. The plaintiff claimed that the defendants had erected and maintained a fish weir in tide waters below low water mark in front of his shore or flats at Green Island so-called in Jonesport, in Washington County, without plaintiff's consent and contrary to the statute. The plaintiff further claimed that the weir interfered with his rights as owner of the island.

The plea was the general issue.

The facts are stated in the opinion.

W. R. Pattangall and J. W. Leathers, for plaintiff.

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

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

WISWELL, C. J. The plaintiff, the owner of a small island known as Green Island in the town of Jonesport, brings this action to

recover the penalty provided by R. S., c. 3, § 63, as amended by chap. 334, Public Laws of 1885, which section as amended is as follows: "No fish weir or wharf shall be extended, erected or maintained except in accordance with this chapter; and no fish weir shall be erected or maintained in tide waters below low water mark in front of the shore or flats of another without the owner's consent, under a penalty of fifty dollars for each offense to be recovered in an action of debt by the owner of said shore or flats; but this chapter does not apply to weirs, the materials of which are chiefly removed annually, provided that they do not obstruct navigation, nor interfere with the rights of others. All acts or parts of acts inconsistent with this act are hereby repealed."

The defendants erected some years ago, and have since maintained, the fish weir complained of, a permanent structure, the materials of which are not chiefly removed annually. The distance between the nearest portions of the island and of the weir, at low water mark, is five hundred and twenty-eight feet. Between the weir and the island there is a sufficient depth of water at low water for vessels of considerable size to pass.

The question decisive of the case is whether or not the defendants' weir is "in front of the shore or flats" of the plaintiff within the meaning of this statute. It is obvious that the statute must contain some limitation other than is expressed in it. If it were to be given a literal construction, there is no point however distant in any direction that would not be in front of the shore of the plaintiff, since he owns the whole island with shores fronting in all directions.

A brief consideration of the purpose of this statute, in connection with the rights of an owner of land upon the sea shore and of the public, will readily enable us to supply the limitation in the effect and meaning of this section that must have been contemplated, and which is perhaps so evident that it need not have been expressed. In this State under the Colonial Ordinance of 1641, as modified by that of 1647, which has become the common law of this state, the owner of land upon the sea shore owns to low water mark, unless the tide recedes more than one hundred rods, although of course the ownership of upland and flats may become divided by the act of the

owner. Within the limits of his ownership he has all the exclusive rights of an owner. But beyond low water mark the owner of the upland and flats has no more ownership or control than any other member of the public. This ownership of the land under the sea, as well as the control of the sea fisheries, is vested in the state for the benefit of the public and the state may regulate the time and method of taking fish from the sea.

It is apparent that the rights of the owner of the shore might be seriously affected by the building of a fish weir beyond the limits of his ownership, but so near thereto as to very materially injure him; for this reason the legislature wisely enacted the statute under consideration. But the purpose of this was not to extend the ownership of the owner of the shore or to give him any new or additional rights, but simply to protect him in the enjoyment of those which he already had as owner of upland and shore or of shore alone. It follows that this statute does not apply to all fish weirs that may be erected by a person in front of the shore of another, but only to such as are so situated or are so near the shore of another as to injure or injuriously affect the latter in the enjoyment of his rights as such owner, as for instance by preventing, to some extent at least, fish from coming to the weir of the shore owner, if he has one, or by injuring his weir privilege, or by obstructing access by sea to his land, or in some other way. And the owner of the shore can not maintain this action to recover the penalty provided, which is intended in a certain sense as compensation for the injuries suffered by him, unless he is able to show that in some way he has been injured in the use and enjoyment of his land and shore by the construction of a weir in front of his shore. See *Donnell* v. *Joy*, 85 Maine, 118, and cases cited.

We do not mean that the shore owner can only be injured in some of the ways above referred to. The very purpose of the statute is to extend to him additional protection in the enjoyment of his rights as such owner, and to give him a remedy for injury, where, prior to the statute, there was neither remedy nor injury in the legal sense. But as there must necessarily be some limitation to the statute other than is expressed therein, and as there should be some criterion by which it may be determined when a fish weir is in front

of the shore of another, within the meaning of the statute, and when not, we think that this criterion must be injury of some kind to the shore of the owner. If this was not intended, we can perceive no reason why the legislature should have given to the shore owner a right to maintain an action for the erection of a fish weir beyond the limits of his ownership, and within the public domain. We do not believe that it was intended to give to the shore owner a right to maintain an action of this kind, not a qui tam action, as said in *Donnell* v. *Joy*, supra, unless he had suffered some injury, or been injuriously affected, by reason of the erection of the weir complained of. It follows that a fish weir maintained in front of another's shore, so near or so situated with reference to the shore as to cause any injury to the shore, or to render it less valuable for any purpose for which it is adapted, is within the meaning of the statute, but otherwise it is not.

The report of this case contains no evidence of any injuries suffered by the plaintiff by reason of the construction or maintenance of the weir complained of; in fact, the action is evidently not based upon this theory, but upon the idea that the defendants should make some compensation to him for maintaining a weir in front of his shore, but so situated and so far removed from his shore as to in no way injure or affect his rights. The statute does not give compensation on this account.

Under this construction of the statute, the action is not maintainable and it is unnecessary to decide the other question argued as to whether when consent has once been given by the owner of the shore to erect a permanent weir in front of his shore, it can afterwards be revoked by him or by his successor in title.

Judgment for defendants.

THE EMERSON COMPANY *vs.* THOMAS D. PROCTOR.

York. Opinion March 16, 1903.

Sales. Record. Lex Loci. Contracts. Place. Corporations. Residence. Trover. R. S., c. 91, § 1; c. 111, § 5; Stat. 1895, c. 32.

Revised Statutes, c. 111, § 5, as amended by Public Laws 1895, c. 32, requires the agreements therein named, where a corporation is the purchaser, to be recorded. Such corporation, within the meaning of the amended section, "resides" in the town in which it has its established place of business.

The general rule governing the construction of a contract is that its validity is to be determined by the law of the place where it is made.

Where nothing more remains to be done by either party to make a contract valid and binding between them, it is deemed to have been executed at the place where the last act necessary to complete it was done. Wheresoever the other steps have been taken, it is the last or final act of assent which is regarded as giving the contract a place or locality.

The agreement, under which the plaintiff claimed was finally signed by the purchaser in Biddeford, Maine, and sent by mail to the plaintiff in Maryland. It became obligatory from the moment that the minds of the parties met, even though a knowledge of this concurrence had not been brought home to the plaintiff. The act of acceptance which completed the contract took place when it was finally signed and deposited in the mail, properly addressed to the plaintiff; and the contract was then complete, even though it had never been received by the plaintiff.

Held; that the contract was made in Maine; that its validity is to be determined by the laws of Maine, and, not being recorded in accordance with the laws of this State, it is invalid as against the defendant, who was not a party thereto.

On report. Judgment for defendant.

Trover to recover the value of a dry kiln.

The case is stated in the opinion.

Edwin Stone, Enoch Foster, for plaintiff.

H. Fairfield and L. R. Moore, for defendant.

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

POWERS, J This is an action of trover. The first count is for a six track patent automatic compressing dry kiln 31 feet wide and 84 feet long. The dry kiln is a building erected by the Biddeford & Natick Mfg. Co., a corporation located at Biddeford in this State. The plaintiff corporation furnished, and claims to still own the most of the apparatus and iron work used in its construction, but this would not give title to the building itself. In order to recover under the first count the plaintiff must show title to the dry kiln, and this it has not done.

This brings us to the second count, which is for the apparatus and iron work sold and delivered by the plaintiff to the Biddeford & Natick Mfg. Co., and used by it in the construction of this dry kiln. Prior to October 21, 1899, there had been some negotiations between said company and the plaintiff, but the parties had been unable to agree upon the terms of a sale or contract. On that date the plaintiff made and signed a written proposal at its office in Baltimore, Maryland, and sent it to the Biddeford & Natick Mfg. Co. in Biddeford, by Mr. Bruce, one of the directors of the last named corporation. By this written proposal the plaintiff corporation offered to furnish specifications and schedule of material required for a dry kiln 31 by 84 feet, and also the apparatus and iron work for the price of $1850. The erection of the building was to be under the superintendence of a mechanic to be furnished by the plaintiff and paid by the Biddeford & Natick Mfg. Co. On the day of the shipment the plaintiff was to notify the Biddeford Co. by telegraph, and the latter was to send at once to the former its note on four months, to the order of the plaintiff, for $1850. which note the proposal recited that the First National Bank of Biddeford had agreed to discount. Upon the receipt of the proceeds the plaintiff corporation agreed to immediately assign and forward bill of lading to the Biddeford Co. the title in the shipment until the receipt of said proceeds to remain in the plaintiff. It was further agreed that the title to the property was to remain in the plaintiff until all payments were fully

paid and discharged. The proposal contained a guaranty as to the working of the kiln after construction. The Biddeford Co. was to give to the superintendent before leaving a written acceptance or rejection of the kiln. If rejected it was to have the right to reload and return the material at the cost of the plaintiff, and a failure to do so was to be regarded as an acceptance.

Such in substance was the written proposal made and signed by the plaintiff in Baltimore, and sent to the Biddeford & Natick Mfg. Co. at Biddeford. After its receipt the latter telegraphed the former, "If we sign contract, do you agree to renew notes for four months making eight in all. Wire reply." The plaintiff answered, "Yes, if bank will discount renewal." Thereupon the Biddeford & Natick Mfg. Co., at Biddeford, signed the following acceptance at the bottom of the proposal. "Biddeford, Me., Oct. 26, 1899. The Emerson Company, Baltimore, Md. We hereby accept the above proposition." It then returned it to the plaintiff, and also sent the plaintiff its note for $1850, payable at the First National Bank, Biddeford, Me. This note has never been paid, and the plaintiff claims title to the property under the terms of the written agreement.

The agreement has not been recorded, and the defendant, who claims title by purchase from the assignee of the Biddeford and Natick Mfg. Co., invokes the provisions of R. S., c. 111, § 5, as amended by the laws of 1895, c. 32, which declares that, "No agreement that personal property bargained and delivered to another, shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby. And when so made and signed . . . . it shall not be valid except as between the parties thereto, unless it is recorded in the office of the clerk of the town in which the purchaser resides at the time of the purchase." This section requires all such agreements in which a corporation is the purchaser to be in writing and signed. We think it was also intended that they should be recorded; that a corporation within the meaning of that section "resides" in that town in which it has its established place of business. Prior to 1895, this section required such agreements to be "recorded like mortgages of personal property," and mortgages of personal property made by a corpora-

tion must be recorded in the town where it has its established place of business. R. S., c. 91, § 1. The change of phraseology made in 1895 was not intended to work a change of the law in this respect. It was intended to broaden rather than limit the rule that such agreements, in order to be valid, must be in writing, signed and recorded. No reason can be assigned why it should not apply to such agreements when made by a corporation as purchaser, as well as when made by any other person. The act of 1895 required them to be in writing, and signed, and the legislature when it used the word "resides" did not intend to change the existing law in regard to recording, but did intend that the term should embrace corporations which have an established place of business in this State as well as those persons who, more strictly speaking, reside here.

It is a general rule governing the construction of a contract, that its validity is to be determined by the law of the place where it is made. The case shows that the law of Maryland does not require such agreements to be recorded. In all other respects it must be presumed that the law of that state is the same as our own, and that even in Maryland no such agreement was valid against third parties unless in writing and signed by the purchaser. Where then, was this contract made, in Baltimore or in Biddeford? The plaintiff signed and sent its proposition to the Biddeford & Natick Mfg. Co. in Biddeford. When it did so, it in effect sent its mind into Maine. At Biddeford the Biddeford & Natick Mfg. Co. assented to the proposition, signed and returned the contract. It was in Maine that the minds of the parties met. It was there that, what was before but the plaintiff's proposition, became a contract by the assent of the other party to the proposition. It was there that the agreement that the property in suit should remain the property of the plaintiff until paid for was signed by the person to be bound thereby. Nothing more remained to be done by either party to make the contract valid and binding between them. The paper was returned and received by the plaintiff, and we think it a fair presumption, in view of the testimony in the case, that it was returned by mail from Biddeford. The burden is upon the plaintiff to show title, to show a contract made in Maryland, and there is no sugges-

tion in the case that the written contract was returned in any other way than by being deposited in the mail at Biddeford. By that act it passed beyond the control of the Biddeford & Natick Mfg. Co., and became a binding contract.

In determining the place where a contract is made, it is a rule of very general application that it is deemed to have been executed at the place where the last act necessary to complete it was done. *Northampton Mutual Live Stock Ins. Co.* v. *Tuttle*, 40 N. J. L. 476. The rule is thus stated in a note to *McGarry* v. *Nicklin*, 110 Ala. 559, 55 Am. St. Rep. 44: "It is undoubtedly true that a contract cannot exist to which the assent of two or more parties is essential, until that assent has been given by all, and, therefore, where there are negotiations or various steps leading to the contract, the last of which is necessary before it can become a contract, it is not finally executed until that step has been taken; and, wheresoever the other steps have been taken, the last only is regarded as giving the contract a place or locality, and it is therefore deemed executed at the place only where the final or last act of consent is given." *Gipps Brewing Co.* v. *De France*, 91 Iowa, 108, 51 Am. St. Rep. 329, 28 L. R. A. 386; *Milliken* v. *Pratt*, 125 Mass 374, 28 Am. Rep. 241. In the latter case a guaranty was executed in Massachusetts and sent by mail to the plaintiffs in Maine, and there accepted by them. It was held that the contract was made in Maine, because a guaranty is inoperative until accepted, and the last act of assent was given in Maine. *Bell* v. *Packard*, 69 Maine, 105, 111, 31 Am. Rep. 251, is not in conflict but in accord with this rule. There the plaintiff was to give up the old note upon the delivery of a new one signed by a good surety. The surety's contract was not binding until its acceptance by the plaintiff. The new note was accepted in Maine, and it was held that the contract was made in Maine, where the last act of consent was given.

The contract became obligatory from the moment that the minds of the parties met, even though a knowledge of this concurrence had not been brought home to the plaintiff. The act of acceptance which completed the contract took place when the assent of the Biddeford & Natick Mfg. Co. was deposited in the mail at Biddeford properly

addressed to the plaintiff. *Bailey* v. *Hope Ins. Co.*, 56 Maine, 480. It did not depend upon its delivery to the plaintiff, and the contract was complete even though it had never been received by the plaintiff. VII Am. & Eng. Ency. of Law, 2 ed., 134 & 135; *Bishop* v. *Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437. Not only therefore was the contract made in Maine, and the parties presumed to have contracted with reference to the laws of Maine, but the circumstances are such that it is difficult to avoid the inference that the parties in fact regarded it as a Maine contract. The bill of lading was in the name of the plaintiff as consignee and it was afterwards to be indorsed to the Biddeford & Natick Mfg. Co., and the apparatus and iron work to be first delivered to it in Maine. They were to enter into the construction of a building in Maine, to be erected under the superintendence of the plaintiff. The apparatus and iron work were to be there accepted or rejected, and if rejected to be there returned to the plaintiff. The note was to be paid in Biddeford. Every substantial act attending the performance or enforcement of the contract, except the shipping of the apparatus and iron work consigned to the plaintiff itself, was to be done in this State.

It was a Maine contract; and not being recorded in accordance with the laws of this State, the plaintiff fails, as against the defendant, to show title under it.

Judgment for defendant.

FRED O. WATSON *vs.* LORENZO W. FALES.

Androscoggin. Opinion March 21, 1903.

Judges. Disclosure Commissioner. Compensation. Contracts. Public Policy. Reasonable Time.

No contract is valid which makes the payment of fees to a judicial officer dependent on his decision between parties. Public policy requires that such contracts be declared void; and they are equally futile as a basis of an action or defense.

It is absolutely essential that such an officer should be fair, impartial and unbiased. If his compensation by contract is made to depend on the result, he would be tempted to sway toward that decision which would result in his getting pay for his services and it is not the policy of the law that he should be even subjected to temptation.

In an action of assumpsit to recover for fees as a disclosure commissioner, the defendant offered evidence tending to prove an agreement between the parties that the plaintiff should not receive his pay from the defendant for disclosure cases, as a disclosure commissioner, until it was collected from the judgment debtors; but this was denied by the plaintiff, who recovered a verdict for his claim.

The following instructions of the presiding justice were held to be correct:—

1. "If there was any agreement between the plaintiff and the defendant whereby the plaintiff agreed to perform the services of disclosure commissioner and not have any pay unless the defendant received it, that is, making the receipt of the pay on the part of the plaintiff conditional and contingent on the defendant's getting the money out of the cases, that would be an invalid and unlawful contract and would afford no defense whatever to this action."
2. Among other defenses the defendant alleged that the plaintiff agreed to wait for his fees until the defendant collected them. *Held;* that the following instruction is correct: "If that is taken in its literal sense, so in case the defendant did not collect, the plaintiff was never to have his pay, it would be open to the same objection as the contract I have just discussed with you; that would be a case of no pay unless collected, and that is just the trouble with the other proposition."
3. What is a reasonable time is a question of law.

4. *Held;* in this case, no circumstances appear by which to determine what would be a reasonable time, and the question of the reasonableness of the time is an absolute one. It is not involved with matters of disputed fact or any facts from which an inference could be drawn that the time which had elapsed was within the limit of reasonable time; and it is, therefore, a question for the court.

Exceptions by defendant. Overruled.

This was an action of assumpsit to recover the amount alleged to be due the plaintiff from the defendant for services of the plaintiff as disclosure commissioner and register of probate, done and performed for the defendant. The jury returned a verdict for the plaintiff in the sum of one hundred and fifty-four dollars and ninety cents.

The defendant claimed, and offered evidence to prove, that there was an agreement between him and the plaintiff that the plaintiff should not receive his pay from the defendant for the disclosure cases of the defendant's, in which he had rendered services as disclosure commissioner, until the defendant had collected it from the judgment debtors in the cases. The plaintiff denied that there had ever been such an agreement.

After a verdict for the plaintiff, the defendant took exceptions which are found in the opinion.

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

H. E. Holmes, for defendant.

SITTING: WISWELL, C. J., STROUT, POWERS, PEABODY, SPEAR, JJ.

PEABODY, J. This case comes to the law court on exceptions.

It was an action of assumpsit to recover the sum of one hundred and fifty dollars and fifteen cents, fees of the plaintiff as disclosure commissioner.

The defendant claimed, and offered evidence to prove, that there was an agreement between him and the plaintiff that the plaintiff should not receive his pay from the defendant for disclosure cases in which he had rendered services as disclosure commissioner until the defendant had collected it from the judgment debtors. The plaintiff denied that there had ever been such an agreement.

In reference to this alleged contract the presiding justice instructed the jury as follows:

"If there was any agreement between Mr. Watson and Mr. Fales whereby Mr. Watson agreed to perform the services of disclosure commissioner and not have any pay unless Mr. Fales received it, that is, making the receipt of the pay on the part of Mr. Watson conditional and contingent on Mr. Fales getting the money out of the cases; if that was the proposition, if that is what they meant, if there was such a contract, then I instruct you, gentlemen, that it would be an invalid and unlawful contract and would afford no defense to this action whatever."

The justice explained to the jury the reasons why such a contract with a disclosure commissioner is against public policy, and that, as a judicial officer, "it is absolutely essential that he should be fair and impartial and unbiased." "If his compensation by contract was made to depend on the result," he would be tempted "to sway towards that decision which would result in his getting his pay for his services," that without saying that this or any disclosure commissioner would be influenced "it is not wise and it is not the policy of the law that they should be subjected even to temptation."

As to another construction of the alleged contract, suggested by counsel, viz: that the plaintiff agreed to wait for his fees until the defendant collected them, he instructed the jury as follows:

"If that is taken in its literal sense so that in case the defendant didn't collect, the plaintiff was never to have his pay, it would be open to the same objection as the contract I have just discussed with you; that would be a case of no pay unless collected, and that is just the trouble with the other proposition."

The presiding justice fully and accurately stated the objection to agreements of this nature. Where they relate to the administration of justice and involve considerations which may affect the impartiality of the magistrate, public policy requires that they be declared void, and they are equally futile as the basis of an action or of a defense. The law applies the general principle to all contracts which embody this potential danger to the public interests. So no contract is valid which makes the payment of fees to a judicial officer in any way

dependent on his decision between the parties. *Hawkeye Ins. Co.* v. *Brainard*, 72 Iowa, 130; *Willemin* v. *Bateson*, 63 Mich. 309; Beach on Contracts, § 1534.

The presiding justice referred to another construction which might possibly be given to the language of the alleged contract, viz; that the plaintiff would not hurry but would wait a reasonable time and give the defendant an opportunity to collect. On this view of the contract he ruled that what is a reasonable time is not a question of fact for the jury, but a question of law for the court to decide, and acting upon this ruling he instructed the jury, as a matter of law, that a reasonable time had elapsed in the present case so that, even under the most favorable construction, the alleged contract would not be available as a defense.

From the statement of the contract as claimed by the defendant, it seems unlikely that the jury could have given it so strained a construction as that to which this last ruling relates, even applying to the utmost the presumption in favor of legality.

But if such a view of the case were possible the ruling was undoubtedly correct that the question of reasonable time was for the court.

In *Attwood* v. *Clark*, 2 Greenl. 249, the right of action depended on the furnishing of a certain memorandum by the original plaintiff to the defendant of defective merchandise on which a rebate was to be allowed. There was no time mentioned within which the memorandum was to be furnished. The judge left it to the jury to decide as a question of fact whether it was a part of the contract that the plaintiff should furnish the defendant with a memorandum within a reasonable and convenient time, and if it was, then a reasonable and convenient time had elapsed. Held, that what is a reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law; and that the judge was in error in leaving the construction of the contract to the jury. MELLEN, C. J., says, p. 254, "Now as it appears by the exceptions that no time was mentioned in the contract, within which the memorandum was to be furnished, the *law fixed the time* as we have before stated, viz: a *reasonable time*, and such time had elapsed before demand

made according to the judge's opinion:—there was therefore nothing as to this point for the jury to decide; the contract as proved was not denied, and no fact existed from which they would have a right to presume that the time for furnishing the memorandum *did* form a part of the contract."

Applying the principle of *Attwood* v. *Clark*, to the circumstances of this case, it is clear that in the absence of any other defense than that of the alleged contract, the court properly instructed the jury although his instructions were equivalent to the direction of a verdict for the plaintiff. The three alternatives seem to be: 1. No contract opposed to the plaintiff's right to recover his statutory fees. 2. An illegal contract which is no defense to his action. 3. A contract to defer payment for a reasonable time which had elapsed prior to the date of the writ.

In *Kingsley* v. *Wallis*, 14 Maine, 57, where defendant had the right to rescind the contract and no time was fixed by its terms, it was held that he was bound to make his election to do so within a reasonable time, and that what was a reasonable time was a question of law; the court following *Attwood* v. *Clark*.

"What is due diligence or a reasonable time for making demands and giving notices of negotiable paper is a question of law to be decided by the court." SHEPLEY, J., in *Howe* v. *Huntington*, 15 Maine, 350.

Whether tender was made within a reasonable time was held to be a question for the court in *Greene* v. *Dingley*, 24 Maine, 131.

Under a statute authorizing a city council to vote exempting from taxation property of a water company for a certain term of years, it was held that the exemption must be voted if at all within a reasonable time, and what would be a reasonable time is a question of law. *Portland* v. *Portland Water Co.*, 67 Maine, 135.

Cases like these raise a simple question of law and are to be distinguished from those cited in the defendant's brief which are complicated with disputed facts. The distinction is stated by SHEPLEY, J., in *Hill* v. *Hobart*, 16 Maine, 164. "Where the facts are clearly established or are undisputed or admitted, reasonable time is a question of law. But where what is a reasonable time depends

upon other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to a jury before any judgment can be formed whether the time was or was not reasonable."

Wilder v. *Sprague*, 50 Maine, 355, relied on by the defendant, was an action of the acceptance of an order to pay money when the acceptor had sold certain logs. Exceptions were taken to the introduction of evidence tending to prove that a delay of three years in selling the logs was not unreasonable. This was held to be proper evidence for the jury, as "the court cannot know the limit of time within which, by the exercise of common and ordinary care, a quantity of wharf logs could be sold." In that case the question was as to the default of the acceptor in selling the logs within a reasonable time, for only on such default would he be liable on his acceptance. This raised a question of mixed fact and law. Although prima facie it might appear that a reasonable time had expired, circumstances beyond his control may have delayed the sale, and it was proper for him to show these circumstances.

In the present case, however, no such circumstances appear to show that the delay is reasonable, and the question of the reasonableness of the time must be an absolute one. It is not only not involved with matters of disputed fact, or any facts from which an inference could be drawn that the time which had elapsed was within the limit of reasonable time, but it is seriously involved with the other question of illegality of the alleged contract. It is therefore a question for the court.

Exceptions overruled.

WILLIAM H. FISHER, and another,

vs.

ROBERT G. SHEA, and Trustee.

Sagadahoc. Opinion March 21, 1903.

Attorney and Client. Trustee Process. Necessaries. R. S., c. 86, § 55 par. VI.

Aside from the exclusion of certain classes of articles or services, of which it may be predicated as a matter of law that they are not comprised in the term "necessaries," what are necessaries is a question of fact, dependent upon the varying circumstances of each case.

Legal services rendered in the defense of a criminal prosecution, and in defense of a civil action in which the defendant has been arrested, are necessaries.

The plaintiffs, attorneys-at-law, brought an action to recover for professional services rendered by them in behalf of the defendant, in defense of an action for an alleged assault and battery. The defendant at the time of the alleged assault was acting as a police officer. He was not arrested on the writ, and the suit was disposed of by an entry of neither party, no further action.

The defendant was a police officer, and as such liable to prosecutions of the character described in this case. The suit against him affected his reputation as a citizen and an officer, and he was forced to defend it to avoid consequences more injurious than the loss of property rights. *Held;* that the legal services rendered in his defense, under the circumstances, may properly be included in the term necessaries to which the statute R. S., c. 86, § 55, par. VI, has given preference.

In the action for the alleged assault and battery the defendant was not arrested, but the fact that he was liable to arrest on execution after judgment against him is to be considered. It is analogous to cases where original arrests were made.

On report. Trustee process. Trustee charged.

The plaintiffs were attorneys-at-law and brought this action to recover for professional services rendered by them in behalf of the defendant, in defense of the action *James Hersom* v. *Robert G. Shea* in the Superior Court of Kennebec County. That was an action for an assault and battery alleged to have been committed upon Hersom

by the defendant Shea, while acting as a police officer of the City of Augusta. In the case at bar the principal defendant became defaulted, and it was agreed that, at the time of the service of the trustee writ upon him in this case, there was due from the trustee to the principal defendant the sum of fifteen dollars as wages for his personal labor for a time not exceeding one month next preceding the service of the writ.

The parties agreed to report to the law court the question whether the funds in the hands of the trustee are exempt from attachment by this process under the provision of R. S., c. 86, § 55, par. VI.

W. H. Fisher, for plaintiffs.

F. E. Southard, for defendant.

In the action in which the services sued for were rendered, the defendant's liberty was never in any danger. The likelihood of his being arrested upon an execution which might be issued in that suit, was most remote, and while if that contingency had ever happened, services rendered in releasing him from the arrest perhaps might be held to be necessary within the meaning of the statute, it is submitted that in the suit itself the services do not come within the meaning of the term. If these services are held to be necessaries, all legal services rendered in defending actions of tort, or in prosecuting or defending bills in equity, would be necessaries. For in all of them there is the possibility of the occurrence of an arrest. In every writ of entry an execution may issue against the defendant for costs and authorize his arrest. In every bill in equity the court may order costs to be paid by either party, and issue a capias therefor. The plaintiffs' contention, if supported, would result in holding that a bill for thousands of dollars for attorneys' fees, in defending against a foreclosure of a mortgage by suit, for instance, would be necessaries within the meaning of the statute.

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

PEABODY, J. This case comes before the law court on report. The plaintiffs were attorneys-at-law and brought this action to

recover twenty-four dollars due them for professional services, rendered by them in behalf of the defendant in defense of an action for an alleged assault and battery. The defendant at the time of the alleged assault was acting as a police officer. He was not arrested on the writ. The suit was disposed of by an entry of "neither party, no further action." The amount claimed by the attorneys was a reasonable compensation for the services rendered in defense of the action.

At the time of the service of the writ, in the present action, there was due from the trustee to the principal defendant the sum of fifteen dollars as wages for his personal labor for a time not exceeding one month next preceding the service of the process.

The question is presented whether the funds in the hands of the trustees are exempt from attachment by this process under the provisions of R. S., c. 86, §55, par. VI. This statute provides as follows:

"No person shall be adjudged trustee . . . . by reason of any amount due from him to the principal defendant, as wages for his personal labor, or that of his wife or minor children, for a time not exceeding one month next preceding the service of the process, and not exceeding twenty dollars of the amount due to him as wages for his personal labor; and this is not exempt in any suit for necessaries furnished him or his family; . . . ."

The fund in the hands of the trustee being due as wages for the personal labor of the defendant performed within one month, the trustee can be held only if the subject matter of this suit is "necessaries furnished him or his family".

Aside from the exclusion of certain classes of services or articles concerning which it may be predicated as a matter of law that they are not comprised in the term "necessaries", what are necessaries is a question of fact dependent on the varying circumstances of each case. *Provost* v. *Piche*, 93 Maine, 455. Legal professional services do not belong to a class which can be excluded as a matter of law. *Peaks* v. *Mayhew*, 94 Maine, 571; *Conant* v. *Burnham*, 133 Mass. 503, 43 Am. Rep. 532.

Attempts have been made to state general rules by which legal services rendered in a given case may be tested as belonging to the

class of necessaries. It is impossible to make these rules sufficiently definite to admit or exclude all cases as matter of law. A more practical rule would be to contract the debatable ground so far as possible, for there must always be border lands in which a slight variation of circumstances leads to reasonable difference of opinion among men.

A safe standard for lines of demarcation, as applied to legal services rendered in litigation, is found in the case of *Conant* v. *Burnham* cited above. From the illustrations presented by this case it may be stated as a safe rule of general application, that legal services rendered in the defense of a criminal prosecution fall within the class of necessaries; see also *Askey* v. *Williams*, 74 Texas, 294, 5 L. R. A. 176; that such services rendered in the institution of criminal proceedings are not comprehended in the meaning of the term. Between these extremes lie those services of an attorney rendered in the defense or in the prosecution of civil actions. It would be safe to go a step further and say that there may be services in the defense of a civil action which are included in the term necessaries, *Barker* v. *Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, and that there may even be services rendered in the prosecution of civil actions which are so included. *Munson* v. *Washband*, 31 Conn. 303, 83 Am. Dec. 151.

It is unnecessary to consider further the prosecution of civil actions. The present case comes within the class of those legal services, which are rendered in the defense of a civil action. In most, if not all, cases of arrest of the defendant legal services rendered in protecting and defending him could be properly classed as necessaries. Whether this could be said of the defense of a contract right, where an adverse result of the suit would involve only a pecuniary loss, is doubtful.

In the present case there was no arrest on the writ, but the fact that he was liable to arrest on execution after judgment against him is a circumstance proper to be considered. It is analogous to cases where original arrests were made. The defendant was a police officer and as such peculiarly subject to prosecutions of the character described in this case. The suit against him could not fail to affect seriously his reputation as a citizen and his efficiency as an officer of

the law, and he was forced to defend it to avoid consequences more injurious than the loss of property rights.

It is well to consider here the purpose of the statute invoked in this case. The reason for its existence rests on public policy. It is for the best interests of the state that the wage earner should have the incentive to labor for the maintenance of his home which comes from a judicious protection of his earnings; and equally so that he should be protected from the effects of his own improvidence or misfortune by holding out to those who can furnish him with the things he needs a reasonable expectation of remuneration. It is obviously the intent of the statute to encourage furnishing to all without regard to financial responsibility those things whose lack might not only cause hardship to the individual, but detriment to the community.

The defense of a citizen from injury to his person or his reputation, the protection of a public officer in the performance of his duties, and the maintenance of his official character may properly be included among those things to which the statute has given preference.

It is our opinion that the services rendered in this case were necessaries within the meaning of the law.

Trustee charged for fifteen dollars.

WASHINGTON LIBBY, and another,

vs.

CHARLES S. DEAKE, and another, Admrs.

Cumberland. Opinion March 21, 1903.

Contracts. Assent. Exceptions. Waiver. Practice.

In an action of assumpsit to recover for work and material furnished to the defendants, the dispute related to an item of spruce stringers and planking not in the memoranda of the contract, but for which the plaintiffs claimed to recover as extra material furnished at the request of the defendants.

At the trial the plaintiffs introduced a memorandum which was relied upon by both parties as embodying the final contract, but not signed by the parties. The defendants, while claiming that the plaintiffs were bound to furnish all necessary material for the sum specified in the memorandum of the contract, relied upon the words of the memorandum as conveying that meaning.

The presiding justice, calling the attention of both parties to his statement of their position, instructed the jury as follows: "Both of the parties agree, as I understand it, that the contract that was made between them on that day was embodied in that memorandum." *Held;* that the assumption by the presiding justice as to the memorandum was tacitly acquiesced in by the defendants when stated in the presence of a jury, and any objection thereto was thereby waived.

It being once determined that the memorandum contained the terms of the contract, *held;* that it was the duty of the presiding justice to explain to the jury its legal effect; and the following instructions are accordingly correct:

1. The plaintiffs were bound to furnish only the amount of lumber specifically mentioned in the memorandum.
2. The defendants were liable to pay a reasonable compensation for any additional lumber furnished with their consent.

Where the defendants except to the entire charge of the presiding justice, the law court will consider only those exceptions which are specific.

On motion and exceptions by defendants. Overruled.

This was an action of assumpsit on account annexed to recover for work and material in repairing Deake's wharf in the City of Port-

land. The verdict was for the plaintiffs, and the case comes before the law court on exceptions and motion for a new trial.

The dispute related to an item of $196.64 for 12,895 feet of spruce stringers and planking not in the memoranda of the contract, but for which the plaintiffs claimed to recover as extra material furnished at the request of the defendants.

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

W. H. Looney, for defendants.

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

PEABODY, J. This was an action of assumpsit on an account annexed to recover the balance of $476.89 and interest, for work and material furnished in repairing Deake's wharf in the city of Portland. The verdict was for the plaintiffs, and the case comes before the court on exceptions to the charge of the presiding judge, and on motion for a new trial.

The dispute relates to an item of $196.64 for 12,895 feet of spruce stringers and planking furnished by the plaintiff not comprised in the written memoranda of the contract, but for which the plaintiffs claim to recover a reasonable price as extra material furnished with the consent of the defendants. This leads to the inquiry as to what were the terms of the contract, and if in writing what construction is to be given to the written memorandum.

The following memorandum in the handwriting of one of the defendants, but unsigned, was relied upon at the hearing by both parties as embodying the final contract for repairing the wharf:

"Portland, Me., August 27, 1900.

Mess. Washington Libby and Son agree to furnish the following new material for repairs to Deake's wharf, Portland, Maine, and do all the work required to put it into place on said wharf, and do such labor in taking out and replacing the old material as is found necessary to do during the progress of the work until both old and new work is finished in a complete and satisfactory manner that will pass the inspection of a competent judge of such work. . . . .

"The new material to be as follows:" Then follows an itemized statement of the material to be furnished, including the following item:—

"3,609 feet 'B. M.' spruce lumber for the stringers that are necessary from the outside cap sill to that portion of the stone wall covered by the lumber shed on both the east and west sides; and where found to be required on the other parts of the pile end of the wharf.

"2,500 feet 'B. M.' 3 inch spruce planking."

The memorandum specified the following consideration:

"Washington, Libby & Son to be paid for furnishing this material and doing this work by the administrator of the estate of Charles Deake the sum of thirty-two hundred dollars ($3200).

This the plaintiffs introduced, claiming that it embodied the terms of the contract, and that the $3200 paid only for the items specifically described therein. The defendants at the trial, while claiming that the plaintiffs were bound to furnish for the sum of $3200 all necessary material, nevertheless relied upon the words of the memorandum as conveying that meaning. This appears from the testimony of Mr. Deake, as follows, on direct examination:

"Q. Did he tell you that he would put in all the planking and stringers necessary for the $3200?—

"A. I won't say that he said planking and stringers—specified those. He said all the work that was called for, all the work called for in that memorandum for $3200.

"Q. Was anything said about stringers and planking except as enumerated in those two items?

"A. Nothing whatever."

His cross-examination still further tended to show that he placed his reliance on the terms of the memorandum.

Under these circumstances the presiding judge, calling the particular attention of both parties to his statement of their position, instructed the jury as follows:

"Both of the parties agree, as I understand it, that the contract that was made between them on that day was embodied in that memorandum."

Construing the writing he further said:—

"Now under that memorandum, if that contains the contract, and both parties say that it does,—how much spruce lumber for stringers were these plaintiffs bound to furnish? They were bound to furnish 3609 feet and no more. That is what the contract says, 3609 feet.—"

He further instructed the jury that if the plaintiffs put in any more lumber than the amount named in the memorandum and it was furnished and put into the wharf with the knowledge and consent of Mr. Deake, then Mr. Deake and his co-administrator are responsible for it and must pay a reasonable sum for it.

The defendants have excepted to the entire charge of the presiding judge and have specified certain portions, substantially those above stated, to which they except particularly. Only so far as they have made their exceptions specific can they be considered. *McKown* v. *Powers*, 86 Maine, 291.

There seems to be no ground for criticism of the judge's charge with reference to these propositions. His assumption as to the memorandum is borne out clearly by the record of the evidence, and, even if not warranted by the testimony of Mr. Deake on the stand, it was tacitly acquiesced in by the defendants when stated and cannot now be objected to. *Bradstreet* v. *Bradstreet*, 64 Maine, 204; *McKown* v. *Powers*, supra.

It being once determined that the memorandum contained the terms of the contract, it was the duty of the presiding judge to explain to the jury its legal effect, and this he has correctly stated in the second proposition above quoted, viz: that the plaintiffs were bound to furnish only the amount of lumber specifically mentioned in the memorandum.

It was also correct to instruct the jury that the defendants were liable to pay a reasonable compensation for any additional lumber furnished with their consent.

The questions of fact properly left for the determination of the jury were substantially only two, whether the plaintiffs furnished the extra lumber with the knowledge and consent of the defendants, and what was a reasonable price for the same; and there was evidence

bearing on these points sufficient to warrant the verdict; therefore the motion for a new trial cannot prevail.

Exceptions overruled. Motion overruled.

LIZZIE CAVEN, Admx., *vs.* THE BODWELL GRANITE COMPANY.

Knox. Opinion April 4, 1903.

Evidence. Expert Testimony. Negligence.

It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury. To warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than persons of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties.

A mechanical engineer skilled and experienced in regard to the construction of all parts of a projecting stage, designed especially for unloading coal and when not in use for that purpose drawn back upon the permanent stage of the wharf, and the strength both of wood and wire under different conditions, may be competent to answer questions as to the suitability and sufficiency of an iron guy; also qualified to estimate the strain which would be exerted upon iron guys by a given weight at the end of a projecting stage.

A carpenter and builder with special experience in the construction of coal stagings and platforms may be permitted to give the jury his opinion as to the proper method of constructing certain parts of the woodwork of a staging. But it is a question for the jury whether, upon all the testimony relating to such a structure, an iron guy is suitable and sufficient for the use to which it is applied.

Held; that a witness, who is a carpenter and builder, but not a mechanical engineer or bridge builder, and who has had no special experience in proving the tensile strength of iron wire and cables, is not such an expert as to give his opinion in regard to the strength of wire cables; nor how many pounds a piece of wire rigging three-quarters of an inch in diameter or an inch in diameter, either old or new, can sustain.

On motion and exceptions by defendant. Exceptions sustained.

Action by the plaintiff as administratrix of James Caven under Stat. of 1891, c. 124, to recover damages sustained by her as said Caven's widow by reason of his death caused by the collapse of a wharf staging belonging to the defendant. Verdict for plaintiff.

Besides the general motion for a new trial and exceptions to instructions, and refusal to give certain requested instructions, the defendant excepted to the admission of certain testimony. Only the latter is considered by the court.

The facts are sufficiently stated in the opinion.

M. A. Johnson, for plaintiff.

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

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

WHITEHOUSE, J. This is an action against the defendant company to recover damages for negligently causing the death of James Caven, the foreman of its granite quarry. In addition to the duties immediately connected with his position as foreman of the quarry, Caven also had charge of the loading and unloading of vessels at the wharf. It was not in controversy that his death was caused by the fall of a staging which projected from a permanent structure on the wharf out over the hold of the vessel. This projecting stage was designed especially for unloading coal and when not in use for that purpose it was drawn back upon the permanent stage on the wharf. When extended, the projecting stage was supported by guys running from its outer end to the top of vertical timbers that rested on the capsill of the wharf and supported the outer corners of the permanent stage. Other guys attached to the opposite side of these upright timbers at the top were secured to an anchorage in the ledge by the side of the coal shed. These guys were of wire and when the stage was to be used they were attached to the anchorage and tightened by means of a tackle, one end of which was secured to the lower end of the wire guy and the other hooked into an eye-bolt in the ledge.

The lower end of the wire guy was provided with an eye into which one end of the tackle was hooked.

After the accident it was discovered that the two vertical timbers, to the tops of which the guys were attached, had been broken off at a point nearly level with the stage, and that the northern guy had broken at the eye into which the tackle was hooked.

A section of the wire cable, alleged to be a part of the broken guy, was introduced in evidence and exhibited to the jury.

The plaintiff contended that the northern guy was defective at the point of breaking and unsuitable for the purpose for which it was used, and that the vertical timbers of the stage were also insufficient.

The defendant contended that the breaking of the guy was the sole cause of the accident, but denied that it was insufficient, and further contended that in any event there was no actionable negligence respecting it on the part of the defendant company.

The verdict was for the plaintiff and the case comes to this court on motion and exceptions.

Among other exceptions reserved to certain instructions given the jury, the case discloses the following exception to the admission of evidence.

Charles O. Grant, a witness called by the plaintiff, testified in regard to his occupation that part of the time he was cutting stone and part of the time he built buildings and handled derricks; and that he built the coal shed and staging in question, in accordance with a plan furnished by the superintendent. Thereupon, he was permitted by the court, against the defendant's objection, to testify as follows in regard to the broken guy in question:

"The condition of this wire was worn and it had been used, that is, I could recognize that it had been used. It was an old piece of wire rigging and I didn't consider it suitable for that purpose. (Objected to and moved to be struck out.)

The Court: You may ask him whether it was a suitable piece of wire for that purpose.

Mr. Johnson: What was the condition of it?

Answer: When I put it there seven years ago the wire was rusty and some of the strands, some of the wires broken, and I presume it

was just as rusty at the present time, being exposed to the weather all the time; and it was small wire rigging from a vessel and unsuitable for the place it was put into." (Objected to.)

The Court: I think he may state that about its being suitable.

Whether or not this wire cable, in the condition described, was a suitable and sufficient guy to sustain the projecting stage in question, weighted as it was at the time of the accident, was one of the vital issues in the case, upon the decision of which the liability of the defendant company depended. It was purely a question of fact to be determined by the jury upon a consideration of all the relevant circumstances and conditions. The staging in question when projected eighteen feet beyond the permanent platform, and supported by guys passing over the tops of vertical timbers, illustrated some of the principles of mechanical engineering involved in both the cantilever and the suspension bridge. A mechanical engineer or expert bridge builder might be qualified to estimate the strain which would be exerted upon the iron guys in question by a given weight at the end of the projecting stage; one having special experience in the application of tests to prove the tensile strength of iron wire and iron cables, and special observation respecting the influence of time and use upon them, might be qualified to give the jury valuable information respecting the strength of the wire cable in question. A carpenter and builder with special experience in the construction of coal stagings and platforms might be permitted to give the jury his opinion as to the proper method of constructing certain parts of the woodwork of the staging in question. But it would still be a question for the jury whether, upon all the testimony relating to that particular structure, the northern guy was suitable and sufficient for the use to which it was applied.

Charles O. Grant, the witness in question, was not a mechanical engineer or bridge builder. He had no special experience in proving the tensile strength of iron wire and cables. The projecting stage in question was the only structure of the kind he had ever built or seen. From his experience in erecting buildings and handling derricks, he may have been better qualified than some of the jury to form a judgment as to the sufficiency of the guy in question. But "it is not

sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury. To warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than persons of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties." *Ferguson* v. *Hubbell*, 97 N. Y. 507, S. C. 49 Am. Rep. 544; *Pulsifer* v. *Berry*, 87 Maine, 405. But if it be assumed in this case that a mechanical engineer skilled and experienced in regard to the construction of all parts of the projecting stage, and the strength of both wood and wire under different conditions, would be competent as a general expert to answer the final question as to the suitability and sufficiency of the northern guy, it is manifest that Charles O. Grant was not such an expert, and could not safely be permitted to decide as a witness one of the principal questions which it was the province of the jury to determine. The presiding judge did not feel authorized to recognize him as an expert in regard to the strength of wire cables and accordingly declined to permit him to estimate "how many pounds a piece of wire rigging three-quarters of an inch in diameter or an inch in diameter, either old or new, could sustain."

It may be true, as suggested by counsel, that his expression of opinion gave no additional weight to his testimony descriptive of the size and condition of the cable, and that the jury would have reached the same conclusions if the opinion had not been received as evidence. But as already stated, it related to one of the leading and vital questions in the case, and we do not feel warranted in assuming that the opinion of the builder who erected the staging, although in accordance with a plan furnished by the superintendent, expressed and more positively reiterated as was this opinion, would fail to make any impression upon the minds of the jury under the circumstances of this case. It is therefore the opinion of the court that the entry must be,

Exceptions sustained.

JAMES H. BURGESS, Judge of Probate,

vs.

D. BENSON YOUNG, and others.

Penobscot. Opinion April 4, 1903.

Probate. Executors and Admrs. Liabilities of Estate. Priorities and Payment. Liabilities on Bonds. R. S., c. 66, §§ 1, 2; c. 87, § 3, c. 72, §§ 10, 13.

By R. S., ch. 66, § 2, when by proper proceedings in probate court, it is demonstrated that the estate is not sufficient to pay more than the expenses of the funeral and administration, and the first four classes of debts named in section 1 of the same chapter, that fact, whenever ascertained, may be pleaded and shown in defense to a suit on the administrator's bond.

In a suit upon such bond, any defenses are open to the sureties which they have a right to make, whatever the liability of the administrator alone may be. And while a judgment against an administrator is for the most purposes conclusive upon his sureties, if it be upon the merits, yet they are not in all cases concluded.

When an estate is not sufficient to pay more than the funeral expenses and expenses of administration and the first four classes of debts named in R. S., ch. 66, § 1, the administrator is exonerated from payment of any claim of the fifth class, without representation of insolvency.

Held; that the non-liability of the sureties was judicially ascertained when the administrator's account was subsequently settled, showing that the estate was exhausted by the expenses and the first four classes named in R. S., c. 66, § 1.

An administrator was appointed who gave bond and filed an inventory. After notice and demand, a creditor brought suit against the administrator in which no pleadings having been filed, the plaintiff recovered judgment against the defendant as administrator. Execution was issued upon the judgment and placed in the hands of an officer, who made demand for payment on the administrator, or to show personal estate of the deceased wherewith to satisfy the execution; but the administrator refused to do either, and the execution was returned wholly unsatisfied; thereupon, the plaintiff brought an action of debt on the administrator's bond in the name of the judge of probate. In the meantime the administrator had done nothing towards settling the estate but file the inventory.

To this action on the bond the administrator and his sureties filed the plea of general issue and a brief statement that the estate upon settlement in probate subsequently was not more than was sufficient to pay the expenses and claims of the first four classes mentioned in R. S., c. 66, § 1; and that

said administrator has not, and had not at the date of the purchase of the plaintiff's writ, in his hands any estate whatsoever of the intestate over and above the allowance to the said widow and the expenses of administration and of the last sickness of the intestate. The defendants offered to prove the defense set up in the brief statement, but the plaintiff objected to it as incompetent and furnishing no defense.

Held; that the evidence offered was admissible and will constitute a defense to the plaintiff's action.

On report. Case to stand for trial upon the evidence offered by defendants.

Debt on an administrator's bond in the name of the Judge of Probate, under R. S., c. 72, §§ 10 and 13, to recover a judgment obtained against his estate after letters of administration were issued. Plea, general issue and brief statement that no estate remained in the administrator's hand after having paid the expenses of the intestate's last sickness, expense of administration, and allowance to the widow, as appears by his account settled in the Probate Court since this action was brought. The estate was not represented insolvent, and the plaintiff contended that the administrator's liability was absolute.

The facts are fully stated in the opinion.

D. D. Stewart, for plaintiff.

Not having alleged upon the docket in the original suit the insolvency of the estate, or alleged that the case fell within the provisions of R. S., c. 66, § 1, upon which the offered evidence is based, defendants are estopped to set up the same facts in the present suit. They are estopped to deny assets.

The creditor had obtained judgment against the administrator; execution thereon had been returned wholly unsatisfied; and this action had been pending on the bond more than a month, before any proceedings were begun in the Probate Court to defeat it.

Thus the plaintiff had admittedly pursued all the steps required by statute to perfect his right to recover. He had acquired that right under the standing laws of the land, and it had become fully vested when this suit was commenced. Plaintiff's rights so acquired and vested could not be taken away even by act of the legislature subsequently passed, much less by the subsequent acts of the administrator.

F. J. Martin and H. M. Cook; L. C. Stearns, for defendants.

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

SPEAR, J. This case comes up on report upon the following facts: D. Benson Young was appointed administrator on the estate of his father, Charles L. Young, late of Newport, deceased, and gave the bond in suit on the 23rd day of February, 1897, and filed an inventory on the 31st day of May, 1898, which disclosed personal estate to the value of two hundred and sixty dollars. After notice and demand of payment, of which the defendant took no notice, the creditor of said Charles L. Young, on the 11th day of February, 1899, brought suit against the administrator, D. Benson Young, in Somerset County at the March term of court, 1899, to which the defendant duly answered.

At the following September term of court, on the 18th day of October, 1899, the plaintiff recovered judgment against the defendant, as administrator, and on said day court finally adjourned, no representation of the insolvency of said estate or of the want of funds or property, or suggestion that the estate fell within the provisions of section one of chapter 66 of the Revised Statutes, having been made by said administrator upon the docket of said court during the pendency of said action.

Execution was issued and placed in the hands of a duly qualified officer, who made demand of payment on the administrator, or to show personal estate of the deceased, wherewith to satisfy said execution, but the administrator refused to do either, and said execution was returned wholly unsatisfied. Thereupon the plaintiff brought an action of debt on the administrator's bond in the name of the Judge of Probate for Penobscot County, returnable to the January term, 1901, of the Supreme Judicial Court for Penobscot County. In the meantime the administrator had done nothing toward settling said estate but file the inventory.

To this action of the plaintiff on the bond, the defendants filed the plea of general issue and a brief statement, upon which they rely for defense, setting forth the following facts: That on the 30th day of January, 1900, the administrator presented his account, which was,

on the 13th day of June following, allowed, and left a balance in his hands of one hundred and forty-six dollars and seventy-five cents; that on the 28th day of February, 1900, the Judge of Probate, after petition, due notice and hearing, made an allowance of said balance of one hundred and forty-six dollars and seventy-five cents to Abba M. Young, widow of said intestate, and that all of the estate of said intestate was not more than was sufficient to pay expenses and claims of the first four classes mentioned in section one of chapter 66 of the Revised Statutes; and that said administrator has not, and had not at the date of the purchase of the plaintiff's writ, in his hands, any estate whatsoever of the intestate, over and above the allowance to said widow and the payment of the expenses of administration and of the last sickness of the intestate.

The report presents the exact question to be determined as follows: Without a ruling of the court upon this motion, the defendants offered to prove the proceedings set out in the brief statement by the records of the Probate Court. The plaintiff objected in limine to any and all such evidence as incompetent and furnishing no defense. By consent of parties the case is reported to the law court. If, against the objections of the plaintiff, the evidence offered by the defendants is admissible and will constitute a defense in whole or in part, the action is to stand for trial; otherwise judgment is to be entered for the plaintiff.

We think the evidence offered by the defendants should be admitted. The plaintiff's position is inequitable. If sustained it will enable him to make the sureties, on the administrator's bond, his debtors in the sum of over three hundred dollars, upon a claim admitted to be of no value against the estate.

Section 1, chapter 66, of the Revised Statutes, provides that, "an insolvent estate, after payment of expenses of the funeral, and of administration, shall be appropriated:

1. To the allowance made to the widow or widower, and children.

2. To the expenses of the last sickness.

3. To debts entitled to a preference under the laws of the United States.

4. To public rates and taxes, and money due the State.
5. To all other debts.

A creditor of one class is not to be paid, until creditors of preceding classes, of which the administrator had notice, are fully paid."

Section 2 provides: "When an estate is not sufficient to pay more than such expenses, and claims of the first four classes, the administrator is exonerated from payment of any claim of the fifth class, without making a representation of insolvency."

The case at bar comes clearly within this section. The brief statement, for the purposes of this case admitted to be true, shows that the estate was not sufficient to pay more than the expenses of funeral and administration, and the first four classes enumerated in section 1; in fact, it was all consumed in the payment of the expenses and the first class; hence the administrator was exonerated from payment of the plaintiff's claim, which came within the 5th class, without representation of insolvency.

The statute is entirely silent as to the time when the administrator shall ascertain the condition of the estate of his intestate, or when he shall settle his final account, in order to exonerate himself from paying the debts of the 5th class. The language is "when an estate is not sufficient etc." That is, at whatever time, in the settlement of the estate, it is discovered that the estate "is not sufficient," then the administrator is exonerated. In the absence of any statute to the contrary, the discovery of the insufficiency of the estate would be seasonable, if the settlement of the final account, showing the facts necessary to exonerate, was entered upon the records of the Probate Court, in time to enable such records to be pleaded in defense to the action on the bond.

The sureties became liable for the faithful administration of all the assets of the estate that might come into the administrator's hands. They assumed liability for any negligence, on his part, in properly protecting and distributing such estate. The report shows that the administrator did distribute the whole estate according to the order of court, and duly settled his final account, and that the assets of the estate were all consumed in paying the expenses and the widow's allowance, a claim of the first class. These facts clearly brought

the procedure, in the settlement of the estate, under section 2 of chapter 66. But section 2, under these circumstances, expressly relieved the defendants from any liability for the payment of claims of the 5th class without representation of insolvency.

But the plaintiff says that the administrator should have rendered the estate insolvent, and having neglected to do so, and thereby prevent the issue of a judgment against him, he is not now permitted to come into court and make the defense he could, even if his statement is true, and should have made against the recovery of the plaintiff's judgment; that by permitting the plaintiff to take judgment the defendant admitted that he had funds of his intestate, in his hands, sufficient to pay the plaintiff's judgment, and that, such funds being admitted, upon the refusal of the administrator to pay the judgment or point out personal property with which to do so, the sureties on the administrator's bond were thus made liable. Our discussion of this branch of the case will proceed upon the ground that the estate should have been rendered insolvent, but, by the neglect of the administrator, was not. The plaintiff's theory is that his judgment against the administrator is conclusive upon both the principal and sureties, and not open to the defense of nulla bona or plene administravit. But it is well established, both in this State and in Massachusetts, that a judgment against the goods and estate, in the hands of an administrator, is not conclusive, as to all defenses, against the sureties.

In *Bourne* v. *Todd*, 63 Maine, 434, a case like the one at bar, our court held that the extinguishment of the administratrix' authority, at the time the suit was brought against her, was available as a defense by the sureties to an action on her bond. The court, p. 434, say: "For if to the plea of general performance, the plaintiff had replied, substantially, the recovery of the judgment, demand, refusal and return of nulla bona, and the defendants had rejoined an extinguishment of the administratrix' authority, we think the rejoinder would constitute a good answer to the replication so far as the sureties are concerned, and the evidence offered admissible and would sustain it."

In Massachusetts, before separation, it was held that the sureties on an administrator's bond were entitled to plead the statute of limi-

tations to an action against them on the bond. *Dawes* v. *Shed*, 15 Mass. p. 6. This decision has never been questioned by the court who made it, but has been cited with special approbation in *Heard* v. *Lodge*, 20 Pick. p. 53, 32 Am. Dec. 197, and in *Wells* v. *Child*, 12 Allen, p. 336.

Dawes v. *Shed*, 15 Mass. 6, was exactly like the case at bar so far as the plaintiff's claim was concerned. The court p. 9 say: "The administrator, however, in the present case, suffered a judgment to go against him, not having pleaded the statute; and in a suit to which his sureties, or their representatives, were not parties; so that they had no opportunity to defend themselves under the statute. We are clearly of opinion that, under these circumstances, the executors of the surety have a right, in the present action, to plead the same matter in their defense; not being barred by a judgment, suffered collusively or negligently by the administrator, from a protection which the law intended for their benefit. If it were otherwise, they would be precluded, by a judgment passed inter alois, and which they had no means of preventing, from asserting a privilege which was manifestly intended to be secured to them by the statutes."

So in the case at bar, the sureties had no opportunity to defend themselves against the claim of the plaintiff, which culminated in his judgment against the goods and estate of the deceased in the hands of the administrator. If they are now prevented from making the defense set up in their brief statement, they will also be precluded by a judgment passed inter alios and which they had no means of preventing. There seems to be no more reason for permitting the right of the sureties to plead extinguishment of authority, or statute of limitations, than for asserting their right to plead any other defense. It is the neglect on the part of the administrator to make the defense, that is injurious. And neglect to make the defense of nulla bona is just as injurious as neglect to make the defense of the statute of limitations or extinguishment of authority. The one defense leaves both parties in just the same situation as the other. The plaintiff is no worse off with the defense of nulla bona than with that of the statute of limitations, and the defendant no better off. The kind of defense is immaterial. It is the opportunity to make it

which is important, and there seems to be no good reason why the opportunity should not extend to the neglect of the administrator to make any kind of defense which could legally have been made. We think that the principle underlying the decision of the last two cases would admit the defendant's evidence.

There is another line of cases, which, by analogy, are directly in point. Chapter 87, R. S., § 3, provides that when an officer makes a return of nulla bona on an execution against an estate, a writ of scire facias suggesting waste, may be issued against the executor or administrator. There is no good reason why scire facias on a judgment does not rest upon the same ground as an action upon a bond, on the same judgment. The Massachusetts statute, relating to scire facias, is similar to ours, hence the Massachusetts decisions relating to this subject are in point. But it has been held by a long and well considered line of decisions that the defense of nulla bona or plene administravit may be interposed to an action of scire facias.

In *Fuller* v. *Connelly*, 142 Mass. p. 230, after citing the provision of the statute relating to scire facias, the court say:

"This provision, in substance, has been in force since the statute of 1783, c. 32, was enacted. The policy has always been to make an executor or administrator liable de bonis propriis to a judgment creditor only on the ground of waste. It may be that the burden is put upon the executor of proving that there has been no waste; but, if he can show this, it is the clear implication of the statute that he shall not be liable on scire facias. If, then, he can show that, since the judgment was rendered, there had been an adjudication of insolvency, or the *settlement of the account* showing that all the assets have been exhausted in paying *preferred charges and claims*, he shows that there has been no waste, and therefore that he is not liable for the judgment. It was held in the early and well considered case of *Coleman* v. *Hall*, 12 Mass. 570, that, in scire facias on a judgment recovered against an administrator, it was a defense to show that after the judgment, a representation and adjudication of the insolvency of the estate was made.

"This was approved in *Shillaber* v. *Wyman*, 15 Mass. 322, and extended to a case where the estate was represented insolvent after

the scire facias was brought. It was also approved in *Walker* v. *Hill*, 17 Mass. 380.

"The other remedy of a judgment creditor is by a suit upon the bond under the Pub. Sts. c. 143. This statute merely gives the judgment creditor the right to put the bond in suit for his own benefit, but does not define his rights, or the liability of the executors or his sureties. It cannot reasonably be contended that the liability of the executor or his sureties is greater in a suit upon the bond than it is in scire facias upon the judgment, and therefore the cases we have referred to are applicable to the case at bar, and show that the defense is maintained."

In *Hayes* v. *Seaver*, 7 Maine, p. 239, the court says:

"As a general proposition, perhaps it may be admitted that if the executor neglected to plead nulla bona, or plene administravit, but suffer judgment to be rendered against him, he shall be bound by the judgment, and shall not afterward be permitted, in avoidance of such judgment, to deny assets, although he might have done it under the proper plea. But to this general proposition there are exceptions. As in the case of insolvent estates, where the insolvency is established subsequent to the rendition of the judgment against the goods and estate of the deceased in the hands of the administrator; on scire facias suggesting waste, and pray for execution against the administrator de bonis propriis, the insolvency may be shown in bar to the execution, notwithstanding judgment. *Coleman* v. *Hall*, 12 Mass. 570.

"In this case, it may be true, as contended, that the executors themselves, having been defaulted in the original suit, would not now be permitted to deny assets. But we do not admit that a judgment thus rendered against the principal is equally binding upon the surety, even if it had been rendered, either originally or on scire facias de bonis propriis."

With reference to the liability of the surety the court further says: "He was not a party to any of the previous proceedings, and consequently had no opportunity to show it (his defense). He is now, for the first time, a party in court; and claiming the right to prove that the plaintiff in interest has suffered nothing by any neglect of the executors; that she has received from the estate even more than

she was by law entitled to; it must be a severe principle that would preclude him from the opportunity of doing so. It is clear that the executors suffered a judgment to be rendered against them, which they might have successfully resisted; and inasmuch as the defendant, their surety, was not a party, he ought not to be barred by that judgment thus negligently or collusively suffered by his principals, even were it de bonis propriis, but may now be permitted to avail himself of the same matter in his defense which they might have urged against the original suit or the scire facias. *Foxcroft* v. *Nevens*, 4 Greenl. 72; *Dawes* v. *Shed*, 15 Mass. 6; *Gookin* v. *Sanborn*, 3 N. H. 491; *Tarbell* v. *Whiting*, 5 N. H. 63."

It is worthy of notice in this connection that *Dawes* v. *Shed*, supra, an action upon a bond, is favorably cited by our own court in *Hayes* v. *Seaver*, supra, an action of scire facias, in support of the same defense as was sustained in the action on the bond, thereby admitting that the same defense may be pleaded to either form of action.

We think that the principle is well established that the sureties upon an administrator's bond can, in an action like the one at bar, plead nulla bona or plene administravit. This principle is derived not only from analogous cases but by at least one case directly in point sustaining the defendant's contention, not only as to the liability of the sureties, but the principal as well. *Fuller* v. *Connelly*, 142 Mass. 227.

On the other hand, we have not been able to find a case in our State that sustains the contention of the plaintiff. *Sturgis* v. *Reed*, 2 Greenl. p. 109, relied on by the plaintiff, as on all fours with the case at bar, was a writ of scire facias upon a judgment against the estate of the intestate in the hands of the administrator. The question involved in the case was one of pleading and was whether an execution, having been set aside by order of the court, was regularly issued. To the writ of scire facias the defendant pleaded in bar the order of court setting aside the execution, and the court says p. 112, "the order of court is the only material fact stated in the plea." Also, "the record discloses nothing which shows that the execution, on which the return was made, had issued irregularly or improperly. It is true it appears that the estate of the intestate

was represented insolvent before the defendant assumed the defense, and that it actually is insolvent; still as there was no averment in the defendant's plea in the former actions, that the estate was under a representation of insolvency nor any motion made and entered on the docket after judgment was rendered, for a stay of execution on account of such insolvency, the clerk was authorized and it was his duty to issue execution in the manner before stated."

Therefore the point decided in this case was that the order of court, revoking the execution which had been regularly issued, could not be pleaded in bar to a writ of scire facias on the judgment. What other plea or brief statement the court would have admitted, in defense in this case, had it been offered, does not appear; hence the above case should be regarded as a precedent only upon the point decided. But it is thoroughly established by the cases already cited, that in scire facias "it was a defense to show that, after judgment a representation and adjudication of the insolvency of the estate was made." *Fuller* v. *Connelly*, 142 Mass. p. 230; *Coleman* v. *Hall*, 12 Mass. 570; *Shillaber* v. *Wyman*, 15 Mass. 322; *Walker* v. *Hill*, 17 Mass. 380.

Thurlough v. *Kendall*, 62 Maine, 166, is also cited as in direct support of the plaintiff's contention, but Chief Justice PETERS expressly says: "But we are not required to decide whether the judgment exhibited here would operate as an estoppel or not."

Chief Justice Morton, in *Fuller* v. *Connelly*, 142 Mass. 227, in a well considered opinion sustaining the contention of the defendant in the case at bar says: "The case of *Newcomb* v. *Goss*, 1 Met. p. 333, is opposed to this view. It was there held, that representation of insolvency, made after the suit upon the bond was commenced, was not a defense; and that the administrator and his sureties were personally liable for the full amount of the judgment, without regard to the question whether there was in fact any waste. It is noticeable that the cases which we have cited were not referred to by the court or the counsel in the case of *Newcomb* v. *Goss*, but it is irreconcilable with those earlier decisions, which seem to us to be founded upon better reasons." This case, overruling *Newcomb* v. *Goss*, fully sustains the contention of the defendants.

While we think the case at bar comes within section 2, ch. 66,

Revised Statutes, and that the administrator was not required to render the estate insolvent at any stage of the proceedings and that, without doing so, he is entitled to offer evidence under his brief statement, yet, as the greater includes the less, it became necessary, in order to apply legal principles to the case, to proceed farther and discuss the legal propositions that would apply, had it been the administrator's duty to represent the estate insolvent, with which duty he had failed to comply. And the doctrine seems well established that, in the latter case, the sureties would be entitled to make the defense of nulla bona or plene administravit.

In *Siglar and All, Administrators, Plaintiffs in error* v. *John Hayward, Defendant in error*, 8 Wheaton, p. 675, the administrators were permitted to make a defense to an action of debt on a judgment under the plea of nil debet and plene administravit.

This case was decided in 1823 and Chief Justice Marshall delivered the opinion of the court in which he said, "It is now well settled, and the case cited from Cranch, in the argument, is founded on the principle that if an administrator fails to sustain his plea of fully administered, he is not on that account liable to a judgment beyond the assets to be administered. The plea is not necessarily false within his own knowledge. He may have failed to adduce proof of payments actually made. It is not required that the plea should state with precision the assets remaining unadministered; and an executor or administrator would always incur great hazard, if he were required to state and prove the precise sum remaining in his hands, under the penalty of being disposed to a judgment for the whole amount claimed, whatever it might be. To state a full administration without proving it would be useless. The rule and usage, therefore, is that if the plea of fully administered be found against the defendant, the verdict ought to find the amount of assets unadministered and the defendant is liable for that sum only. The instruction of the court on this point is erroneous, and consequently the verdict and judgment founded on it must be set aside and reversed."

We think this view of the law is the just one. If the brief statement in the case is true, the plaintiff could not have collected any part of his claim from the estate. And, inasmuch as he can take

out execution against the administrator personally for his costs, he would lose nothing. As stipulated in the report,

Case to stand for trial.

LEVI H. MAY *vs.* ROBERT BOYD, Ex'or., and others.

Aroostook. Opinion April 4, 1903.

Equity. Specific Performance. Probate Court. Jurisdiction. Decree. R. S., c. 71, § 17; c. 77, § 6, par. 3; c. 111, § 8.

Decrees of a probate court touching matters within its jurisdiction when not appealed from are conclusive upon all persons.

It is provided by R. S., c. 71, § 17, that: "When it appears to the judge of probate having jurisdiction, that any deceased person had made a legal contract to convey real estate and was prevented by death from so doing, and that the person contracted with had performed or is ready to perform the conditions required of him by the terms thereof, he may authorize the executor or administrator to execute deeds to carry said contract into effect."

Upon a bill in equity in this court praying for the specific performance of a contract, the same being a bond for a deed, for the conveyance of real estate, it appeared that the owner of the bond, who was the assignee of the original holder, filed a petition in the probate court having jurisdiction of the matter praying that the defendant executor might be ordered to make a conveyance; that after due notice and hearing the petition was denied and no appeal was taken from the decree, which still remains in full force.

Held; that the bond was a legal contract in force at the death of the obligor; that no reason is suggested and none is apparent why the probate court did not have jurisdiction of the case under the above statute.

Also; that the facts as then presented by the same parties involved no special equitable feature which would itself constitute a sufficient ground for equitable jurisdiction; and that the bill should be dismissed.

On report. Bill for specific performance. Dismissed.

Bill in equity praying for a conveyance of certain real estate, under a bond for a deed given by Charles H. Randall, deceased, to Hugh McMann. The bond had been assigned by said McMann to the plaintiff, Levi H. May, and the defendants are the legal represen-

tatives of said Randall. The case was reported for the determination of this court upon bill, demurrer, answer, replication and proofs.

The facts are stated in the opinion.

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

This court is not ousted of its jurisdiction in this case by R. S., c. 71, § 17. *Bates* v. *Sargent,* 51 Maine, p. 425.

Don A. H. Powers and Jas. Archibald; Geo. H. Smith, for defendants.

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

WHITEHOUSE, J. This is a bill in equity praying for the specific performance of a contract for the conveyance of real estate. The case is reported for the determination of this court upon bill, demurrer, answer, replication and proofs.

On the ninth day of January, 1895, Charles H. Randall was the owner of a tract of land in Hersey in the County of Aroostook, comprising 110 acres, subject to a mortgage given by George R. Nickerson, a former owner, to Levi M. Carver, upon which was then due the sum of $400.00, and on that day gave to Hugh McMann a bond for a deed of the same whereby he agreed to execute and deliver "a good and sufficient deed" in consideration of the payment to him by McMann of the sum of $170.00 according to the tenor of three promissory notes of that date, one for $70.00 payable in one year, and two for $50.00, each payable in two and three years from date respectively.

On the 17th day of July, 1897, Charles H. Randall died testate. At that time the entire sum of $170.00 called for by the terms of the bond had not actually been paid by McMann, and hence no conveyance of the land or of Randall's equity of redemption in the premises had been made to McMann during Randall's life time. The defendant Boyd is the executor of Randall's will and the other defendants are his heirs and devisees. The plaintiff claims from the defendants a conveyance, not simply of Randall's equity of redemption, but of an absolute title to the land, free of the incumbrance, by virtue of an assignment of the bond from Hugh McMann, dated April 5, 1898.

The defendants first interpose an objection that the bill could not, in any event, be sustained by virtue of section 8 of chapter 111 of the Revised Statutes, for the reason that it is neither alleged in the bill nor shown in evidence that any written notice of the existence of the contract relied upon was given to the executor within one year after the "grant of administration," or was ever given to the executor in this case, as required by that section. Secondly, the defendants suggest that it could never have been in the contemplation of the Legislature that such a cause would be maintainable without previous notice under part 3 of section 6, chapter 77, R. S., conferring upon the court a general power to compel the specific performance of written contracts; otherwise the separate provision of section 8, chapter 111, R. S., requiring the written notice above mentioned, would have no distinct field of operation and be entirely superfluous. They further insist that if in any case such a bill could be maintained under the general equity power of the court, a specific performance of the contract set up by the plaintiff in this case, would be manifestly unjust, inequitable and contrary to good conscience, for the reason that it is shown by the evidence to be wholly improbable that according to the mutual understanding of the parties, at the time the bond was given, Randall, in consideration of $170.00, was to convey to McMann any thing more than his equity of redemption in the premises.

But, finally, the defendants say that the plaintiff had an adequate remedy afforded by the provisions of section 17 of chapter 71 of the Revised Statutes; that at the November term, 1898, the plaintiff filed a petition in the Probate Court, having jurisdiction of the matter, representing that Charles H. Randall made a legal contract with Hugh McMann to convey to him the real estate in question upon the terms and conditions therein set forth; that all the conditions of the contract had been performed, and that Randall was prevented by death from making the conveyance called for by the contract, and praying that the defendant executor might be ordered to execute the necessary deeds to carry the contract into effect; that after due notice and hearing upon this petition, the Court of Probate decreed that the prayer of the petitioner be denied and ordered the defendant

Boyd as executor not to carry into effect the provisions of the contract set forth in the petition. The defendants accordingly contend that inasmuch as no appeal was taken from this decree and the judgment of the Probate Court still remains in full force, neither reversed nor annulled, and the parties and the issue in these proceedings before the Probate Court were the same as in this bill in equity, the question must be deemed res judicata.

Section 17 of chapter 71 provides that "When it appears to the judge of probate having jurisdiction, that any deceased person, had made a legal contract to convey real estate and was prevented by death from so doing, or that such deceased person, had made such a contract to convey an estate upon a condition, which in its nature could not be fully performed before his decease, and that in either case the person contracted with, or petitioner, has performed or is ready to perform the conditions required of him by the terms thereof, he may, on petition of such person, his heirs, assigns or legal representatives, authorize the executor or administrator, or special administrator of the deceased, or when there is no executor or administrator, the guardian of the heirs of the deceased, to execute deeds to carry said contract into effect."

In *Bates* v. *Sargent*, 51 Maine, 423, the construction of this statute was brought directly in question, and it was there said that it relates only to "legal contracts in force at the death of the obligor, the performance of which was by his death prevented," and that "it was not intended to oust this court of its equitable jurisdiction or to limit or restrict its exercise." In that case it appeared from the statement of facts that the bond had become forfeited for non-payment of the notes when due, and it was held that the rights of the parties arising from the fact of a payment indorsed on a note after such forfeiture could only be determined by proceedings in equity.

But in the case at bar the bond was a legal contract in force at the death of the obligor. It is true, as already noted, that the full sum of $170.00 called for by the bond had not actually been paid in the life time of the obligor, for the last note for $50.00 did not become due until January, 9, 1898, nearly six months after his death; but it appears from the uncontroverted evidence of McMann, and is con-

ceded by both sides, that on the sixteenth day of April, 1897, Charles H. Randall accepted from McMann, in settlement of the three notes, a mare and colt and a new note for $100.00 payable in four months from that date at the "First National Bank." This note, it will be perceived, did not mature until after the death of Randall, but the bond was recognized by the representative of the estate as a subsisting legal contract and the full amount due thereon was paid by the plaintiff and accepted by the executor, before the filing of the petition above described in the Probate Court. Here were no facts or conditions calling for the exercise of the equity power of the court to grant relief from forfeiture. Any forfeiture arising from McMann's failure to pay the first and second notes at maturity was waived by the obligor, and the bond continued in force by the mutual agreement of the parties made in Randall's life time and evidenced by the new note for $100.00.

No reason has been suggested, and none is apparent, why the Probate Court did not have jurisdiction of the case under these circumstances by virtue of the statute above quoted. As the facts then presented themselves, the case involved no special equitable feature which would in itself constitute a sufficient ground for equitable jurisdiction. The plaintiff elected his tribunal and invoked the jurisdiction of the Probate Court. The question now presented was fully heard and determined after due notice to all parties interested, and a decree entered adverse to the petitioner. No appeal was taken from that decision; and the authorities are substantially uniform in support of the familiar proposition that the "decrees of a Probate Court touching matters within its jurisdiction when not appealed from are conclusive upon all persons." *McLean* v. *Weeks*, 65 Maine, 421; *Potter* v. *Webb*, 2 Maine, 257; *Merriam* v. *Sewall*, 8 Gray, 316.

It is therefore the opinion of the court that the entry in this case must be,

Bill dismissed, with one bill of costs for defendants.

NANCY F. POND, EXRX., *vs.* ELLEN W. FRENCH.

Penobscot. Opinion April 4, 1903.

Limitations. Partial Payment. New Promise. Removal of Bar.
R. S., c. 81, §§ 87, 97, 100.

A partial payment made on account of an existing indebtedness, accompanied by an oral promise to pay the balance of it, takes the debt out of the statute of limitations up to that time.

The identity of the debts sued upon with that with which the payment is made must be established; but if it is shown that the payment was made to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute.

Such payment is an acknowledgment of the existence of the indebtedness, and raises an implied promise at that time to pay the balance.

Perry v. *Chesley*, 77 Maine, 393, distinguished.

Exceptions by defendant. Exceptions certified from the Bangor Municipal Court to this court. Exceptions overruled.

From the bill of exceptions it appears that this was an action of assumpsit on an account annexed, the account having been contracted by the defendant with Hartford Pond. Plea, the general issue, with a brief statement setting up the statute of limitations. The debit items run from April 1, 1889, to August 3, 1889. The only credit item was a payment of five dollars on account, made by the defendant to the plaintiff on August 31, 1897. At the time of said payment defendant orally promised the plaintiff to pay said account. Hartford Pond died in March, 1892. The plaintiff was appointed executrix of his estate January 31, 1894.

Upon the above agreed statement of facts the court below ruled that the payment on August 31, 1897, revived the cause of action, and rendered judgment for the plaintiff, to which ruling the defendant excepted. And it was agreed that if said action is not barred by the statute of limitations, judgment shall be rendered for the plaintiff. If said action is so barred, judgment shall be rendered for the defendant.

R. B. Cookson and A. L. Blanchard, for plaintiff.

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

Our court has never held that a partial payment upon an account consisting of numerous items, said payment being made after the whole account has become barred by the statute, will renew said account. On the contrary, our court has decided in the case of *Perry* v. *Chesley,* 77 Maine, page 393, that a payment of five dollars on an account cannot save from the operation of the statute of limitations any item of said account, if none of said items are within six years of the date of said payment; which is holding that after a debit item in an account becomes six years old it will not be renewed or in any way affected by a payment of said account.

Perry v. *Chesley,* seems to have been entirely overlooked by both counsel and the court in the consideration of *Sinnett* v. *Sinnett,* in the 82 Maine, 278, as the case is nowhere referred to, either in briefs of counsel or in the opinion of the court. It seems to us that to allow stale accounts of, it may be, thousands of items each representing separate causes of action, to be revived by the payment of a trifling sum, would open a wide door to fraud and be conducive to the pernicious practices which the statute was designed to prevent.

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

WHITEHOUSE, J. This is an action on a grocer's account comprising numerous small items delivered between April 1, and August 3, 1889, amounting in the aggregate to $56.29. During this period, no items of credit or part payment appear upon the account. But on the thirty-first day of August, 1897, after the debt had become barred by the statute of limitations, the defendant made a payment of five dollars on account of the indebtedness, and orally promised the plaintiff to pay the balance of it.

The case was heard in the Bangor Municipal Court. The defendant pleaded the general issue with a brief statement setting up the statute of limitations as a bar to the action. The judge of that court ruled that the part payment of August 31, 1897, revived the cause of action and rendered judgment for the plaintiff. The case comes

to this court on exceptions to this ruling, accompanied by a stipulation that if the action is not barred by the statute, judgment should be rendered for the plaintiff; otherwise judgment should be rendered for the defendant.

In *Sinnett* v. *Sinnett*, 82 Maine, 278, it was held by this court that a partial payment upon a promissory note, after it had become barred by the statute of limitations, operated as a renewal of the note and removed the bar of the statute. "It is common learning," say the court, "that an intentional part payment of a debt is an acknowledgment of its existence and a renewal of its obligation. It cannot matter how old the debt is. The recognition, the acknowledgment, will restore the legal obligation, however late they are made. We find nothing in the statute, in the books or in reason, which requires the recognition, the reinstatement to be made within six years and not after. The creditor must bring suit within the six years, but the debtor can pay or renew his obligation at any time."

Section 97 of chapter 81, Revised Statutes, provides, it is true, that "no acknowledgment or promise takes the case out of the operation hereof, unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby." But section 100 of the same chapter declares that "nothing herein contained alters, takes away, or lessens the effect of payment of any principal or interest made by any person." Thus while a mere acknowledgment of the existence of the debt, or a mere promise to pay it, must be express and in writing to render it effectual against the statute of limitations, the act of making a partial payment upon a debt operates as a renewal of the obligation to pay the balance of it precisely the same as before the passage of the statute.

But "the language accompanying the act of payment is admissible to show the intent with which the payment is made, just as it was admissible before, and, that is so, whether or not it contains a promise to pay upon which the creditor could have maintained an action prior to the requirement that it should be in writing." *Gillingham* v. *Brown*, 178 Mass. 417. In *Benjamin* v. *Webster*, 65 Maine, 170, the facts were similar to those in the case at bar, except that the partial payment in that case was made before the debt was barred by

the statute. After discussing the question of "mutual dealings" referred to in Revised Statutes, chapter 81, section 87, the court proceed to show that the bar of the statute was also removed by force of the payment according to the provisions of section 100. "But the contract," say the court, "upon which the partial payment is made need not necessarily be a written one, but may be an oral contract as well. Such payment is prima facie evidence of a promise by the debtor to pay the balance of the debt, and conclusive evidence of the same, unless the circumstances under which the payment is made, or some proofs in the case, show to the contrary."

In the case at bar it has been seen that the partial payment of August, 1897, was unquestionably made only as a part of the larger debt of $56.29, accompanied as it was by an oral promise to pay the balance of it. "Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is thereby taken out of the statute of limitations up to that time. The identity of the debt sued on with that upon which the payment was made must, of course, be established. But if it is shown that the payment was made to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute. The payment is an acknowledgment of the existence of the indebtedness, and raises an implied promise at that time to pay the balance." *Day* v. *Mayo*, 154 Mass. 474.

If a promissory note had been given August 2, 1889, for the amount of the debt then subsisting, viz, $56.29, no question could have been raised that the intentional part payment of August, 1897, would have renewed the obligation and removed the bar of the statute, upon the authority of *Sinnett* v. *Sinnett*, supra. But the substance of the debt is the same, whether in the form of an account or promissory note. The fact that the obligation to pay is express in case of the latter and only implied in case of the former is immaterial. The effect of a partial payment on account of a specific sum due is the same in the one case as in the other.

But the defendant insists that the action must be deemed barred on the authority of *Perry* v. *Chesley*, 77 Maine, 393, and suggests that this case is in conflict with *Sinnett* v. *Sinnett*, supra, and must have

been overlooked by the court in the decision of the latter case. Upon a careful analysis of the two cases, however, it is manifest that there is no conflict between them. The decision in *Perry* v. *Chesley* rests exclusively upon the doctrine peculiar to "mutual accounts" or "mutual dealings" between the parties, under the provision of section 87, chapter 81. The effect of a partial payment on account of a larger debt, under section 100 of chapter 81, was not considered by the court in that case, and does not appear from the statement of facts to have been necessarily involved in the decision of the cause. The two cases are in this respect clearly distinguishable.

It is the opinion of the court that the part payment of August 31, 1897, operated as a renewal of the obligation to pay the debt and removed the bar of the statute of limitations.

According to the stipulation of the parties the entry must therefore be,

Exceptions overruled. Judgment for the plaintiff for $51.29 with interest from the date of the writ.

FREDERICK W. STOCK, and others,

vs.

JOSIAH C. TOWLE, and another.

Androscoggin. Opinion April 4, 1903.

Sales. Modification of Offer. Delivery. Transit Car.

The phrase transit car in a contract for the sale and delivery of merchandise by railroad has a well defined and uniform meaning. In this case it means a car already loaded with flour and on its way from the mill to the vendee.

The introduction of additional terms in an answer to an offer of sale is a material modification of the terms of offer and operates as a rejection and constitutes a new proposal which must be assented to before a contract is completed.

When the plaintiffs were informed during the preliminary negotiations for the purchase of flour that the defendants wanted it for immediate use, and must have understood that the term "transit car" was inserted in the order, by the defendants, for the purpose of insuring the delivery of the flour at the earliest practicable hour, *held;* that the stipulation for a transit car is a substantial and important element in the proposal. Time is of the essence of the contract and a condition precedent to the plaintiffs' right and the defendants' obligation.

A tender of a carload of flour not in transit at the date of the contract, but shipped three days later, is not a sufficient compliance with the condition of sale by transit car, and the defendants' refusal to accept the flour, when tendered, under those conditions, is not a breach of their contract.

On report. Judgment for defendants.

Action to recover forty dollars, claimed to be due the plaintiffs, for loss of twenty cents per barrel on two hundred barrels of flour, alleged to have been sold to the defendants and the acceptance of which was refused by them. Plea, general issue.

The facts appear in the opinion.

Geo. C. Wing, for plaintiffs.

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

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

WHITEHOUSE, J. This is an action to recover damages sustained by the plaintiffs by reason of the refusal of the defendants to accept a car load of flour, alleged to have been bargained and sold to them by the plaintiffs. The plaintiffs were proprietors of flouring mills at Hillsboro, Michigan, with a branch office for the wholesale of flour at Lewiston, Maine, and the defendants were wholesale dealers in flour and grain at Bangor, Maine. The case comes to this court on report.

At the time of the alleged contract, the price of old wheat flour was well advanced, but new wheat flour was coming into the market and the price was likely to fall. The defendants informed the plaintiffs by telephone that they desired to purchase a car load of old wheat flour for immediate use, but the conversation by telephone failed to result in the mutual assent of the parties to the same proposition. In the afternoon of the same day, however, the plaintiffs, from their office in Lewiston, sent the following telegram to the defendants at Bangor:

"July 29, 1902.

Dated, Lewiston, Me.

To J. C. Towle & Co.,

Bangor, Me.

Advise quick book one car four ten delivered.

F. W. STOCK, JR. 4-25"

This telegram was received by the defendants the same day and at six minutes past five o'clock, the same afternoon, the defendants telegraphed to the plaintiffs the following answer:

"July, 29, 1902.

Bangor, Me.

To F. W. Stock & Sons.

Accept car Stocks best patent at offer transit car.

J. C. TOWLE & CO. 5-6 P. M."

The introduction of the term "transit car" in this answer being a material modification of the terms of the offer, operated in law as a

rejection of it and constituted a new proposal, which, however, was equally ineffectual to complete the contract until it was assented to by the plaintiffs. But the next day, July 30th, the plaintiffs sent the following letter to the defendants:

"Lewiston, Me., July 30, 1902.

J. C. Towle & Co.,

Bangor, Me.

Gentlemen:

Received your wire last night and have booked you one car flour $4.10 delivered Bangor. Will give you the first car to arrive. Thanking you for your favor, I remain,

Yours truly,

F. W. STOCK & SONS,

Per F. W. S. Jr."

This constituted an acceptance of the defendants' proposal. It warranted the conclusion that the plaintiffs had "booked" the defendants a "transit car" as specified in the proposal. It is in evidence and not in controversy that the phrase "transit car" had a well defined and uniform meaning in the trade, well understood by both parties. In this instance, it meant a car already loaded, and on its way from Hillsboro to Maine.

No further communication took place between the parties until August 11th when the following letter was sent from the defendants to the plaintiffs, namely:

"Bangor, Me., August 11, 1902.

F. W. Stock & Sons,

Dear Sirs:—

July 30th we bought of you one car of your best patent with the understanding that the car was in transit and that we were to have the first car that arrived, as you have not seen fit to give us the first arrival, please cancel the order.

Yours truly,

J. C. TOWLE & Co."

To this the plaintiffs made the following reply:

"Lewiston, Me., August 11, 1902.

J. C. Towle & Co., Bangor, Me.

Gentlemen:—

Replying to your favor will say that I have plenty of cars on the way but not one arrival that has not been sold. The very first car arriving for my account I expect to forward to you.

Yours truly,

F. W. STOCK & SONS,

Per F. W. S. Jr."

To this letter the defendants replied as follows:

"Bangor, Me., August 13, 1902.

F. W. Stock & Sons,

Dear Sirs:—

Yours of the 11th received. Please cancel the order as we shall not take the car flour. Your letter of July 30th says that you will give us the first car that arrives and as you have not done so, we shall consequently refuse the car.

Yours truly,

J. C. TOWLE & Co."

It appears from the evidence that on July 29th and 30th the plaintiffs did not have a car load of best patent flour in transit from their mills at Hillsboro to Portland and that a car load of this quality of flour did not leave the plaintiffs' mills at Hillsboro, Michigan, until August 2nd, and did not arrive in Portland until after August, 12th. It is in evidence that eight or ten days are required for a car to come from Hillsboro to Portland. It is not in controversy that this car load was duly tendered to the defendants and that an acceptance of it was refused by them.

The plaintiffs accordingly contend that they performed their part of the contract and are now entitled to damages for a breach of it on the part of the defendants. On the other hand, the defendants insist that the plaintiffs failed to perform the contract according to its terms, for the reason that their tender of the flour was more than three days later than it would have been if the car had been in transit July 30th, according to the understanding of the defendants and the requirement of the contract.

It is the opinion of the court that the contention of the defendants must be sustained. The plaintiffs were informed during the preliminary negotiations for the flour that the defendants wanted it for immediate use, and must have understood that the term "transit car" was inserted in the order, by the defendants, for the purpose of insuring the delivery of the flour at Bangor at the earliest practicable hour. The stipulation for a "transit car" was therefore a substantial and important element in the proposal. Time was of the essence of the contract and a condition precedent to the plaintiffs' right and the defendants' obligation.

But it is contended that the defendants' letters of August 11th, and August 13, show that they refused to accept the flour because the plaintiffs did not see fit to give them the first car that arrived from the west, and that they must be deemed from the language of their letters to have waived their right to insist on a "transit car" as a condition precedent in the contract. In the letter of August 11, they say: "we bought with the understanding that the car was in transit and that we were to have the first car that arrived, as you have not seen fit to give us the first arrival, please cancel the order." In the letter of August 13th, they say: "Your letter of July 30, says that you will give us the first car that arrives and as you have not done so, we shall consequently refuse the car."

These letters should obviously be read and considered in connection with all the other correspondence and interpreted in the light of the facts known to the defendants, at that time, and of all the attending circumstances. They ordered and expected a transit car loaded with flour, knowing that in the ordinary course of transportation a maximum limit of ten days only would be required to bring it to Maine. They had the plaintiffs' assurance that the first car load to arrive would be delivered to them. They knew that thirteen days had elapsed, and their reasonable conclusion was that if a transit car had arrived, the flour had been delivered to some other customer. Construed in the light of these facts and circumstances, the two letters read together may fairly be understood to signify that the defendants cancelled the order because they believed that the plaintiffs had not given them the first transit car that arrived. The letters

do not support the plaintiffs' contention in regard to a waiver.

To entitle the plaintiffs to recover, it was incumbent upon them to show a full performance on their part of all the terms of the contract. A tender of a car load of flour not in transit at the date of the contract, but shipped three days later, was not a sufficient compliance with the condition of the sale, and the defendants' refusal to accept the flour when tendered, under those conditions, was not a breach of their contract.

Judgment for the defendants.

ASA F. YORK *vs.* AUGUSTUS H. CLEAVES, and another.

Cumberland. Opinion April 9, 1903.

Negligence. Failure of Due Care. Nature of Liability.

In an action on the case to recover damages for negligence in burning the plaintiff's corn factory, the verdict was for the defendants, and two important questions of fact were presented, first, whether the fire that burned the plaintiff's buildings was communicated by sparks and brands from the defendant's sawmill, and second, if it was, were the defendants negligent in permitting the sparks to escape.

Held; that by the process of elimination, the evidence all points to but one conclusion, that the spark or cinder which set fire to the plaintiff's factory was communicated from the defendants' mill.

As to the second proposition, the evidence shows that the defendants' boiler, flues and smoke-stack were so constructed that they were well calculated, and liable, in a strong wind, to carry sparks and cinders for a considerable distance through the air, and that a person of ordinary care and prudence, under all the circumstances of this case, should have anticipated such a result.

On motion by plaintiff. Motion sustained.

Action on the case to recover damages for the destruction of the plaintiff's corn factory in the town of Yarmouth by defendants'

alleged negligence in the maintenance and operation of a sawmill, from which it is claimed the sparks escaped and caused the fire. A verdict was returned for the defendants and plaintiff moved for a new trial.

The case is stated in the opinion.

L. C. Cornish and N. L. Bassett; G. E. Bird and W. M. Bradley, for plaintiff.

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

SITTING: SAVAGE, STROUT, POWERS, PEABODY, SPEAR, JJ.

SPEAR, J. This is an action on the case to recover damages for negligence in burning the plaintiff's corn factory. The verdict was for the defendants. The case comes up on motion and exceptions.

Asa F. York the plaintiff was the owner of a corn factory and appurtenances connected therewith in Yarmouthville in the County of Cumberland.

The defendants owned and occupied a sawmill, operated by a boiler and steam engine. The plaintiff alleges that the smoke-stack connected with the boiler was improperly constructed, defective and out of repair; that on the 13th day of April, 1900, it was a very dry time and a high wind was blowing in the general direction of the plaintiff's buildings; that the defendants' sawmill was in such close proximity to the plaintiff's buildings that the use of fire in and about said boilers would ordinarily and necessarily threaten and endanger the buildings of the plaintiff and cause the burning thereof, of all which the said defendants well knew; that notwithstanding these conditions, the defendants on said 13th day of April, negligently built and maintained a great and hot fire in their furnaces about said boilers; that said fires, thus negligently built under said conditions, caused sparks and burning brands to escape from said smoke-stack, whereby fire and sparks and burning brands were negligently carried to the roof of the plaintiff's buildings, and caused them to take fire and to be wholly burned and destroyed.

The evidence in the case comprises nearly four hundred pages and contains the testimony of many witnesses on both sides. The testi-

mony does not disclose any direct evidence of how the fire actually occurred, as no witness saw the spark that kindled the flame. The fire was in an early stage of progress when discovered. The truth, therefore, as nearly as it can be ascertained, must be gleaned from the facts, circumstances, and conditions tending to prove or disprove the cause of the fire. These elements of proof, based upon admitted facts, all pointing in the same direction, or so connected, one with another, as to produce an effect the cause of which is inevitable, are often more reliable than positive or direct testimony which depends upon the interest, bias, opportunity, eyesight, hearing, and intelligence of the witness.

The first important question involved is, whether the fire originated from sparks or brands from the defendants' mill. The admitted facts in this case all concur, we think, in pointing to the defendants' mill as the cause of the fire which consumed the plaintiff's factory.

The defendants came from Freeport to Yarmouthville in the fall of 1899 and there erected their mill and appurtenances on the site which it occupied at the time of the fire and began to operate it in the early part of 1900. The mill was equipped with a boiler, engine, smoke-stack, and other machinery as set forth in the writ. The plaintiff's corn factory, erected in 1887-88, and operated since that time, was situated almost exactly due north of the defendants' mill and a little over 300 feet therefrom. The plan shows that the distance from the smoke-stack of the defendants' mill to the point on the roof of the plaintiff's factory, where the fire is alleged to have caught, is 340 feet, a little over 100 yards. No buildings or other obstacles intervened to break a direct and clear passage between the mill and the factory. The elevation occupied by the two buildings was such that the top of the defendants' smoke-stack was considerably higher than the roof of the plaintiff's factory.

The character of the defendants' mill was well calculated to carry sparks or brands, when the wind and the weather were such as to act in favorable conjunction with the tendency of the flues and smoke-stack to scatter fire. It appears from the testimony of the defendants that the engine and boiler, set in their mill, had been used in another mill some five or six years. The doors and grate of the fire box

were more or less broken and the draft thereby constantly increased. The flues of the boiler were straight, running directly from the fire box into the smoke-stack, giving a straight passage way for sparks and cinders direct from the fire box to the smoke-stack. The steam was exhausted directly into the smoke-stack for the very purpose of increasing the draft as the defendants themselves and other witnesses admit. The smoke-stack was about 25 feet high without any spark arrester on the top, so that if any sparks, cinders or embers passed into the smoke-stack the draft would have a tendency to at once carry them to the top of the stack and thence scatter them to a greater or less distance, depending upon the size of the sparks or brands and the velocity of the wind.

The fuel used in the fire box of the boiler, as stated by the defendant Walker, was "slabs mostly with a little hard wood." Mr. Knight who fired the boiler in the winter of 1900 says: "They were mostly green slabs but not wholly so; they used some dry wood that they had hauled there." Robert Beers who was firing at the time of the fire says: "They were burning green slabs, most all green slabs, a few dry ones. Other witnesses say "that they used slabs, pine limbs, shavings and sawdust at various times, and that they were burning slabs and dry wood all together in April." We think it can make but little difference, however, with respect to the carrying of cinders and sparks, whether the wood when it was put into the furnace was dry or green, inasmuch as it must become thoroughly dry in the furnace before complete combustion could take place; and the embers, left from the burning, whether from dry or green wood, would be practically the same in weight and density. We see no reason, even if all the slabs were green, why sparks and cinders might not with sufficient draft be drawn through the straight flues of the furnace and carried up and out of the smoke-stack, as in fact the testimony shows was done.

Mr. Knight, the fireman, when asked in regard to this matter testified "that he knew of sparks and brands coming out of the stack; that he noticed them in the evening, the latter part of the day's work." He testified to the same on cross-examination. Mr. Knight worked at the mill during the months of December and January. Mr. Blake

another workman at the mill, in the month of January, corroborated Mr. Knight. Mr. Lawrence, who was often at the mill during the whole time of its operation, also said that he saw "sparks and brands coming out of the smoke-stack." In answer to the question as to how often he had noticed them, he said "well, quite frequently when I used to be down there; it would depend on the way of the wind. If the wind was a south wind, it was right in my track going and coming, but if it was a west wind, it would blow them off where I didn't take much notice of them." Thus it appears from the uncontradicted evidence that sparks and brands during the whole period of the operation of this mill were observed by several witnesses to be coming from the top of this smoke-stack. There seems but little question that a wind strong enough and blowing in the right direction would carry sparks and cinders from the smoke-stack of the defendants' mill a distance a little more than 100 yards to the plaintiff's factory; and if the conditions were right, communicate fire.

The evidence all shows that April 30th when this factory was burned was an unusually dry time for this season of the year. The fact that some twenty other fires were started from the cinders and brands, carried from the burning factory, is sufficient to show that the roofs of the houses were very dry and easily set on fire. We think that, on the day of this fire, the evidence convincingly shows that a heavy wind was blowing from the south directly from the defendant's smoke-stack towards the plaintiff's roof. The strength of the wind on the afternoon of the fire is characterized by various witnesses, as follows: "Almost a gale; heavy wind; blew very hard; very strong; pretty strong wind; quite strong wind. Perhaps 20 miles an hour; good strong wind; very strong; unusally strong." The weather bureau gives the velocity on the day of the fire, as follows: "12 o'clock 10 miles an hour; 1 o'clock 12 miles an hour; 2 o'clock 16 miles an hour; 3 o'clock 17 miles; 4 o'clock 16 miles. The greatest velocity between 1 and 6 o'clock 23 miles per hour." Mr. Jones of the weather bureau thinks this was about 3 o'clock. There was no material controversy as to the strength of the wind. The evidence clearly demonstrates that it was of sufficient force to create

a heavy draft in the smoke-stack and to carry sparks and cinders a considerable distance.

But with reference to the direction of the wind, as already observed, there was a claimed difference. While the defendants appear to contradict the contention of the plaintiff upon this point, yet we think their own witnesses practically substantiate it, and all the evidence in the case, taken into consideration, overwhelmingly sustains it. Various witnesses testified as to the direction of the wind as follows: Merrill, from the south; plaintiff, from the south, a little west of south; Horn, south-west, southerly; Sawyer, south or nearly so; York, about south; Ring, nearly south; McKennon, from the south, a little to the westward; Gay, was shifting a little; Humphrey, south; Beeman, about south; nearly parallel with the Grand Trunk Railway; blew right up the track. It should be here observed that the railroad track is nearly parallel with a straight line drawn from the defendant's saw mill to the plaintiff's factory.

The defendants' witnesses testified as to the direction of the wind, as follows: Gero, a hoseman of the fire department, says, speaking of the smoke of the fire, it went in a northerly direction; and also that it trended from the depot in a northerly direction; also that it was changeable; Jenness, southerly—about; McKenney, it was very near a south wind; Leighton, the wind was a little west or south and then varied, shifted about. With reference to the lines upon the plan, representing the railroad track, he testified, that the wind was nearly parallel with the lines, it wasn't quite parallel; it was a little west from parallel.

The record of the weather bureau also shows that on the morning of April 30, at 8 o'clock the wind was from the west; at 10 o'clock it was from the west; at 11 o'clock from the south-west; at 12 o'clock set south and so continued until 4 in the afternoon when it worked back again towards the south-west. It was testified to by the keeper of the bureau that the wind this afternoon backed from the west towards the south and then veered again towards the west during the evening. The witness said, "we consider the wind as backing when it moves from the south point around by the west point towards

the north, and veering when it moves from the north point around by the west point towards the south."

There is no substantial difference between the witnesses of the plaintiff and those for the defendant with respect to the direction of the wind. They vary somewhat as to the exact course, but the conclusion of the whole is that on the afternoon of the fire the wind was substantially blowing from the south, shifting a little from east to west, practically parallel with the railroad tracks. We think there can be but little doubt that the course of the wind was such during this afternoon as to carry sparks and cinders directly towards the plaintiff's factory. The spark or cinder that caused the fire must have come from the south.

The defendants, however, contends that the spark which burned the plaintiff's buildings might have been communicated from fires along and near the railroad track, or from a passing train. Of course it is not incumbent upon the defendants to show how the fire did occur, but as they contend that it might have taken from one of these sources, it is proper here to determine what weight, from the evidence in the case, should be given to the contention. The conclusion already arrived at with respect to the direction of the wind settles this point. The railroad is situated nearly due east of the corn factory and about 144 feet distant therefrom. The evidence shows that the wind during the whole afternoon would carry sparks from a fire along the railroad, or cinders from a locomotive, in an opposite direction from the railroad to the corn factory.

The wind backed from the north through the west to the south and, during all the time until it reached the south, would carry fire to the eastward of the railroad. When it reached the south it would carry sparks up the railroad in a line parallel with the plaintiff's factory. As the wind was at no time in a quarter calculated to carry sparks towards the plaintiff's buildings, the fire therefore could not have been communicated from the direction of the railroad track. Hence, it becomes immaterial to consider the character of the fires along the railroad or whether a train passed along, as contended by one of the defendants' witnesses. It is further contended that the fire might have originated from within the building itself, as several men were

occupying a portion of the building engaged in some kind of labor; and to substantiate this theory, some of the defendants' witnesses said that they saw, or thought they saw the fire break through the roof.

Joseph McKearney states that he first saw the fire about midway between the ridgepole and the ventilator and that when he discovered it, it was from a yard and a half to two yards square. Alvin Goff says that he first discovered the fire in the cupola and that it seemed to be coming out all around it. He didn't notice the shingles on fire. John W. Kenney says that he first saw the fire on the roof about halfway between the ridgepole and the ventilator. Mr. Cleaves in direct contradiction of his own witness Alvin Goff and also of Mr. Walker, says that he, at the time he saw the ventilator afire, also saw a blaze on the roof five or six feet across it. Mr. Kenney, who notified Mr. Walker of the fire and who must have looked directly at it with Mr. Walker, saw the fire on the roof, while Mr. Walker saw the ventilator and only the ventilator all afire. We have no doubt that each of the above witnesses, as well as the defendants themselves, testified to the location of the fire exactly as they saw it, but the contradictory views expressed by them demonstrates that such testimony is of little or no value in fixing the origin of the fire on the roof.

This leaves for consideration upon this point only the testimony of the witnesses who were within the building. The evidence shows that there had been no fire in the furnace of the boiler at the factory since the previous fall and that all the workmen, at the time the fire caught, were, at that moment, at work about the only fire inside the building, contained in a fire box about 15 inches in diameter and 18 inches high, in which soft coal was burned and on top of which was a place for melting solder. There was no other fire of any kind in the building, neither could it have occurred from smoking by the men, as at the time of the fire, they were all at work in the westerly end of the building, while the fire first appeared on the roof of the easterly end. Without analyzing the testimony further, it clearly appears that the fire did not originate from within the building. The conclusion, therefore, seems irresistible that the spark or cinder, which

set fire to the plaintiff's factory, was communicated from the defendants' mill.

This brings us to the consideration of the second proposition in the case, the defendants' negligence; for, if it is conceded that the fire was caused by sparks from the defendants' smoke-stack, the plaintiff must go still further and show that it was by reason of some neglect either in the appliances, or in the care and management of the fire by the defendants. The defendants were not insurers, but they were bound to exercise ordinary care and precaution in the control and management of their fire to prevent the destruction of their neighbor's property. Did the defendants, under the circumstances disclosed in this case, exercise such care and prudence in the construction and equipment of their boiler and smoke-stack, and in the control and management of the fire in the furnace, on the afternoon of April 30, as ordinarily careful, prudent men would have done under like circumstances? We think they did not.

The fire box was directly in front of the flues. The flues were straight and horizontal, connecting directly with the smoke-stack. The smoke-stack had an increased draft through the agency of the exhaust pipe, had no spark arrester and presented an opening at the top to the full area of the mouth of the stack. A heavy wind was liable to blow at any time, as it was actually blowing on the afternoon of the fire. A furnace, flues and smoke-stack constructed like this one were liable in a strong wind to carry sparks and cinders for a considerable distance through the air, and we think that a man of ordinary care and prudence, under all the circumstances in this case, should have anticipated such a result.

Upon both propositions in the case, the evidence is so overwhelmingly in favor of the plaintiff's contention that the court is of the opinion that the jury must have been influenced, in their verdict, by some misunderstanding, bias or prejudice. This conclusion on the motion renders it unnecessary to consider the exceptions.

Motion sustained. New trial granted.

GEORGE W. HOWE

vs.

SAMUEL T. HOWE and CHARLES A. HOWE, Trustee, and CHARLES W. PIERCE, Trustee and Claimant.

Penobscot. Opinion April 9, 1903.

Trustee Process. Set-Off. Assignment. Notice. Attachment. R. S., c. 82, § 63.

The plaintiff by a trustee process attached the principal defendant's distributive share of personal estate to which he was entitled in the hands of an administrator; he also attached the goods, effects, and credits of the defendant in the hands of another party as the defendant's assignee.

The administrator in his trustee disclosure offered evidence to prove that the plaintiff was indebted to him in his individual capacity and this sum he claimed to set off against such sum as was due to the plaintiff from the intestate's estate. *Held;* that this demand, thus due him in his individual capacity, cannot be set off in this action.

Where the subject of the assignment is not capable of manual delivery an oral assignment may be sufficient, if founded upon a valuable and adequate consideration and accompanied by acts which amount to a constructive delivery; and even if the written assignment had never been executed.

By the assignee's disclosure it appeared that the principal defendant was indebted to him and that for a valuable consideration consisting of such present indebtedness and also future advances, the defendant had executed an assignment to him of all sums of money then due and all that might be due him from the estate, then unsettled, and in the hands of the administrator. *Held;* that the transaction between the defendant and the claimant satisfies the requirements of an equitable assignment.

As between the plaintiff and the claimant, equitable considerations must prevail as fully as possible. *Held;* that the execution of the assignment and its record, in accordance with a previous understanding between the assignor and the assignee, and notice to the administrator, removes the question of its sufficiency from possible doubt.

An assignment is not effective to charge the holder of a fund as debtor to an assignee until notice has been given him of the assignment; but it will be complete as against creditors of the assignor if the trustee has notice or knowledge of it in season to disclose the fact of the assignment.

Where an assignment is given as collateral security for the amount then due the assignee and for future advancements and is valid between the parties for that purpose, and it does not appear that there was any adjustment

by which the fund was applied in payment or as specific security for a stated amount, but transactions between the parties continued and the items of debit and credit were the subject of general account up to the time of the hearing on the assignee's claim, *held;* that as against attaching creditors, the assignment is not security for advancements made by the assignee to the assignor after notice of the attachments; and the plaintiff's attachment thereupon had precedence over subsequent advancements of the assignee and defeated his claims to the fund.

Exceptions by plaintiff. Sustained.

Assumpsit to recover upon two promissory notes given by Samuel T. Howe. The action is by trustee process, in which the plaintiff sought to hold the defendant's distributive share of the estate Mary J. Keaton, in the hands of her administrator, Charles A. Howe; also the same fund claimed by Charles W. Pierce under an assignment from the defendant.

The case appears in the opinion.

G. W. Howe, for plaintiff.

H. J. Chapman and G. H. Worster, for Howe, Trustee.

M. L. Durgin, for defendant and Pierce, Claimant.

SITTING: WISWELL, C. J., WHITEHOUSE, POWERS, PEABODY, SPEAR, JJ.

PEABODY, J. The plaintiff in an action of assumpsit against the principal defendant attached his goods, effects and credits in the hands of Charles A. Howe, administrator of the estate of Mary J. Keaton, deceased, intestate, in his capacity as administrator, and in the hands of Charles W. Pierce, assignee of the defendant, as trustees.

The trustees filed their disclosures made in answer to interrogatories propounded by the plaintiff. It appears that at the time of the service of the writ upon the administrator as trustee, the defendant was entitled to a distributive share of the personal estate of the intestate, which was subsequently shown by an order of distribution issued by the Probate Court of Penobscot County having jurisdiction of the estate, to the amount of one hundred and four dollars and ninety-seven cents.

The administrator offered evidence tending to prove that at the time of the service of the writ, the plaintiff was owing him in his individual capacity the sum of one hundred and twenty-two dollars

and seventy-five cents, which he claimed to set off against such sum as might become due to the plaintiff from the intestate's estate. His demand, if valid, could not be set off in this action. R. S., ch. 82, § 63.

The disclosure of Charles W. Pierce as trustee states that he had at the time of the service of the writ on him no goods, effects or credits belonging to the defendant, but that prior thereto and prior to the service of the writ upon the administrator of the estate of Mary J. Keaton, deceased, the defendant was indebted to him to the amount of one hundred and fifty-five dollars and fifteen cents; and for a valuable consideration, consisting of such present indebtedness and also future advances, the defendant had executed an assignment to him of all sums of money then due and all that might be due him from the estate of Mary J. Keaton, then unsettled, which assignment was dated June 26, 1901.

It appears that the assignee did not receive the assignment after it was signed, but it was shown to him at his house by the defendant, who at his request took it to the office of the town clerk of Milo where it was signed by him and recorded July 4th, 1901. His claim under the assignment to the funds disclosed by the administrator was duly filed. The plaintiff formally denied the validity of the assignment, and a hearing was had upon the disclosures of the trustees and the evidence of the claimant.

The presiding justice ruled as follows: "Trustees discharged with costs. Funds in trustees' hands to the amount of one hundred and fifty-five dollars, if so much, adjudged to claimant, Charles W. Pierce." And to this ruling the plaintiff by exceptions has brought the disclosures and evidence before this court.

The plaintiff contends that the assignee's claim against the principal defendant is fictitious and that the assignment is void by reason of fraud and informality.

The assignee's account against the assignor, in addition to his testimony, is supported by exhibits and books of account, and we think it is proved that the amount of one hundred and fifty-five dollars and fifteen cents was legally due him at the date of the assignment.

The testimony of the defendant shows that immediately after a conversation with the plaintiff he executed the assignment to the claimant, from whom he expected favors. This fact and other attendant circumstances indicate his intention to hinder and delay the plaintiff in the collection of the debt in suit, but the evidence fails to prove that the claimant at the time acted collusively with the defendant or knew of his intention, and his rights are not prejudiced by any fraudulent purpose of the assignor to delay or defeat the demands of other creditors.

It is also contended by the plaintiff that the assignment was not legally delivered to the assignee and that no such notice was given to the administrator as made the assignment effective against his attachment of the fund.

The subject of the alleged assignment was not capable of manual delivery, and an oral assignment might be sufficient if founded upon a valuable and adequate consideration and accompanied by acts which amounted to a constructive delivery; and even if the written assignment had never been executed by the assignor, we think the transaction between the defendant and the claimant satisfied the requirements of an equitable assignment. *White* v. *Kilgore*, 77 Maine, 571; *Simpson* v. *Bibber*, 59 Maine, 196; *Porter* v. *Bullard*, 26 Maine, 448.

As between the plaintiff and the claimant, equitable considerations must prevail as fully as possible. *Haynes* v. *Thompson*, 80 Maine, 125. And the execution of the assignment and its record, in accordance with a previous understanding of the assignor and assignee, removes the question of its sufficiency from possible doubt. *Jenness* v. *Wharff*, 87 Maine, 307.

An assignment is not effective to charge the holder of a fund as debtor to an assignee until notice has been given him of the assignment; but it will be complete as against creditors of the assignor trusteeing the chose in action if the trustee has notice or knowledge of it in season to disclose the fact of the assignment. *Littlefield* v. *Smith*, 17 Maine, 327; *Thayer* v. *Daniels*, 113 Mass. 129.

The record of the written assignment in this case was not required by law, and was not, therefore, constructive notice to the adminis-

trator: but the evidence shows that he was actually informed that it had been made, executed and recorded before making his disclosure as trustee.

But we think there is another phase of the case which controls the decision. The assignment was not absolute. It was given as collateral security for the amount then due the assignee and for future advancements and was valid between the parties for that purpose.

It does not appear that there was any adjustment by which the fund was applied in payment or as specific security for a stated amount, but transactions between the parties continued and the items of debit and credit were the subject of general account up to the time of the hearing on the assignee's claim.

As against attaching creditors the assignment was not security for advancements made by the assignee to the assignor after notice of the attachments. The writ was served upon the claimant as trustee July 13, 1901, and he thereby had definite knowledge of the plaintiff's attachment of the fund in the hands of Charles A. Howe, administrator, as trustee. And the assignment as security for credits thereafter given was subject to the attachment and might be extinguished by a payment of the claim secured.

It is shown by the claimant's testimony that on the day he received notice of the plaintiff's attachment, there was due him from the principal debtor under the assignment the sum of one hundred sixty-nine dollars and seventy-five cents, an increase by advancements of fourteen dollars and thirty cents above the amount due at the date of the assignment, which was one hundred fifty-five dollars and forty-five cents; that subsequently by credits in excess of debits the assignor had on the sixth day of November, 1901, overpaid the debt which was secured by assignment. The plaintiff's attachment thereupon had precedence over subsequent advancements of the assignee and defeated his claim to the fund.

Exceptions should be sustained. Charles A. Howe as administrator should be charged as trustee for one hundred four dollars and ninety-seven cents less his costs. Charles W. Pierce should be discharged as trustee with costs, and judgment for costs should be rendered against him as claimant of the fund in the trustee's hands.

So ordered.

JOSIAH C. TOWLE *vs.* ALICE H. DOE, and others.

Penobscot. Opinion April 9, 1903.

Wills. Perpetuities. Gift. Remainder. Trust. Children. Cy Pres Doctrine. Time of Vesting. Fund not Separable.

Where by will a gift is made of a remainder in fee and in the same will there follows language showing a clear intent to charge such remainder with a trust invalid under the rule against perpetuities, the donee takes such remainder in fee.

A trust attempted to be created by will for the use of a man and his children is invalid as contravening the rule against perpetuities, unless it appears from the context that only those children actually in esse at death of the testator are intended to share in the benefit.

The mere fact that events as they finally transpire restrict a trust in such manner that, had the will in apt terms in fact so limited the trust, it would have been valid does not alter the rule that the tests of validity must be applied to the language actually used by the testator in the will itself.

That construction of a will should be adopted which does not contravene the rule against perpetuities, whenever by so doing the intention of the testator will not be wholly disappointed.

A trust fund created by a clause in a will providing for the payment of "the interest, deducting expenses, to W. M. T. and his children so long as they live," is not separable and might vest too remotely to be valid.

In such a clause the word "children" is not to be construed as meaning alone those in esse at the death of the testator, unless such meaning is evident from the context.

On report. Decree according to opinion of court.

Bill in equity to obtain the construction of the residuary clause of the last will and testament of Josiah Towle, late of Bangor, deceased.

The will showed evidence of being holographic and the complete residuary clause was as follows:—

"To my wife Lucinda L. Towle I give & bequeath all the remainder of my property of every description both real personal & mixed to have & to hold occupy & enjoy & receive all the income rents & interest during her life time & at her decease I give & bequeath all the aforesaid property which I have devised to her during her life

time & which shall remain at her decease, to my four children viz: Wm. M. Towle & his heirs one-fourth part to be invested by my executor in U. S. bonds or State bonds & the interest deducting expenses paid over to said Wm. M. Towle and his children so long as they live & then the principal divided to his or their heirs.

"Mary L. Taylor and her heirs one-fourth part said fourth part to be invested by my executor in U. S. or State bonds & the interest deducting expenses paid over to said Mary so long as she shall live & after her decease the principal divided to her heirs & invested in bonds as aforesaid for them by my executor & the accruing interest deducting expenses shall be so invested & added to the principal & as fast as they shall attain the age of twenty-five years provided they shall be of sound mind and steady habits & shall have accumulated not less than three hundred dollars of property if a male or fifty dollars if a female by their own industry then their several portions shall be paid over to them & such of them as shall not be of sound mind & good habits & have accumulated as aforesaid shall receive only the interest (deducting expenses) of their said share yearly during their life time & at their decease the principal shall be paid to their heirs.

"To my son John A. Towle & his heirs one-fourth part to be paid over to him by my executor.

"To my son Josiah C. Towle & his heirs one-fourth part to be paid over to him by my executor.

"Provided however if my estate shall not prove sufficient (after deducting the four thousand dollars herein before set aside) to leave a sufficient sum for my wife Lucinda L. Towle so that she shall receive therefrom a net income of Ten hundred dollars per annum after deducting taxes & expenses & house rent then sufficient of the interest of the aforesaid four thousand dollars shall be paid over to her yearly—instead of being paid over or reserved for said needy ones as afore herein stipulated to make up her income to the sum of $1000 per annum & if the whole of the interest of the said four thousand is not sufficient to make up the yearly net income to ten hundred dollars then a portion of the principal of said four thousand dollars may be taken each year until the whole is used up if needed to make up said sum of $1000 net yearly income instead of being

reserved as before devised to my children aforesaid & whatever may remain of it shall be divided to them as above devised.

"And for the furtherance of the aforesaid object and for the safety & protection of the property & to establish a legal mode for the sale & transfer of all my property I hereby devise & bequeath to my trustee hereinafter named all my estate real personal & mixed to have & to hold the same upon the terms trust & conditions hereinafter specified herein fully authorizing and empowering said Trustee to sell & dispose of any & all said estate real personal & mixed except that my dwelling house on State Street & my store if (I shall own any at my decease) shall not be sold until after the decease of my wife but all the other property may be sold & conveyed by my said Trustee when & in such manner as to said Trustee may seem most advantageous hereby directing my said Trustee to invest the whole proceeds of sales in U. S. or State bonds & to keep the same so invested & pay over the income & interest deducting taxes & expenses to meet the aforesaid devises as herein before specified."

The only child of William M. Towle at the testator's death, at the termination of the intervening life, and also at his death, was Alice H. Doe.

There was also a codicil which, however, had no bearing on the case.

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

J. R. Mason, for defendants.

C. H. Bartlett, guardian ad litem, for minor defendants.

Matthew Laughlin, administrator of the estate of William M. Towle, pro se.

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

PEABODY, J. This cause comes before the law court on report. It is an equity suit brought for the purpose of obtaining a legal construction of certain provisions of the will of Josiah Towle, late of Bangor, Maine, deceased.

The case shows that the testator made and executed his will on

the seventeenth day of August, A. D. 1866, and a codicil thereto on the ninth day of March, A. D. 1876. The provisions of the codicil are immaterial in the case. The portions of the will which the parties desire construed being part of the residuary clause, are as follows:

"To my wife, Lucinda L. Towle, I give and bequeath all the remainder of my property of every description, both real, personal and mixed, to have and to hold, occupy and enjoy and receive all income, rents and profits and interest during her life and at her decease I give and bequeath all the aforesaid property devised to her during her lifetime and which shall remain at her decease to my four children, viz: William M. Towle and his heirs one-fourth part to be invested by my executor in U. S. bonds or State bonds and the interest deducting expense paid over to said William M. Towle and his children so long as they live and then the principal divided to his or their heirs."

The remaining parts of the residuary clause relate to the bequests to the other three children of the testator and do not affect the question submitted except as indicating the intention of the testator.

The testator died January 26, 1883, and his widow, Lucinda L. Towle, died April 8, 1886. His son William M. Towle died January 23, 1896, leaving a widow, now living; and his granddaughter, Alice H. Doe, the surviving child of William M. Towle, has died since the filing of the bill in equity, leaving a husband and children who are now living.

The validity of the will and codicil is not questioned, and their terms clearly indicate that the testator thereby intended to dispose of his entire estate. The will is not artificially drawn, as is evident both from the words used and the structure of its testamentary provisions.

In the portion of the will quoted, the words used in the first section of the clause imply an absolute bequest to his son, William M. Towle, but they are followed by words showing that the testator intended that the legal estate in this fourth part of the residuum should vest in a trustee, to be disposed of in accordance with the terms of the trust.

In determining the general intent of the testator, the words defin-

ing the bequest to William M. Towle and his heirs cannot be dissociated from those which immediately follow; and the language of the whole clause shows that the bequest was not intended by the testator to be a remainder in fee to William M. Towle but an executory bequest to be held by the executor in trust for the lives of William M. Towle and his children and at the decease of the survivor of them to vest in their heirs. The doubt which has arisen as to the legal effect of this bequest is whether it is in conflict with the rule against perpetuities.

The common law rule is recognized by the courts of this State, as formulated in *Cadell* v. *Palmer*, 7 Bli. 202, quoted in 2d Woerner on American Law of Adm., § 427:

"The utmost period in which an executory bequest can take effect is a life or lives in being and twenty-one years thereafter, together with the period of gestation already existing."

The same rule applies to trusts as is applied to legal estates. 1 Perry on Trusts, § 382.

The actual events now show that the will in effect limited the trust to William M. Towle and his daughter Alice H. Doe, as beneficiaries for life, and had it done so in terms the bequest would not have been void for remoteness because this daughter was his only child at the death of the testator, at the termination of the intervening life and at his own death. But the test of the validity of the gift must be applied to the language of the will itself. And the possibility that the executory limitation might be void for remoteness is clear from the fact that a child or children of the testator's son William M. Towle, might be born after the death of the testator, the continuance of whose lives might postpone the vesting of the estate beyond the time limited by law. 1 Jar. on Wills, 266; 2 Woerner Am. Law Adm., § 427; *Webber* v. *Jones*, 94 Maine, 429; Gray on Per. § 214.

From the facts in the case and the language of the will several theories arise as to the construction of the portion quoted in the third clause of the bill. 1. That the entire bequest is void because the fatal defect of violating an inflexible rule of law applies to the whole.

This construction would do great violence to the manifest intention of the testator to give his four children and their immediate

families the benefit of equal shares in his estate at the death of his wife.

The general terms of the provision are: "At her decease I give and bequeath all the aforesaid property which I have devised to her during her lifetime and which shall remain at her decease to my four children".

He then in specific terms defines the several bequests of one-fourth to each. To two of his sons he gives the shares in apt words to them and their heirs. To the daughter and her heirs he gives one-fourth part, and in words immediately following modifies the bequest by directing its investment by his executor and creating a trust not free from complications similar to those in the provision under consideration.

If a construction may be given to the will which does not contravene the rule and does not wholly disappoint the intention of the testator, it should be adopted. 3 Jar. on Wills, 5th Am. ed. 709.

2. Another theory of construction is that the bequest in trust is limited to beneficiaries in esse at the date of the death of the testator, namely, William M. Towle and his child, Alice H. Doe, and vested at the death of the survivor, Alice H. Doe, in her heirs.

This construction is claimed on the ground that the word "children" used by the testator in his will may mean children living at the time of his decease, but we think that this can only apply to cases where this meaning is evident from the context. It cannot be forced against the plain language of the will so as to apply only to those of the same class who might legally take the equitable estate. Gray on Per. ch. X; *Barnum* v. *Barnum*, 26 Md. 119, 90 Am. Dec. 88; *Leake* v. *Robinson*, 2 Mer. 363, 388; *Dorr* v. *Lovering*, 147 Mass. 530.

3. Another construction sought is that the bequest was in trust during the life of William M. Towle and that only the limitation over to his children for life and to his or their heirs in fee was void for remoteness. This construction can only rest upon the assumption that the beneficiaries mentioned in the trust would take the interest in succession. But the legal estate is not given to them for life but to a trustee. The trust is an entirety for the benefit of a

parent and his children and is prima facie concurrent. It would seem that the equitable interest belonged to William M. Towle and his children as a class and consequently to the survivor. This is also indicated by the words "his or their heirs." Schouler on Wills, §§ 530, 557; Gray on Per. §§ 322, 323.

The equitable remainder could not vest until the death of these beneficiaries. *Spear* v. *Fogg*, 87 Maine, 132; *Hunt* v. *Hall*, 37 Maine, 363.

4. We think that the legal construction of the bequest in question depends upon whether it is a remainder to William M. Towle in fee, or whether the words in the first part of the provision, which imply this, are so inseparably connected with the modifying clause attempting to create a trust as to render the whole provision void for remoteness.

The creation of a trust which cannot vest the object of the trust within the time limited by law will be nugatory. 1 Perry on Trusts, 383; *Blagrave* v. *Hancock*, 16 Sim. 371; *Dodd* v. *Wake*, 8 Sim. 615; *Sears* v. *Russell*, 8 Gray, 86; *Brattle Square Church* v. *Grant*, 3 Gray, 142, 63 Am. Dec. 725; *Pulitzer* v. *Livingston*, 89 Maine, 359; *Brooks* v. *Belfast*, 90 Maine, 318. See *Slade* v. *Patten*, 68 Maine, 380.

The trust fund is not separable and might vest too remotely in the heirs of a child of William M. Towle born after the death of the testator.

If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule of law and the other not, the construction which will not offend the rule is to be adopted by the court. 1 Perry on Trusts, 381; *Martelli* v. *Holloway*, L. R. 5 H. L. 532.

It will be observed that the testator uses the words "and his heirs" technically in reference to other devises in this will, and he is presumed to employ them in their legal sense unless the context clearly indicates the contrary. 3 Jar. on Wills, 707.

It must be held that William M. Towle took a remainder in fee. This is the legitimate effect of the language used in the first section of the provision under consideration, and even the intent of the tes-

tator to restrict it by a trust must yield to the rule against perpetuities. 1 Jar. on Wills, 293, 295, 296; Gray on Per., §§ 233, 235, 240; *Deford* v. *Deford,* 36 Md. 168; *Sears* v. *Putnam,* 102 Mass. 5. The trust is therefore invalid.

We answer the prayer of the complainant, in behalf of all parties interested, that the proportion of the estate in which William M. Towle was interested, and which came at the death of Lucinda L. Towle into the hands of the complainant as executor, vested absolutely in William M. Towle and belongs to his estate.

The expenses of this suit should be paid out of the property involved in this decision.

Decree accordingly.

JAMES A. PULSIFER, Trustee,

vs.

CHARLES E. HUSSEY, and another.

Androscoggin. Opinion April 11, 1903.

Life Insurance. Exemptions. Bankruptcy. Bankrupt Act 1898, §§ 6, 70, cl. 5. R. S., 1883, c. 49, § 94; c. 75, § 10.

At the date of the filing of his petition, March 8, 1901, a bankrupt held a policy of insurance on his life payable to him or his assigns, if he survived twenty years, the date of the policy being March 1, 1893; but if he died before that time, it was payable to his wife if she survived him; if not, to his representatives or assigns. In 1900 his wife was divorced from him and she assigned her interest in the policy to her husband. Shortly after that, he assigned to his daughter all his right to the sum insured "in event of death", if she survived him, but did not assign the endowment if he survived twenty years. His trustee in bankruptcy sought by bill in equity against the bankrupt and the daughter to hold this policy, or its surrender value at the date of bankruptcy, March 8, 1901.

Held; that by the laws of Maine (R. S., c. 49, § 94; c. 75, § 10) this insurance is exempt from the claims of creditors; also by the bankrupt act of 1898,

The bankrupt act of 1898 provides, in section 6, that the "act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws." And section 70 of the bankrupt act provides that the trustee of the bankrupt shall "be vested by operation of law with the title of the bankrupt . . . except in so far as it is to property which is exempt," to various enumerated kinds of property and to "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." *Held;* that this clause must be construed in the light of the terms in the earlier part of the same section which excepts exempted property. Any other construction would annihilate all the exemptions specially provided for in the act.

By another subsequent provision in section 70 of the bankrupt act it is declared: "Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value, payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the policy, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." *Held;* that this proviso, instead of enlarging the rights to property in the trustee, qualifies and limits them. But for it, in states where life policies are not exempted, and no beneficiary is named, the entire interest in the insurance would pass to the trustee. The proviso limits the amount to go to the creditors to the "surrender value" only, reserving to the bankrupt an interest he would not otherwise retain. This construction gives effect to the manifest intent of Congress, harmonizes all sections of the act and escapes an otherwise unavoidable conflict between sections 6 and 70.

Held; that the assignment to the daughter "in the event of death" before the endowment period, is not fraudulent as to creditors. The assignment to the daughter is not of the whole policy, as it might have been, but only of the right to the fund if the assured shall die before the endowment period of twenty years. The right thus assigned has no surrender value,—that remains to the assured for the endowment period,—it had no value as to creditors, for it was absolutely exempt from their claims under the bankrupt act and the State statute. Even as his heir the result to the daughter would be the same, or it could have been accomplished by a will of the father.

The policy contains this clause: "At the end of the fifth and every subsequent fifth year from date of issue the cash value specified in table of cash surrender values indorsed hereon will be paid for this policy, provided it shall be in force under its original conditions, and is legally surrendered thereafter to the home office within thirty days from the close of such period." The date of the policy was March 1, 1893. The first surrender

period was on March 1, 1898, but the policy was not then surrendered, and that right to surrender was lost. The next period will arrive March 1, 1903, but the bankruptcy occurred March 8, 1901. *Held;* that at that date the policy had no surrender value which the company was bound to recognize. The surrender value referred to in section 70 of the bankrupt act refers only to the contract right of surrender, and not to the result of a negotiation, or act of grace.

Section 70 of the bankrupt act does not include policies payable to a wife or kindred of the assured, but only applies to policies payable to the assured or his personal representatives.

Bill in equity heard on report of agreed statement. Dismissed.

Bill by the plaintiff trustee in bankruptcy against Charles E. Hussey, bankrupt, and his daughter, seeking to hold a policy of insurance on the life of the bankrupt, or its surrender value on March 8, 1901. Date of policy, March 1, 1893.

The parties agreed to report the case to the law court upon bill, answer and replication, and the following agreements and statement of facts.

On December 12, 1899, Lizzie L. Hussey, the beneficiary named in the policy and mentioned in the plaintiff's bill, assigned to the defendant, her husband, Charles E. Hussey, or his legal representatives or assigns, all her interest in said policy. A copy of said assignment was filed with the agent of the insurance company and by him forwarded to the home office of the company, the Travelers Insurance Company, where it was received as filed on December 19, 1899. A copy of said assignment was annexed to and made part of the statement of facts.

On July 10, 1900, Lizzie L. Hussey, having obtained a divorce from her husband the said Charles E. Hussey, claiming that she had not assigned her interest December 12, 1899, executed another assignment of all her interest as beneficiary in said policy to the defendant Charles E. Hussey and a copy of the same was forwarded by him to the home office of the insurance company, where it was received and filed August 7, 1900. A copy of said assignment was annexed to and made a part of the statement of facts.

On August 10, 1900, said Charles E. Hussey, without receiving any compensation or valuable consideration therefor, gave to his daughter, Edith G. Gove, a defendant in this case, the writing of that

date by him signed which was forwarded to the same home office of the insurance company, where it was received and filed August 20, 1900.

The last named assignment is as follows: "For One Dollar, in hand paid, and for other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby assign, transfer and set over unto Mrs. Edith G. Gove, daughter, of Biddeford, Maine, (provided said assignee be living at the time of the death of the insured), all the right, title, claim, interest, and benefit of the undersigned in and to the principal sum insured in event of death by the Policy of Insurance issued by the Travelers Insurance Co., of Hartford, Conn., on the life of Charles E. Hussey and numbered 73148. In Testimony Whereof, I have hereunto set my hand and seal at Biddeford Me. this tenth day of August 1900.

Charles E. Hussey. L. S.

In presence of

H. G. Hutchinson — to C. E. H."

On said August 10, A. D. 1900, the said Charles E. Hussey was owing a large part of the debts mentioned in his schedule of liabilities and filed in court with his petition in bankruptcy.

Said plaintiff demanded of said Charles E. Hussey, to wit, on June 6, 1901, said policy of insurance, and said Charles E. Hussey refused to deliver up the same. Said plaintiff thereupon demanded of said Charles E. Hussey the equivalent of the cash surrender value of said insurance policy, and the said Charles E. Hussey refused to pay the same, and has ever since refused and neglected to either deliver said policy of insurance to the plaintiff or to pay him the said cash surrender value.

By the written terms of said policy, its cash surrender value was, on March 1, 1898, $287.50, and will be, on March 1, 1903, $712.50. But while said policy gives the right to the insured to surrender his policy only during the thirty days immediately succeeding each five year period from its date, and only provides in terms as to what the cash surrender value shall be at those periods, it is, nevertheless, the custom of said insurance company to waive the strict and literal construction of the clause in its said policy relating to the cash surrender

value of said policy, and allow said policy to be surrendered and cancelled at any time, and to pay in consideration of such surrender an increased sum therefor with each full year's premium paid thereon. In other words, under said custom, the cash surrender value of said policy changes on the first day of March of each year during its life, and does not increase on account of anything less than a full year's premium.

Under said custom, the cash surrender value of said policy was, on March 1, 1901, $522.50, and on March 1, 1902, $615.

Said policy had no cash surrender value to said Edith G. Gove, the full sum being payable to said Charles E. Hussey at the expiration of twenty years, if he was living. And in order to have a cash surrender value, said Hussey and said Gove (if said writing of August 10, 1900, be valid) must release each of their interests in said policy.

Said insurance policy was thereupon filed in court and became a part of this agreed statement of fact, and together with said writing dated August 10, A. D. 1900, there remains, pending the final decision of the case, subject to the trial and final disposition of the court according to the rights of the parties as they should be determined.

The said Charles E. Hussey has paid the following sums at the time specified, as premiums upon said policy of insurance, since the date of his petition in bankruptcy.

Date due.	Date payment reported by Agent.	Amount.
Mar. 1, 1901	Apr. 23, 1901	$30.85
June 1, 1901	Aug. 28, 1901	30.85
Sept. 1, 1901	Nov. 27, 1901	30.85
Dec. 1, 1901	Jan. 21, 1902	30.85
Mar. 1, 1902	May 29, 1902	30.85
June 1, 1902	July 31, 1902	30.85

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for plaintiff.

The proviso of the bankruptcy act of 1898, sec. 70, (5,) is a specific limitation on sect. 6, which secures to the bankrupt in general terms the benefit of the exemption laws of the State, and the title to such policy vests in the trustee, notwithstanding it is exempt

from execution under the State laws. *In re Lange*, 91 Fed. Rep. 361; *In re Scheld*, 104 Fed. Rep. 870, 52 L. R. A. 188; *In re Slingluff*, 106 Fed. Rep. 154; *In re Boardman*, 103 Fed. Rep. 783; *In re Holden*, 113 Fed. Rep. 141; *In re Willing*, 113 Fed. Rep.189; *In re Holden*, 114 Fed. Rep. 650. The language of the proviso is not limited to a policy of insurance not exempt. It refers to "any insurance policy which has a surrender value, payable to himself (i. e. the bankrupt), his estate or personal representatives." Several of the cases already cited by the plaintiff are of the same court, and of more recent date than *Steele* v. *Buel*, 104 F. R. 968. A general provision in a statute in regard to a particular subject is controlled by a special provision in reference thereto. *State* v. *Cornell*, 54 Neb. 75, 74 N. W. 432; *State* v. *Hobe*, 106 Wis. 411, 82 N. W. 336; *Rodgers* v. *United States*, 36 Ct. Cl. 266; *Kolb* v. *Reformed Episcopal Church*, 18 Pa. Super Ct. 477; *Savings Inst.* v. *Makin*, 23 Maine, 360.

A provision in a statute must be given some effect differing from that which would exist without it, and withdraw from the operation of the statute that which would otherwise have been included in it. *Quackenbush* v. *United States*, 33 Ct. Cl. 355. Counsel also cited: *In re Schenck*, 116 Fed. Rep. 554.

It is immaterial what the State law may be in regard to exemption of insurance policies, if sect. 70, (5,) of the bankruptcy act overrides the State law, as indicated by the above decisions. No person had any interest in the policy except the bankrupt, on Dec. 12, 1899, and it became virtually and in fact a policy payable to his estate, and so within the express provisions of sect. 70, (5,) in which condition it remained until said Hussey was decreed a bankrupt, unless the writing of August 10, 1900, by which the said Hussey undertook to give his daughter, Edith G. Gove, a valuable and substantial interest therein, without consideration, changed its character.

The assignment of August 10, 1900, to the daughter was fraudulent as to existing creditors. The conveyance was to his daughter, was without consideration, and given at a time when Hussey was owing a large part of the debts mentioned in his bankruptcy schedule, amounting in all to $2878.17. *Gardiner Savings Inst.* v. *Emerson*, 91 Maine, 535; *White* v. *Bolster*, 95 Maine, 458.

Even regarding the assignment of August 10, 1900, as valid and effective to accomplish the purpose its language imports, the policy would still be the property of Charles E. Hussey and assets in the hands of his trustee, under the rule laid down in *in re Slingluff*, 106 Fed. Rep. 154. "An endowment policy, payable, with accumulated profits, to the insured at the end of a specified term, but providing that in case of his death during the term, the principal sum shall be paid to a beneficiary named, has two features; primarily it is an investment for the benefit of the holder, and secondarily, a policy of life insurance for the benefit of the beneficiary. There is no joint interest between the two, but so long as the holder lives, the policy is his property, and on his bankruptcy, constitutes assets of his estate for the benefit of his creditors, like any other investment of his capital, and the title vests in his trustee, who may dispose of it in any manner by which it can be made of value to the estate."

The right of exemption has been waived. *Wyman* v. *Gay*, 90 Maine, page 36.

Geo. F. and Leroy Haley, for defendants.

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

STROUT, J. The defendant Hussey was decreed bankrupt on March 8, 1901. March 1, 1893, he obtained a policy of insurance upon his life, which was in force when he became bankrupt and is still in force. His wife, Lizzie L. Hussey, was the beneficiary named in it. By its terms, the amount insured was to be paid to Charles E. Hussey, or his assigns if he survived twenty years—or if he survived his wife, then to his legal representatives or assigns. But if he did not survive twenty years, and his wife survived him, then the amount was payable to her. It also contained provision for surrender at certain times according to the "cash surrender values" indorsed thereon. Lizzie L. Hussey was divorced from her husband, and afterwards, on July 10, 1900, executed an assignment of all her interest in the policy to her former husband, Charles. August 10, 1900, Charles assigned to his daughter, Edith G. Gove, one of the

defendants, provided she be living at the time of his death, all his right to the sum insured "in event of death," but not assigning the endowment to her if he survived twenty years.

Plaintiff, as trustee in bankruptcy of Charles, claims to hold this policy, or its surrender value at the date of bankruptcy. Whether it is to be regarded as assets in the hands of the plaintiff, is the question presented.

By R. S., of Maine, c. 75, § 10, "money received for insurance on his life, deducting the premiums paid therefor within three years with interest, does not constitute a part of his estate for payment of debts . . . . when the intestate leaves a widow or issue," but descends to the widow and issue, or if no widow to the issue. "It may be disposed of by will, even if the estate is insolvent." Charles has a daughter, Mrs. Gove.

By R. S., of Maine, c. 49, § 94, "life and accident policies, and the money due thereon are exempt from attachment, and from all claims of creditors during the life of the insured, when the annual cash premium paid does not exceed one hundred and fifty dollars, etc."

Under these statutes it is beyond question, that if the policy is within them it could not be reached by creditors under the laws of this State.

By the bankrupt act of 1898, c. 541, § 6, it is provided that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherever they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." This provision pervades and qualifies the whole act and is to be read into all its subsequent language. It is equivalent to saying that, whatever general expressions may appear in other parts of the statute, they must all be taken subject to this unqualified expression.

By section 70 of the same act it is provided that the trustee of the bankrupt shall "be vested by operation of law with the title of the bankrupt . . . . except in so far as it is to property which is

exempt," to various enumerated kinds of property, and, fifth, to "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." If this clause five should be given literal effect, it would destroy all exemptions specially provided for in section six of the act. It must be construed in the light of the term in the earlier part of the same section, which excepts exempted property, manifestly referring to the exemption in section six.

This construction harmonizes section 6 and that part of section 70 with the evident legislative intention. There immediately follows in section 70 the language "provided that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the policy, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceeding, otherwise the policy shall pass to the trustee as assets."

The policy in this case had a surrender value to Charles, at each successive five years after its date. The plaintiff claims under the recited proviso.

Arbitrary rules for the construction of statutes afford slender aid in their consideration, and not infrequently mislead. To so construe the different provisions of a statute so as to produce a harmonious whole, in accord with the apparent legislative intent, is the object aimed at, and to be accomplished, if it can be done consistently with its terms, although detached sentences or paragraphs may indicate a different view.

In this statute, in section six, there is expressly exempted from the operation of the act, the exemptions given by the State. Later in section 70, which defines the property passing to the trustee, it is prefaced with the statement, "except in so far as it is to property which is exempt", and then follows, in the same section, all subject to the exemption, the property which he might have conveyed, and the provisions as to life policies. On reading the section, the intention

appears to be clear, that all its terms apply only to property not exempt by the State laws.

Instead of enlarging the rights to property in the trustee, this proviso further qualifies and limits them. But for it, in states where life policies are not exempted, and no beneficiary is named, the entire interest in the insurance would pass to the trustee. But the proviso limits the amount to go to the creditors to the "surrender value," reserving to the bankrupt an interest he would not otherwise retain. The proviso is in the interest of the bankrupt, and not in that of his creditors; for whether payable to his estate at death, or as an endowment to the insured after a definite period of years, only its cash surrender value at the time of bankruptcy is secured to the creditors, and the ultimate fund, if an endowment policy, is retained by the bankrupt, and if an ordinary life policy, to the beneficiary, if any—if not, to the heirs of the insured.

This construction of the statute will give effect to the apparent intention of Congress, and harmonize all sections of the act, and escape an otherwise unavoidable conflict between sections 6 and 70.

We do not find that this question has been passed upon by the Supreme Court of the United States, but there are several decisions of the District and Circuit Courts which are not in harmony. These decisions of learned judges are entitled to great respect, but are not conclusive upon this court.

In *re Lange*, 91 Fed. Rep. 361, where the insurance was by an endowment policy, which by the laws of Iowa was exempt, the District Court held that the surrender value went to the trustee, but in this case we think sufficient weight was not given to the language of the first part of section 70, or the imperative language of section 6. Section 70 in defining the property passing to the trustee, says the title of the bankrupt passes to the trustee, "except so far as it is to property which is exempt", (which exemption is defined in section 6) to all the then following enumerated species of property. The opinion also treats the proviso as to insurance policies, as an independent, positive and controlling enactment, unaffected by the exception which applies to all the after enumerated property. This case, and that of *Steele*, 98 Fed. Rep. 78, were reversed by the Circuit

Court in *Steele* v. *Buel*, 104 Fed. Rep. 968. In *re Boardman*, 103 Fed. Rep. 783, the policy was an endowment one. The case arose on petition of the bankrupt for an order upon the trustee who had possession of the policy to deliver it to him. In denying the petition upon the ground that the trustee had some interest in the policy, the district judge cited with approval *Diack's* case, 100 Fed. Rep. 770. In that case, the policy was an endowment, payable to the assured, if he survived fifteen years, "or should he die before, then to his wife, if living, if not, then to" the insured's personal representatives. For some years Mrs. Diack paid the premiums, and it was held that "as the trustee cannot require Mrs. Diack, either to accept a paid-up policy, or to suffer the policy to lapse and thus obtain immediate payment of the surrender value, the bankrupt should be required, unless Mrs. Diack shall elect to surrender, to execute an assignment to the trustee of his interest in the surrender value of the policy, which "should be made payable out of the proceeds of the policy when it matures, or whenever sooner paid." The case does not discuss the construction of the bankrupt act which is presented to us.

In *re Scheld*, 104 Fed. Rep. 870, 52 L. R. A. 188, in the ninth circuit, it was held that policies payable to the bankrupt or his personal representatives, passed to the trustee under section 70, but that policies payable to wife or children did not pass.

In *re Slingluff*, 106 Fed. Rep. 154, a case in Maryland, in which State a policy like that before the court was not exempt by the State law—it was rightly held that it passed to the trustee.

In *re Holden*, 113 Fed. Rep. 142, the court held to the doctrine of the Scheld case.

In *re Welling*, 113 Fed. Rep. 189, policies of insurance were not exempt by the laws of the State. The case therefore is not an authority upon the question under consideration.

In *Steele* v. *Buel*, 104 Fed. Rep. 968, three Circuit judges sitting, Caldwell, Circuit judge, delivered an able and well considered opinion in which is adopted the same construction of the statute we have given it. We do not see how any other construction can obtain, without doing violence to the language of the act and the evident intention of Congress.

Plaintiff claims that the assignment to Mrs. Gove is invalid, as a fraud against creditors. This contention cannot be sustained. The policy is a combination life and endowment. When issued the amount insured was payable to Hussey, the insured, if he survived twenty years; but if not, then it was payable to his then wife Lizzie. When she assigned her interest to Mr. Hussey, the policy then became payable to him, if he survived the endowment period, otherwise to his personal representatives or assigns. The policy authorized an assignment, and the company's promise to pay was to the parties named, or assigns. The assignment to Mrs. Gove is not of the whole policy, as it might have been, but only of the right to the fund, if the assured shall die before the endowment period of twenty years. If he survives that, he receives the money, and Mrs. Gove gets nothing. The right thus assigned had no surrender value—that remained to the assured for the endowment period,—it had no value as to creditors, for it was absolutely exempt from their claims, under the bankrupt act and the State statute. It was entirely competent for Mr. Hussey to make that assignment, practically a designation of a new beneficiary—his creditors are not harmed and cannot complain—but after the assignment to Mrs. Gove, and filing with the company a copy, as required by it, she became the rightful and legal owner of the insurance, if Mr. Hussey shall not survive the endowment period. If he does, she takes nothing. Even as heir the result would be the same, or it could have been accomplished by will of Mr. Hussey.

The contract of the insurance company was "at the end of the fifth and every subsequent fifth year from date of issue, the cash value specified in table of cash surrender values indorsed hereon will be paid for this policy, provided it shall be in force under its original conditions, and is legally surrendered thereafter to the home office within thirty days from the close of such period." The date of the policy was March 1, 1893. The first surrender period was on March 1, 1898, but the policy was not then surrendered, and that right to surrender was lost. The next period will arrive March 1, 1903, but the bankruptcy occurred March 8, 1901. At that date the policy had no surrender value which the company was bound to

recognize. The parties have agreed that notwithstanding this, it has been the custom of the company to allow a surrender at any time. The surrender value referred to in section 70 of the bankrupt act refers only to the contract right of surrender, and not to the result of a negotiation, or act of grace. If the company has been in the habit of accepting a surrender at other than the contract periods, it is not bound to continue the practice. What it may have done as an act of grace, it is under no obligation to continue. It may at any time fall back upon its contract. Under that the policy had no surrender value at the date of the bankruptcy. *In re Welling*, 113 Fed. Rep. 192.

But if this were not so, the transfer to Mrs. Gove of the insurance, in the event of the death of the assured before the expiration of the endowment period, invested her with the right of an assignee, and entitled her, under the terms of the policy, to receive the amount insured, if the death of the assured occurred before the end of the endowment period. All the cases hold that section 70 does not include policies payable to a wife or kindred of the assured, but only applies to policies payable to the assured or his personal representatives. After the assignment to Mrs. Gove, the policy, in the event of death within the endowment period, was payable to her, the daughter. The bill must be dismissed.

So ordered.

CHARLES R. MILLIKEN *vs.* JOHN HOUGHTON.

Oxford. Opinion April 14, 1903.

Deed. Tax Title. Sale. Return by Town Treasurer. Insolvent Law. R. S., c. 6, §§ 188, 189; c. 70, § 33.

1. In making return of his doings in selling land of a non-resident for non-payment of town taxes, the town treasurer should state facts showing that no bid could be obtained for less than the whole land and that it was necessary to sell the whole land in order to obtain the amount of the tax and costs.

3. A statement in such return that "it became necessary to sell the whole amount of the real estate" without any statement of facts showing such necessity, is a statement of the treasurer's opinion only, and is not sufficient to sustain a title under such sale.

4. An assignment under the insolvent law R. S., c. 70, § 33, does not require a seal.

5. In a real action where no rents or profits are sued for, no allowance can be made for taxes paid by the defendant.

On report. Judgment for plaintiff.

Real action to recover possession of lot 8, range 12, in the town of Byron, Oxford County, known as the Hiram Gilcreasse farm.

The defendant relied on a tax title.

The parties agreed that if the court find the title to be in the plaintiff, the court may also determine whether the defendant had any right to be re-imbursed for taxes paid by him and interest thereon.

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

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

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

EMERY, J. The defendant's claim of title rests solely on a tax sale and deed by the treasurer of the town of Byron for non-payment of a town tax assessed in 1885 to the then non-resident owner. The statutes (1883) R. S., ch. 6, §§ 188 and 189, were then in force. It

was explicitly declared by the court in construing that statute in *Ladd* v. *Dickey*, 84 Maine, 190, at the bottom of page 194, that to show a valid sale "it should appear that he exposed for sale and sought offers for a fractional part of said premises sufficient to pay the tax and legal charges, and that he could obtain no bid therefor. It is not sufficient for him to say that it was necessary to sell the whole amount so assessed and advertised, no person offering to pay the tax and legal charges for a smaller fractional part of said real estate. It must appear that he tried to obtain an offer for the payment of the tax and legal charges for a fractional part of the premises without success."

The treasurer sold the whole tract, but we nowhere find, either in the recitals in the tax deed, or in the treasurer's return of his doings, or any where else, the evidence that the treasurer "sought offers for a fractional part", or "tried to obtain an offer for the payment of the tax and legal charges for a fractional part of the premises without success." The most the treasurer says is that "it became necessary to sell the whole amount of the real estate so assessed and advertised as no person would pay the taxes, interest and legal charges for a less amount of said real estate." This is merely a statement of the treasurer's opinion, viz: that he thought no person would pay the taxes, &c., for a less amount, and that, therefore, he thought it was necessary to sell the whole amount. The fact might have been different. Had he "sought offers for a fractional part" or "tried to obtain an offer" therefor, as the court said in *Ladd* v. *Dickey*, supra, was his duty, he might perhaps have been successful. Had he done so and without success, and so stated in his return, it would then have been apparent to the court that it was necessary to sell the whole tract. As it is, the necessity does not appear and we must therefore hold the sale, being of the whole tract, to be invalid.

The plaintiff shows a prima facie title by a chain of deeds from a former acknowledged owner. The only objection seriously made to his prima facie title is that, where it passed through the insolvency court, neither the seal of the court nor of the judge was affixed to the instrument of assignment by which the judge assigned and conveyed the insolvent's property to the assignees in the case. The statute

(1883) R. S., ch. 70, § 33, then in force did not require any seal. "An instrument under his hand" was all that was required. After considering all the objections suggested, we are satisfied the plaintiff has sufficient title to maintain this action.

By the terms of the report, if the court find the title is in the plaintiff, it is to determine whether the defendant has any right to be re-imbursed for taxes paid and interest on same. This is an action at law, a real action, in which no rents and profits are claimed, and, as the case is now presented, no right of re-imbursement is shown by the defendant. He is, and presumably has been, in possession taking the rents and profits if any. When he is asked to account for these, he may perhaps raise the question of allowance for taxes paid.

Judgment for the plaintiff for title and possession and for one dollar of damage.

CHARLES BRADBURY *vs.* HENRY C. JACKSON, and others.

Kennebec. Opinion April 20, 1903.

Will. Devise and Legacy. Life Estate. Trust Fund. Powers. Residue.

When a testator's intention is clearly expressed in the will, and violates no rule of public policy, it overrides technical rules of construction and must be given effect.

That intention is to be gathered from the whole will, and not from isolated words and phrases. A will is not to be expounded by a word here and another there, but by what, on the whole, was the testator's scheme for the rational disposition of his estate.

The language of the will should be viewed in the light of the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised, with the testator and with the will itself.

By the ninth item of his will a testator divided the residue of his estate consisting largely of stocks and bonds into two equal parts, one-half to the trustees of his granddaughter, and one-half to the trustees of his only surviving son; further directing that the certificates of stock so received

should show for whom they held them, as well as the names of the trustees.

By the tenth item he appointed the trustees of his granddaughter, and after investing them with necessary powers for the preservation of the property and fixing the time when she should come into the full possession and absolute control of her part of the estate, he made her his residuary legatee, including lapsed bequests, and the reversionary or other interests in the property in trust for his son; but subject to the provision that should she marry and die before she was twenty-seven years old, leaving issue, then with the right of disposal of one-fourth, etc., and the residue was to be divided among certain persons, or their issue, named in the will.

The eleventh item, after appointing trustees for his son and giving them half of his property, provides as follows: — "As the property is mostly in stocks paying dividends, and a few bonds that will not soon mature, I direct that the trustees shall keep an annual income account and balance the same annually, and pay the net income thereof (deducting all charges and expenses) to the said Charles during his life. The account will thus be closed at the end of every year, and should be settled in the probate court every third year. I wish that he should be paid in quarterly payments, and if convenient, monthly. He is my son, and I should prefer to give him the property directly free from the trust, were I not satisfied that it is best for him that I should do as I propose. I am led to fear, from the unfortunate disposition of the property he has had control of, that what I leave for him would also be lost, if left for his unrestricted control, and old age might find him in need. Should he lose his present wife and marry again, and have issue by such wife, such issue, if alive, shall have the property left for him, as aforesaid. Should such wife survive him without issue, he has the right to the disposition of one-half of the block of brick stores in Augusta, and can make provision for her. Should he be very unfortunate and there should be any pressing necessity, said trustees, upon so finding and certifying, may advance to him from time to time, not exceeding five thousand dollars in all. Upon the decease of my sons, James W. and Thomas W. S., I gave their half of the block of brick stores on Water Street (that fell to me as their heir) to my surviving sons, Henry, and Charles, placing the latter in trust for him with the right to dispose of it by will. As he has often complained in regard to the disposition of his mother's property, I wish to say here, that after the payment of specific bequests, her property was divided equally between Henry and Charles, and no more of Charles' half was put in trust than she was bound by her promise to her brother, Henry R. Smith, to so place it in order to receive anything from him."

Upon a bill of interpleader filed by the son, the plaintiff, to obtain the construction of the will, he claimed that under item eleven he took at once an absolute equitable fee in the corpus of the estate therein devised in trust, restricted to the enjoyment during his lifetime of the income only subject to the limitation over to his issue, if any, and if no issue then that the

trust would terminate at his death, and both the legal and equitable fee would vest in his heirs, subject to any intermediate disposition of it by him.

Reading the will in this case in the light of the facts, which the testator had in his mind and recited in the will itself, *held;* that the plaintiff takes a life estate in the income only of the trust fund named in the eleventh item of the will, with a right to have paid to him not exceeding $5000.00 of the principal, contingent upon the trustees finding and certifying that there is a pressing necessity for it.

On report. Bill in equity. Sustained. Decree according to opinion.

This was a bill in equity brought by Charles Bradbury, the only surviving son of James W. Bradbury, late of Augusta, for the construction of his father's will, and especially under items ninth, tenth and eleventh. These items are set forth in full in the opinion of the court. The case came before the law court upon report.

The questions raised under these items of the will were:

1. Whether under the provisions of the will the plaintiff takes an absolute estate at law or in equity in one undivided half of the residue, both principal and income, subject only to a trust as to the income during his lifetime; or whether he takes a life estate only in the income; or, if neither, what estate he takes in the principal and income.

2. In the event of the death of the plaintiff without will and without issue by his present wife, to whom should the trustees deliver the principal in final disposition under the terms of the will.

O. D. Baker, for plaintiff.

Counsel argued the following points: (1) The intention of the testator which is to govern must be gathered conclusively from the language used, and not from any supposed intention, which finds no legal expression in the will itself. (2) The general intent of the testator, his general plan of disposition of his estate as a whole, is always of leading importance. (3) The general intent of the testator here, as to the disposition of his estate as a whole, is to divide it equally between his two surviving heirs, his granddaughter Eliza and his son Charles. (4) The particular intent of the testator here, as shown in the disposing clauses to his granddaughter and his son,

respectively, preserves and enforces this same equality of division. (5) The two opening clauses in items tenth and eleventh, being thus the principal and effective disposing clauses of those legacies, must be given their full and exact legal meaning, if they have one, regardless of results to either party. (6) The language used in each of these two disposing clauses admits but one legal interpretation, and to that end the language used is legally apt, exact and exhaustive, and if the will stopped there, would pass instantly on the testator's death through the trustees to the beneficiary, in each case, the full beneficial title both to the corpus and the income of the property bequeathed, the trust being but a dry or passive one. (7) If the disposing clause has first, by apt and unmistakable words, conveyed a fee, legal or equitable, that grant will not be cut down or diminished to something less than a fee by any subsequent words, unless those words also have a meaning as definite and unmistakable as the principal disposing clause. (8) The subsequent clauses of item eleventh, completing the bequests to Charles, contain simply restrictions on the mode of enjoyment of the income, but contain no words which, either expressly or by implication, cut down the equitable fee in the corpus already granted by the principal disposing clause.

The residuary clause in item ten cannot operate to strip from Charles, and transfer to Eliza, the entire property or corpus of the fund left for Charles, because the general nature of the clause forbids it; the clause is strictly a residuary clause, and nothing more.

L. C. Cornish and N. L. Bassett; J. O. Bradbury, for defendants.

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

POWERS, J. This bill is brought to obtain a construction of a part of the will of James W. Bradbury. The testator left an estate of about $217,000.00, all in personal property. By the first eight items of his will he gave about $37,000.00 in various public or private bequests, including a legacy of $8000.00 to his son Charles. The balance of his estate he disposed of by the ninth, tenth, and eleventh items of his will, which are as follows:

"Ninth. The residue of my property that remains after the payment of the bequests, gifts, debts and expenses provided for in the eight preceding sections, is to be divided into two equal parts by my executors, as soon as the last bequest is paid, and by them transferred and delivered to the trustees hereinafter named, one-half to the trustees for Eliza Louisa Bradbury, and one-half for the trustees of Charles Bradbury. They shall see that the certificates of the stock they deliver shall show for whom the trustees are holding the property, as well as the name of the trustees.

"Tenth. I name Henry C. Jackson, my nephew, and Louisa H. Bradbury, as trustees for Louisa H. Bradbury, and give to them to hold in trust for Eliza Louisa Bradbury the half of the property transferred to them by my executors. It is mostly in stocks, with a few bonds, and will give little trouble, so that Mr. Jackson can find time to look after the business. The trustees shall have all necessary powers in regard to the preservation of the property, and the investment of the interest until their ward is to have it. When the said Eliza Louisa shall reach the age of twenty-one, she is from that time to have annually the net income of her property, to be paid to her by her trustees in quarterly payments, unless she shall prefer to leave it with the trustees to invest for her.

"On the arrival of my dear granddaughter to that age, I wish to make her a birthday present, and for that purpose I direct the trustees to transfer to her and deliver the certificate of fifty-two or fifty-three shares of the stock of the Dexter and Newport Railroad, which they will have in trust for her.

"As she will have from her father's estate as much property as she, with her inexperience, can be likely to manage, I deem it for her interest and hereby direct that the trustees continue their trust of the principal, until she shall reach the age of twenty-seven, when they shall transfer to her one-half, and when she reaches the age of thirty-three, the whole of the property, after deducting all proper charges.

"I make her, the said Eliza Louisa, my residuary legatee; including lapsed bequests and the reversionary or other interests in the property in trust for my son Charles. All of her share of the property shall

vest in her when she reaches the age of twenty-seven, although a part shall remain in trust. Should she marry and decease before that age, leaving issue, she shall have the right, after she is twenty-one, to dispose of one-fourth of all her property, and her mother shall have one-fourth. The residue shall be divided into shares, and paid by the trustees to the following persons in the proportions according to the shares, and to the issue of any who may die, viz.: To my son Charles four shares, and for his wife, Eva, one share: To James Otis Bradbury, four shares, and one for his wife, and one for each of his two children; his mother, brother, and sister, and the husband of his sister are each to have a share: To Cotton M. Bradbury, one share for himself, one for his daughter Jennie, and one for his two minor children: To Mrs. Margaret H. Gregorie, Miss Esther H. Gregorie, Mrs. Alice G. Hayward, Mrs. Julia M. Claghorn, Mrs. Margaret H. Carter, Miss May Martin, one share for each.

"Eleventh. I name James Otis Bradbury, Oscar Holway, and Henry C. Jackson of Boston, as Trustees for my son Charles Bradbury, and I give to them, in trust for him, the half of my property, to be transferred to them by my executors.

"As the property is mostly in stocks paying dividends, and a few bonds that will not soon mature, I direct that the trustees shall keep an annual income account and balance the same annually, and pay the net income thereof (deducting all charges and expenses) to the said Charles during his life. The account will (thus?) be closed at the end of every year, and should be settled in the Probate Court every third year.

"I wish that he should be paid in quarterly payments, and if convenient, monthly. He is my son, and I should prefer to give him the property directly free from the trust, were I not satisfied that it is best for him that I should do as I propose. I am led to fear, from the unfortunate disposition of the property he has had control of, that what I leave for him would also be lost, if left for his unrestricted control, and old age might find him in need. Should he lose his present wife and marry again, and have issue by such wife, such issue, if alive, shall have the property left for him, as aforesaid.

"Should such wife survive him without issue, he has the right to the disposition of one-half of the block of brick stores in Augusta, and can make provision for her.

"Should he be very unfortunate and there should be any pressing necessity, said trustees, upon so finding and certifying, may advance to him from time to time, not exceeding five thousand dollars in all.

"Upon the decease of my sons, James W. and Thomas W. S., I gave their half of the block of brick stores on Water Street (that fell to me as their heir) to my surviving sons, Henry and Charles, placing the latter in trust for him with the right to dispose of it by will.

"As he has often complained in regard to the disposition of his mother's property, I wish to say here, that after the payment of specific bequests, her property was divided equally between Henry and Charles, and no more of Charles' half was put in trust than she was bound by her promise to her brother, Henry R. Smith, to so place it in order to receive anything from him."

The plaintiff claims that under item eleven he took at once an absolute equitable fee in the corpus of the estate therein devised in trust, restricted to the enjoyment during his lifetime of the income only, subject to the limitation over to his issue, if any, and if no issue then that the trust would terminate at his death, and both the legal and equitable fee would vest in his heirs, subject to any intermediate disposition of it by him.

Great research and learning have been displayed, and a vast array of authorities cited by counsel in support of the successive steps by which it is sought to establish the above proposition. It would be unprofitable to here undertake to distinguish or analyze the cases cited. Precedents and rules of testamentary instruction may afford valuable aid when the testator's intention is in doubt, but when that intention is clearly expressed in the will, and violates no rule of public policy, it must be given effect. It overrides precedents and technical rules of construction. This "pole star", as it is sometimes termed, of testamentary construction "leads into various courses, since every will must be steered by its own luminary. Yet uniform justice is better than strict consistency." Schouler's Exors. & Admrs. § 474. "It may well be doubted," said Mr. Justice Miller in *Clark* v. *Johns-*

ton, 18 Wall. 493, "if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties, and the property devised, with the testator, and with the instrument itself." No two wills are ever precisely alike. No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another.

Coming now to the instrument before us, we find that the testator had two natural heirs, his granddaughter Eliza and his son Charles. The former had been a member of his household, and he had conveyed to her and her mother his homestead in Augusta. He calls her in the will his "dear granddaughter," and it is evident that the ties of association had strengthened those of natural affection. He had made advances to his son for him to go into business. He had bought of him his one-fourth interest in the homestead. The testator knew that his wife had devised property to Charles, placing it in trust as she was bound to do by her promise to her brother in order to receive anything from him. Charles had often complained of the disposition which was made of his mother's property. The testator had himself conveyed property to Charles, placing it in trust, with a right of disposition by will. He had seen his son make an unfortunate disposition of the property he had had the control of, and he feared that what he should leave him would also be lost if left to his unrestricted control, and that old age might find him in need. He anticipated that, notwithstanding the property Charles had already had from both the testator and his wife, and the $8000.00 bequeathed him by the will, he might in the future be very unfortunate, and there might arise a pressing necessity for his relief. It is evident that he did not have confidence in his son's business capacity, in his ability to successfully manage or long retain any property over which he had the power of alienation; and that, judging the future by the past, he feared an "unfortunate disposition" of such means as Charles might control. That these facts were present in the testator's mind

at the time he made the will cannot be questioned, for they are all recited in the will itself.

The ninth item of the will directs that the residue of the property, after paying bequests, gifts, debts, and expenses, be divided into two equal parts by his executors, and transferred, one-half to the trustees for his grandchild, and one-half for the trustees of his son. In item ten he gives to the trustees for his grandchild the one-half of the property conveyed to them by his executors, and declares the purposes of the trust, and the nature and extent of the beneficial interest of the cestui que trust. He makes her his residuary legatee, including lapsed bequests, "and the reversionary or other interests in the property in trust for my son Charles." In the next item of the will he gives to the trustees in trust for Charles the half of the property to be transferred to them by his executors, and proceeds to declare the purposes of the trust, and to define the nature and extent of the son's beneficial interest. The trustees are directed to pay the net income to Charles during his life, in quarterly payments, and if convenient, monthly. Should he marry again, as he did during the testator's lifetime, and have issue, such issue are to have the property. Should the wife survive him without issue, the testator states that Charles has the right to dispose of one-half of the block of brick stores in Augusta, and can make provision for her. If Charles is unfortunate, and there is pressing necessity for it, the trustees may advance him not exceeding $5000.00 in all.

Such are the terms of the will. Reading it in the light of the facts which the testator had present in his mind at the time he made it, we think it clear that he intended to give to his son a life interest in the income only of the trust fund named in item eleven of his will, with a right in case of misfortune and pressing necessity, upon the trustees so finding and certifying, to receive not exceeding five thousand dollars from the principal. Indubitable evidence is afforded that he believed he had done this and nothing more by the statements, that his granddaughter is his residuary legatee in the reversionary and other interests in the property in trust for his son, and that the son can provide for his wife, in case he marries again, out of the property over which he already had the power of disposition by

will. It is incredible that Mr. Bradbury would have incorporated this last statement into the same clause of a will by which he intended to give Charles the right to dispose by will of $90,000.00 of property. Mr. Bradbury was a lawyer of long experience and large practice. The matter of the son's right to dispose of property by will was present in his mind, brought sharply home to his attention at the time he was writing the very item of the will under which the plaintiff claims, and yet plainly the testator regarded the block of brick stores as the only property from which Charles could make a future testamentary provision for his wife. No thought could have been further from his mind when he penned that statement than that Charles had the entire beneficial interest in and the power of disposal by will of the $90,000.00 which he had just given to trustees, with directions to pay the net income to Charles during his life.

It is strongly urged that certain parts of the will manifest a contrary intention. Stress is laid upon the direction that the executors shall see that the certificates of stock they deliver shall show for whom the trustees are holding the property. This may require a few more words, but it can be done as well under one construction of the will as the other. In the residuary clause the testator speaks of the reversionary or other interests "in the property in trust for my son Charles." In a sense it was in trust for Charles, as he was to have the income from it for life, and possibly $5000.00 of the principal. The context wherein he speaks of reversionary or other interests in this fund passing to the residuary legatee, is strong evidence that when he used the words he did not intend that Charles should have the entire beneficial interest in the property. It is hardly probable, in view of all the provisions and recitals in the will, and in view of the advanced age of the testator when he made it, that when he spoke of reversionary or other interests he had nothing more in his mind than the remote possibility of his surviving his son.

When the testator explains his reasons for making the disposition of his property which he did, it is contended that the statement that he would prefer to give Charles the property directly, free from the trust, is inconsistent with an intention that he should not take the entire beneficial interest; and that the same is true of the further

statement in the same connection, that he fears what he leaves for him would be lost if left for the son's unrestricted control, and old age might find him in need. That might be true if the words stood alone, but these words were used to express the testator's reason, as well as his regret that he felt compelled not to give Charles a larger interest than he did. He feared that whatever the son had the control of would be "lost." The words must be read in connection with the other parts of the will, which plainly show an intention to give but a life interest in the income. It is not probable that the testator would give an unlimited power of disposition over a large estate to one whom experience had taught him was incapable of wise and prudent business management.

Lastly, the use of the word "advance" is said to indicate that the testator understood the corpus of the fund to be vested in his son. The use of the word is undoubtedly consistent with that view, but the intention of the testator is to be gathered from the whole will, and not from isolated words and phrases. The most exact of men do not always express themselves with equal care and precision. This is as true of wills as of other human transactions. The testator's predominant idea was to care for his granddaughter and his son, and that the bulk of the estate which he left should be preserved and applied for this purpose, and not "lost" or made the subject of "unfortunate disposition." Sad experience had taught him that what the son controlled he might well fear would be lost. His intention extended beyond the preservation of the income of the trust fund for the life of his son, and he provided that after Charles' death without issue it should vest in the "dear granddaughter." A will is not to be expounded by a word here and another there, but by what on the whole was the testator's scheme for the rational disposition of his estate.

Such being Mr. Bradbury's intention as expressed in his will, and construing the will in the light of that intention, has he used appropriate language according to the rules of law to carry that intention into effect? The plaintiff invokes the familiar rule of testamentary construction that where an estate in fee simple is devised, or an absolute gift of personal property made, a devise or gift over is void, and the

estate first given cannot afterwards be cut down except by the use of clear and appropriate language. *Wallace* v. *Hawes*, 79 Maine, 177; *Loring* v. *Hayes*, 86 Maine, 351; *Mitchell* v. *Morse*, 77 Maine, 423, 52 Am. Rep. 781. The answer is, that that is not this case. The trust fund is not given to the trustees "in trust for Charles" and nothing more. If it were, he would take both the legal and equitable estate in the corpus of the fund. The purposes of the trust are declared. They are to pay the net income to Charles during his life. If he has issue they are to have the property left for him "as aforesaid," that is, left in trust for the purpose of paying to him the net income. There is no absolute gift of this property. It is given in trust for Charles, to pay the net income to him during life. The words which give to the trustees and all the words which declare the purposes for which the trust is created, are to be read and construed together. A gift of the income of personal property is a gift of a life estate. *Sampson* v. *Randall*, 72 Maine, 109. If there is nothing in a will to show an intention that anything should be paid to a legatee except the income of a fund during life, the fund upon his death falls into the residue. *Wyman* v. *Bartlett*, 167 Mass. 222. Here there is ample evidence that the testator intended to give no more than the income, and that intention must be given effect. In *re Morgan* (1893) L. R. 3 Ch. 222, Lindley, C. J., says, "I should have thought that upon the will the matter was reasonably plain, but we are pressed with authorities. Now, I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases, or decisions in other cases. Of course there are principles of law which are to be applied to all wills, but if you once get at a man's intention, and there is no law to prevent you giving it effect, effect ought to be given to it."

The plaintiff takes a life estate in the income only of the trust fund named in the eleventh item of the will, with a right to have paid to him not exceeding $5000.00 of the principal contingent upon the trustees finding and certifying that there is a pressing necessity for it. The remainder in said trust fund, by the tenth item of the will, vested in Eliza Louisa Bradbury, subject to be divested by sur-

viving issue of the plaintiff, and at his death without issue is to be paid over by the trustees to her, if living, or if deceased to such person or persons as are entitled to her estate.

Costs and reasonable counsel fees are to be allowed out of the estate.

Decree accordingly.

ROBERT F. DUNTON, Trustee,

vs.

FREDERICK O. PARKER, and others.

Washington. Opinion April 27, 1903.

Deed. Description. Sea-Shore. Flats. Fish Weir. Colonial Ordinance, 1641-7. R. S., c. 3, § 63.

In construing the description in a deed of land upon the sea-shore, upon the question as to whether or not the shore is included in the conveyance, certain well established general principles must be applied. By reason of the Colonial Ordinance of 1641-7, the owner of the 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.

It is, of course, true that the owner of upland and shore may separate the ownership by the conveyance of the one and the retention of the other. Where, in the conveyance of land upon the sea-shore, the side boundary line is described as running "to the shore," and the boundary is thence "by the shore," the side line terminates at the inner side of the shore, and shows, in the absence of other calls or circumstances showing a contrary intention, that the inner side of the shore is intended as the boundary. A call in a deed which describes a line as running to a strip of land whether shore or upland, does not carry the line over, across or onto the strip referred to, because the word "to" is a word of exclusion rather than of inclusion.

But it does not by any means follow from the mere fact that the shore of land is made a boundary, or that the boundary is "by the shore" that it is by high water mark. The space between high and low water mark, prop-

erly called the shore, is frequently of many rods in width, it has an outer or seaward side and an inner or upland side, and, nothing else appearing, a boundary by the shore may be as well intended to mean the one as the other. To determine which side of the shore is intended as the boundary it is necessary to look for something further. It follows, that the starting point of a boundary "by the shore" is one of the important elements in throwing light upon the question as to which margin of the shore was intended.

While a boundary which is described as commencing at high water mark on the shore, and thence runs by the shore to another point at high water mark, will, in the absence of other calls or circumstances showing a contrary intention, be construed as excluding the shore, it is equally true that when both the termini of a boundary by the shore are at its outer margin, the shore will be included. This is the necessary and logical result when both the starting and ending points of the boundary by the shore are at the same margin of the shore. The grantor's intention may not be so apparent when one of the termini of the shore boundary is at one margin and the other at the other. But even in such a case when nothing appears in the case showing any motive for a separation of upland and shore, and it does not appear that the shore has any value apart from the upland, and there can be no reason why an owner of both should convey the one and retain the other, if one of the termini of the boundary by the shore is at low water mark, and the other, according to the technical construction of a call in the deed, is at high water mark, the shore will be regarded as included in the conveyance, because of the strong presumption under these circumstances, that such was the intention of the grantor.

In an action under R. S., c. 3, § 63, to recover the penalty therein provided for maintaining a fish weir below or beyond low water mark in front of the shore or flats of the plaintiff, it appears that the plaintiff is the owner of a large tract of land, containing about seventeen hundred acres, known as Petit Manan Point, which extends almost exactly south into the sea. The water upon the east side of the Point is known as Pigeon Hill Bay, and that upon the west side as Dyer's Bay. The Point is nearly separated from the rest of the mainland upon the north by a long narrow inlet, known as the Carrying Place Cove, which extends from Dyer's Bay on the west side of the Point, in a south easterly direction towards, and to within one hundred rods of the eastern shore of the Point.

The plaintiff put into the case a chain of deeds commencing with one in in 1820 and continuing until the conveyances to him as trustee. These deeds admittedly conveyed the upland and brought the title thereto into the plaintiff. The question is whether or not they included and conveyed the shores, and especially the eastern shore in front of which the weir complained of is maintained. The earlier deeds, prior to 1827, unquestionably included the shore. Whether or not the form of description adopted in the various deeds from 1827 up to the time of the conveyance of an undivided portion of the Point by quitclaim deed in 1867 and the convey-

ance of the remainder by a warranty deed in 1874, included the shore, may be doubtful.

But in the warranty deed of 1874, under which the plaintiff claims, the material calls are as follows,—"Beginning at a blue ledge at the southeast corner of the E. A. Hilton lot, so-called," the boundary is then described as extending westerly and northerly by some small lots, "to the Carrying Place Cove, thence following the shore of said Cove northerly and westerly to the waters of Dyer's Bay, thence southerly by the shore to the southern extremity of Petit Manan Point, thence following the shore easterly and northerly to the first mentioned bound."

It will be noticed that in this description the starting point is on the eastern shore of the Point, and the termination of the first boundary line, which extends across the Point to the Carrying Place Cove, is at low water mark, according to the invariable construction of the language of this call. The next boundary, which commences at low water mark and extends by the shore "to the waters of Dyer's Bay," is necessarily by the outer margin of the shore, because both termini are at that margin. From this Point, low water mark at the junction of Dyer's Bay and the Carrying Place Cove, the boundary is described as extending by the shore "to the southern extremity of Petit Manan Point," which means, when considered in connection with the starting point for this last boundary, the southern extremity of the Point at low water mark. So that when the boundary commences to run northerly, "following the shore" from the southern extremity of the Point, it starts at the outer margin of the shore. The form of the description above quoted was followed in substance and effect in all the subsequent deeds until the title to the Point came to the plaintiff.

In accordance with the general principles above stated it is considered by the court that this description discloses an intention on the part of the grantor to include the shore upon the eastern side of this point of land, and that the result is the same whether the southeast corner of the Hilton lot, the point of beginning on the eastern shore, and the terminus of the boundary after it has extended around the whole point, is at high or low water mark. That it is unnecessary to determine the location of the blue ledge referred to in the deed as at the southeast corner of the Hilton lot, because this ledge was evidently selected as a convenient monument for the purpose of indicating the point of beginning at the shore, rather than the identical starting point on the shore with reference to high or low water mark.

It is further considered that this record title to the shore in the plaintiff, which extends back to 1867, and 1874, coupled with evidence showing a possession by the owners of the upland for the entire period entirely consistent with the joint ownership of upland and shore, and showing that no claim to or possession of the shore was ever made or had by previous owners of the upland or by anybody else, is sufficient to authorize the maintenance of this action against these defendants, who do not claim to have any title whatever or right to the possession of the shore. And that consequently it is not necessary to determine the construction of the descriptions in the prior deeds.

Upon the issue of facts presented as to the character of the weir complained of, *held;* that this weir is not one "the materials of which are chiefly removed annually;" and that consequently the statute under which the action is brought is applicable.

The language of this statute, "in front of the shore or flats of another" cannot be taken literally; the statute must contain some limitation other than is expressed therein; the criterion to be applied, in determining whether or not a weir is in front of the shore of a plaintiff, within the meaning of the statute, is whether or not it causes injury of some kind to the plaintiff in the enjoyment of his rights as shore owner; the action cannot be maintained unless it appears that the weir complained of is so near or is so situated, with reference to plaintiff's shore that it in some way injures or injuriously affects him in the enjoyment of his rights as owner.

Held; that it sufficiently appears from the situation, and from the evidence, that the defendants' weir injuriously affects the rights of the plaintiff as the shore owner.

See *Sawyer* v. *Beal*, ante, 356.

On report. Judgment for plaintiff.

Action of debt under R. S., c. 3, § 63, to recover the penalty provided for maintaining a fish weir below or beyond low water mark in front of the plaintiff's shore or flats in Pigeon Hill Bay, in Steuben, Washington County.

The case appears in the opinion.

H. H. Gray and C. B. Donworth, for plaintiff.

E. Foster and O. H. Hersey; J. F. Lynch, G. M. Hanson, F. I. Campbell, for defendants.

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

WISWELL, C. J. This is an action under R. S., c. 3, § 63, to recover the penalty therein provided for maintaining a fish weir below or beyond low water mark in front of the shore or flats of the plaintiff. The case comes to the law court upon report.

The first objection to the maintenance of the action is, that the plaintiff does not own the flats in front of which the weir was erected, that the deeds in his chain of title to the upland, of which the plaintiff is admittedly the owner, does not include the shore, the space between high and low water mark.

The tract of land owned by the plaintiff, and as to the title to the upland of which there is no question, consists of a large point of land, known as Petit Manan Point, containing about seventeen hundred acres according to the earlier deeds, the area in the later deeds being given as somewhat larger, and extends almost exactly south into the sea. The water upon the east side of the point is known as Pigeon Hill Bay and that upon the west side as Dyer's Bay. The point is nearly separated from the rest of the main land upon the north by a long, narrow inlet, known as the Carrying Place Cove, which extends from Dyer's Bay on the west side of the point, in a southeasterly direction towards, and to within about one hundred rods of, according to the plan, the eastern shore of the point.

The plaintiff put into the case a chain of deeds, commencing with one in 1820, and continuing until the conveyances to him as trustee. The question is, whether these deeds conveyed the shores of this point of land, and especially the eastern shore opposite to which the weir complained of is maintained. The descriptions in these various deeds are not the same but they can be classified into groups. The first two deeds offered in evidence unquestionably included the shore. The description is: "Also Petit Manan Point, bounded easterly by Pigeon Hill Bay and westerly by Dyer's Bay." In the next deed the description is different, but it is said therein that the property is, "the same which was conveyed to me by Samuel Freeman and John Taylor, Esq." And as the deeds to this grantor from Freeman and Taylor included the shore, this reference to those deeds is sufficient to show that the shore was intended to be included in that conveyance.

In 1827, the grantee in the last deed conveyed the tract of land, employing this language in the description: "Beginning at the land of Moses McCaleb and running southerly by the shore of Pigeon Hill Bay on the east to Petit Manan Point, its western shore bounded by Dyer's Bay, and northerly by an arm of the sea called the Carrying Place (meaning undoubtedly the Carrying Place Cove) and the land belonging to" various settlers. An examination of the deed of the Moses McCaleb lot, first conveyed as a separate lot to him in 1824, shows that in accordance with the well settled doctrine in this State, the seaward boundary of this lot was at high water mark. As the

starting point in the description of the deed of the main tract is at the McCaleb lot, at high water mark, and extends from this starting point "by the shore," it would follow, if nothing else appeared, that this eastern boundary was along the inner margin of the shore or at high water mark. But the language used by the grantor in describing the other boundaries of this tract, where it is contiguous to tide waters, renders the construction of the description of the eastern boundary more doubtful, and might have a controlling effect in ascertaining the true intention of the grantor. It will be noticed that the western and northern boundaries of the point in the description, are Dyer's Bay and the arm of the sea known as the Carrying Place Cove; this language undoubtedly included the shores upon these sides of the tract. Inasmuch as there is no conceivable reason why the shores on the northerly and westerly sides of the point should have been conveyed, and that upon the easterly side retained, and, as in fact, there is no reason apparent or suggested why either of the shores should have been retained by this, or by any of the subsequent grantors, who adopted the same form of description in their various deeds, the fact that the conveyance included the shores upon these two sides might properly have great weight in tending to show that the language used for the purpose of describing the eastern boundary was not used in its technical sense, but that the grantor intended to convey the shore upon the eastern as well as upon the other two sides of the point. See *Storer* v. *Freeman*, 6 Mass. 435. But we do not think it is necessary to determine the question, whether or not the deeds in this group, in view of all the surrounding circumstances, conveyed the shore, because of the description adopted in the later deeds.

The description above quoted was adopted in substance and effect by the grantors in all of the intervening deeds until Franklin Brown and others acquired title to the tract by a quitclaim deed from one John Brown in 1867, and by a warranty deed of one undivided-half of the tract from James B. Mansfield in 1874. In the warranty deed of 1874 the material calls are as follows: "Beginning at a blue ledge at the southeast corner of the E. A. Hilton lot, so-called," the boundary is then described as extending westerly and northerly

by some small lots, "to the Carrying Place Cove, thence following the shore of said Cove northerly and westerly to the waters of Dyer's Bay, thence southerly by the shore to the southern extremity of Petit Manan Point, thence following the shore easterly and northerly to the first mentioned bound."

In determining the construction of the description in a deed of land upon the seashore, certain well established general principles must be applied. By the Colonial Ordinance of 1641–7, it was provided that in such cases, "the proprietor of the land adjoining shall have propriety to low water mark," etc. By reason of this ordinance the owner of the 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. *Doane* v. *Willcutt*, 5 Gray, 335, quoted with approval in *Snow* v. *Mount Desert Island Real Estate Company*, 84 Maine, 14. It is, of course, true that the owner of upland and shore may separate the ownership by the conveyance of one and the retention of the other, and, as has frequently been decided in the states to which this ordinance is applicable, where the side boundary line of the lot conveyed is "to the shore," and thence "by the shore," the side line terminates at the inner side of the shore, and shows, in the absence of other calls or circumstances showing a contrary intention, that the inner side of the shore is intended as the boundary. That is, a call in a deed which describes a line as running to a strip of land, whether shore or upland, does not carry the line over, across or onto the strip referred to, because the word "to" is a word of exclusion rather than of inclusion. This logical result was adopted in the leading case of *Storer* v. *Freeman*, supra, and has since been universally followed in this State.

But it does not by any means follow from the mere fact that the shore of land adjoining tide waters is made a boundary, or that the boundary is "by the shore," that it is by high water mark. The space between high and low water mark, properly called the shore, is frequently of many rods in width, it has an outer or seaward side and an inner or upland side, and, nothing else appearing, a boundary by the shore may be as well intended to mean the one as the other. To determine which side of the shore is intended as the boundary it

is necessary to look for something further. It follows, that the starting point of a boundary "by the shore" is one of the important elements in throwing light upon the question as to which margin of the shore is intended, because, as we have already seen, low water mark is as much the shore as is high water mark.

In the description in this deed the starting point is on the eastern side of the point at the southeast corner of the Hilton lot, but, it will be noticed, that the next call is not by the shore. The first boundary line, which commences at the Hilton lot, extends across the land to the Carrying Place Cove, and the termination of this first line is not the shore, but the Cove. The language is not "to the shore," but "to the Carrying Place Cove," language which has been invariably held to have the effect of carrying the line across the shore to low water mark. The next boundary, which starts as we have just seen at low water mark in the Cove, is by the shore, necessarily by the outer margin of the shore, because it commences at the outer margin, and it extends "to the waters of Dyer's Bay"; so that here again the termination of the boundary is not the inner but the outer side of the shore, as the expression "to the waters of" a bay, has always been construed as meaning to low water mark. So that the starting point for the next boundary, which extends around the whole point to the place of beginning on the eastern shore, is at low water mark, and the boundary follows the outer margin of the shore to the southern extremity of the point at low water mark. This expression, "southern extremity of Petit Manan Point" is certainly at least as capable of meaning the extremity of the point at low, as at high water mark, and when taken in connection with the starting point shows that the former was intended.

So that when the boundary, according to the description, commences to run northerly, "following the shore" from the southern extremity of the point, it starts at the outer margin of the shore. While a boundary which is described as commencing at high water mark on the shore, and thence runs by the shore to another point at high water mark, will, in the absence of other calls or circumstances showing a contrary intention, be construed as excluding the shore, it is equally true that when both the termini of a boundary by the

shore are at its outer margin, the shore will be included. This is the necessary and logical result when both the starting and ending points of the boundary by the shore are at the same margin of the shore. Of course, the grantor's intention may not be so apparent when one of the termini of the shore boundary is at one margin and the other at the other. But even in such a case when nothing appears in the case showing any motive for a separation of upland and shore, and it does not appear that the shore has any value apart from the upland, and there can be no reason why an owner of both should convey the one and retain the other, if one of the termini of the boundary by the shore is at low water mark, and the other, according to the technical construction of the call in the deed, is at high water mark, the shore will be regarded as included in the conveyance, because of the strong presumption, under these circumstances, that such was the intention of the grantor. *Snow* v. *Mount Desert Island Real Estate Company*, 84 Maine, 14.

In this case, in view of these principles and of the situation, we decide that the description above quoted in the warranty deed of 1874 to Brown and the other grantees, discloses an intention upon the part of the grantor to include the shore upon the eastern side of this point of land; and that the result is the same whether the southeast corner of the Hilton lot, the starting point of the line which extends westerly and northerly to the Carrying Place Cove, and the terminus of the boundary that extends from low water mark in the Carrying Place Cove around the shore by its outer margin, is at high or low water mark. So that it is unnecessary to determine the location of the blue ledge referred to in the deed as at the southeast corner of the Hilton lot. This ledge at the southeast corner of the Hilton lot was evidently selected as a convenient monument for the purpose of indicating the starting point at the shore, rather than the identical starting point on the shore with reference to high or low water mark. *Brackett* v. *Persons Unknown*, 53 Maine, 238.

The lot spoken of in this and the later deeds as the Hilton lot is the same that was earlier referred to as the McCaleb lot, except that while in the first deed of the lot the seaward boundary was so described as to limit it to the inner margin of the shore, in a deed

of this lot in 1848, and in the subsequent deeds thereof, the description carried the shore boundary to low water mark.

The form of the description in the warranty deed of 1874 to Brown and other grantees was followed in effect in all the subsequent deeds until the title to the point came to the plaintiff. While the description in the quit claim deed of 1867 to the same grantees was not precisely similar to that in the warranty deed, it was sufficient, in accordance with the principles which we have referred to, to include the shore upon the eastern side.

So that whether the deeds prior to the time that Brown and others acquired title in 1867 and in 1874, included the shore or not, the plaintiff has introduced a chain of deeds, commencing in 1874 and ending in the conveyances to himself, which include both upland and shore, and evidence from which it appears that the possession of himself and of those under whom he claimed, for the entire period has been entirely consistent with the joint ownership of upland and flats, and that no claim has ever been made by previous owners or by anybody claiming under them to any ownership in the shore. In fact, the evidence is full and uncontradicted that the owners of the upland during this period have had the exclusive and uninterrupted possession of the shore. This tract of land has been principally used for pasturing a large flock of sheep, and has been especially valuable for this purpose because of the great extent of shore which enabled the sheep, averaging about three hundred in number, to there get their food during the winter months.

We think that this record title to the shore since 1874, a period of almost thirty years, with a possession of this character entirely consistent with the ownership of the shore, and without any claim to or possession of the shore by any one else, inconsistent with such ownership, is sufficient to authorize the maintenance of this action against these defendants, who do not claim to have any title whatever or right to the possession of the shore, especially when it is at least doubtful if the earlier deeds, considered in connection with the situation and the other calls therein, showed any intention on the part of the grantors to retain the ownership of the shore. The very nature of the use made of this tract of land, the value of the shores

for this purpose, and their want of value if separated from the upland, would be circumstances of much weight in determining the construction of these earlier deeds, if it were necessary to decide that question.

Another defense relied upon is that the weir complained of is one, "the materials of which are chiefly removed annually", and that consequently, as the weir does not come within the statutory exception to this clause, the statute is not applicable to it. A brief description of the method in which the weir was constructed, and of the portion that is annually removed, will show the fallacy of this contention. The weir consists of a pound and two wings; large posts, seven or eight inches through at the bottom and thirty-five feet or more in length, are driven with the use of a pile-driver, six feet or more into the ground under the sea; these posts are six feet apart around the pound and ten feet apart along the wings; two hundred posts of this character are used. In the space between every two of these large posts, three or four smaller ones are used. They are all joined together by two rows of stay-laths; when the weir is put into condition in the spring, about twelve hundred pieces of birch brush, twenty to twenty-five feet long, are fastened to the stay-laths, extending from high water downward.

In the fall of the year when the weir is being prepared for the winter season, so that it will be as little injured as possible by the floating ice, these pieces of brush and one row of the stay-laths are taken off, and the tops of all the posts, down to about three feet above low water, are removed. Every spring the tops of the posts, the top row of stay-laths and new pieces of brush, the old brush having become generally unsuitable for a second year's use, are put back. The expense of replacing these portions of the weir in the spring, including the costs of the new brush, is trifling. According to the testimony of one of the defendants who is most familiar with this matter, the cost of the new brush is only about twelve dollars, and three or four men can do the work of replacing the top of the posts, the top row of stay-laths and of putting on new brush in about four tides. The case does not show the cost of the building of the substantial portion of the weir which we have above described,

but it is evident that the annual cost of putting the weir into condition for the season's fishing is insignificant compared with the expense of building the permanent and substantial portion of the weir.

Some of the witnesses upon the part of the defense, who testified that the principal part of the materials were annually removed, gave as the reason for their opinion, that the brush was a necessary part of the weir without which it would be useless for the purpose intended. It is undoubtedly an important part in making the weir serviceable for the purpose for which it was intended, but it by no means follows that it is the principal part of the weir. We are satisfied, this issue of fact being submitted for the determination of the court, that the materials of this weir were not chiefly removed annually. The principal part of the weir is the permanent structure consisting of the posts driven close together down into the ground under the sea, which are designed to remain until it becomes necessary, from time to time, to replace them, as the old posts become rotten and decayed.

This court has recently decided that the language of this statute, "in front of the shore or flats of another" cannot be taken literally; that the statute must contain some limitation other than is therein expressed, and that the criterion to be applied in determining whether or not a weir is in front of the shore of a plaintiff, within the meaning of the statute, is whether or not it causes injury of some kind to the plaintiff in the enjoyment of his rights as shore owner; that the action provided by this statute cannot be maintained unless it appears that the weir complained of is so near or is so situated, with reference to a plaintiff's shore, that it in some way injures or injuriously affects him in the enjoyment of his rights as owner. *Sawyer* v. *Beal*, ante, p. 356. In that case the weir was situated a long distance from the plaintiff's shore, upon ledges, which were entirely independent of the shore; there was a channel between the weir and the shore through which vessels of considerable size could pass; the plaintiff had no weir or fishing privilege that was in any way affected by that of the defendant: so that in that case it was decided by the court

that no injury to the plaintiff was shown, and that the action could not be maintained.

The situation in this case is entirely different; when the defendant's weir was first built it was attached to a ledge on the plaintiff's shore, and, although this attachment was later discontinued, during the first part of the season of 1901, and at the time alleged in the writ as the date when the weir was maintained without the owner's consent, one of the wings came to within about thirty feet of the plaintiff's shore at low water; there were other fishing privileges along the eastern shore of this point and one weir, at this time, was maintained by the person in charge of the property, situated a short distance southerly of the defendant's weir. We think it evident in this case that the defendant's weir injuriously affected the rights of the plaintiff as the owner of this shore.

Judgment for plaintiff for $50.00.

INHABITANTS OF CARTHAGE *vs.* INHABITANTS OF CANTON.

SAME *vs.* INHABITANTS OF LEWISTON.

Franklin. Opinion April 27, 1903.

Pauper. Derivative Settlement. Minors. Parent and Child. Emancipation.

It is well settled in this State that a minor child may become emancipated from its parents.

An emancipated child will not take the subsequently acquired pauper settlement of its parent, but will take by derivation that of the parent at the time of the emancipation.

Emancipation must be by consent, express or implied of the parent if living, and is an entire surrender of all right to the care, custody and earnings of the child, as well as a renunciation of parental duties. It occurs by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or, in some way conducting in relation thereto in a manner which is inconsistent with any further performance of them.

For the purpose of determining whether or not a parent has thus voluntarily surrendered all right to the care, custody and earnings of his child, and renounced all future parental duties, it is frequently of the greatest importance to ascertain the subsequent conduct of parent and child, and this may throw great light upon the intention of the parent at the time of the claimed emancipation.

The pauper settlement of one who, as a child, was emancipated from his parents, and has never gained a settlement on his own account, continues in the town where the father's settlement was at the time the emancipation took place.

On report. Judgment for plaintiff against Canton.

Actions of assumpsit for pauper supplies furnished by the plaintiff town to a man and his family who fell into distress in Carthage.

The pauper had never gained a settlement in his own right either in any of the three towns concerned or elsewhere.

The case appears in the opinion.

E. E. Richards, for plaintiff.

J. P. Swasey, for defendant town of Canton.

J. W. Mitchell and A. T. L'Heureux, City Solicitor, for defendant City of Lewiston.

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

WISWELL, C. J. These two cases are submitted together to the law court upon a report of the testimony, which is applicable to both.

Pauper supplies were furnished by the plaintiff town to one George Jones and family between December 9, 1900, and April 13, 1901. During that period the pauper had his settlement either in the town of Canton or in the city of Lewiston, and the question submitted for the determination of the court is, which municipality is liable to the plaintiff town, no question being made as to the necessity for pauper assistance, the amount of the supplies furnished, the reasonableness of the charges or the statute notices and replies.

It is agreed that the pauper never gained a pauper settlement in his own right. At the time of his becoming of age his father's settlement was in the city of Lewiston, but it is claimed by the defendant

in the case against Lewiston, that the pauper was emancipated by his father many years before that time, while the latter's settlement was in the town of Canton, and that the pauper took the settlement of his father at the time of such emancipation. This is the single question presented for our determination.

Bearing upon this question the following facts are material: The parents of the pauper separated in the year 1875, or just before the commencement of that year. They were divorced upon the libel of the wife at the October term, 1876, of the Supreme Judicial Court for Kennebec County, and at the same time a decree was made giving the care and custody of the two minor children, the pauper being one of them, to the wife. In the libel the date of the birth of George was given as Oct. 7, 1868, and this substantially corresponds with the less exact testimony of the father as to the son's age. After the separation of the parents, but before the decree of divorce, the father, then living at Pittston, took his two young boys to Canton where he stayed, and kept them with him, for about two months; during that time he made various efforts to obtain homes for the boys, but at the expiration of that time, being unsuccessful in these efforts, he left the two boys with the selectmen of the town, by whom they were carried to the poor farm, and the father went to Lewiston where he has continued to reside ever since. From the time in 1875, when the father left his two sons in Canton, he exercised no care over them whatever, he did not see them again until they had become, as he expresses it, men grown, he did not communicate with them directly or indirectly in any way, he in no way exhibited any interest in them, nor sense of responsibility as to their welfare, he contributed nothing to their support, made no claim for their earnings and had no knowledge of the manner in which they were cared for, or as to what they were doing, he did not even see the son, George, except upon two casual and brief occasions, until after the latter had become twenty-one years of age and was married.

During this period the father was by no means in a condition of destitution. Shortly after he commenced living in Lewiston in 1875 he obtained employment, and continued to be steadily employed with occasional exceptions when he was unable to work on account

of sickness, up to the present time. During this time he received as wages $1.50 per day, or $10 per week, except that sometimes during the winter he worked in the woods for $16 per month and his board. In addition to this, in about the year 1881, he commenced to receive a pension of $4 per month, which in 1884, after an intermediate increase to $8 per month, was increased to $12 per month. In about 1879, the father remarried and has a son by his second marriage, who is now about 21 years of age.

In this State the doctrine has become settled by a long line of decisions that a minor child may become emancipated from its parent, and that in such case the child will not take the subsequently acquired settlement of its parent, but will take by derivation that of the parent at the time of the emancipation. What is emancipation is a question of law, whether or not there has been an emancipation is one of fact. In this case both questions are submitted to the court.

This question of emancipation must, of course, be determined upon the peculiar facts and circumstances of each case, and nothing more than general rules or tests can be laid down which will be applicable to all cases. But this has been done in several instances by this court. In *Lowell* v. *Newport*, 66 Maine, 78, it was said: "It must be by consent, express or implied, of the parent if living, and is an entire surrender of all right to the care, custody and earnings of the child, as well as a renunciation of parental duties." In *Sanford* v. *Lebanon*, 31 Maine, 124, it was said that the test to be applied is that of "the preservation or destruction of the parental and filial relations." In *Monroe* v. *Jackson*, 55 Maine, 59, it is said that emancipation occurs "by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or, in some way, conducting in relation thereto in a manner which is inconsistent with any further performance of them." It is, of course, true that for the purpose of determining whether or not a parent has thus voluntarily surrendered all right to the care, custody and earnings of his child, and renounced all future parental duties, it is frequently of the greatest importance to ascertain the subsequent conduct of

parent and child, as this may throw great light upon the intention of the parent at the time of the claimed emancipation.

Applying these general rules, thus somewhat differently stated, to the facts of this case, we are satisfied that there was an entire surrender by the father of his right to the care, control and earnings of his children, and a renunciation of his parental duties towards them, at the time that he left them in Canton in 1875. His conduct from that time on has been entirely inconsistent with any other theory. It can not be said that the parental and filial relation exists between a father and a child, when the father has abandoned his child of the age of seven years, and never after that time exhibited any interest in or sense of responsibility as to his welfare, contributed nothing to his support when support was needed, and claimed none of his earnings after he had become more than self-supporting, when he does not in any way communicate with his child, and is entirely ignorant of what the child is doing or of what is being done for him.

It is undoubtedly true that the mere separation of father and child, or the mere failure of the former to contribute to the support of the latter, are not sufficient for the purpose of showing such a voluntary abandonment and renunciation as are necessary to constitute an emancipation. These conditions may be accounted for by reason of the misfortune, or destitution of the father, without disclosing any intention upon his part to permanently terminate the parental and filial relation. But in this case, as we have seen, the father was not in a condition of poverty; during all of this time he was receiving fair wages, with practically steady employment. In addition to this he received a pension, which, for a number of years before the son became of age, amounted to $12 per month. He could have supported these two children if he had desired to, and the fact that he never contributed anything towards their support after his abandonment of them in 1875, and since then has evinced no interest whatever in their welfare, is satisfactory evidence to us that he did not support them for the reason that he did not want to, and that he understood he had no further concern as to them. As said by this court in *Liberty* v. *Palermo*, 79 Maine, 473: ‘ The separation of the

child from the father was not occasioned through poverty, nor in other respects did the parental and filial relation continue."

We have not considered the effect of the decree giving the divorced wife the custody of these children, because we are satisfied that there was an emancipation prior to that time, and also because it appears from the case that the mother in fact did not have any care, custody or control of the children.

As this emancipation took place when, as it is agreed, the settlement of the pauper's father was in Canton, and as the pauper never gained any other settlement than that derived from the father at the time of the emancipation, the town of Canton must be held liable for the supplies furnished. The entries will be,

In the case of Inhabitants of Carthage v. *Inhabitants of Canton, judgment for plaintiffs for $187.15 and interest since the date of the writ.*

In the case of Inhabitants of Carthage v. *Lewiston, judgment for defendant.*

SETH STERLING, In Equity,

vs.

ELLA A. LITTLEFIELD, and another.

CUMBERLAND. Opinion April 27, 1903.

Equity. Nuisance. Action at Law. Way.

It has always been the general rule in this State, that while, in a proper case, equity will interfere to prevent a threatened and prospective nuisance, it will not take jurisdiction to compel the removal of an alleged nuisance, which is already existing, and restrain its continuance, until the alleged infringement of the complainant's rights, and the existence of the nuisance resulting therefrom, have first been established in an action at law.

To this rule there are various exceptions which have been recognized by the court. The aid of the equity court and its intervention by injunction may be invoked in the case of an existing nuisance, notwithstanding that the right has not first been determined, when the necessity is imperious, or where immediate and irreparable injury is threatened unless relief be given in equity, or where, on account of the necessity of a multiplicity of suits at law, or even for some other sufficient reason, the remedy at law would be inadequate.

In this case, in which relief in equity is sought to remove an alleged nuisance which is already existing, and to prevent its continuance, there is no allegation in the bill that the complainant's rights have been determined in an action at law. There is no allegation from which it can be inferred that there is any imperious necessity for invoking the aid of equity to remove by injunction the already existing nuisance, if nuisance it is. The allegations do not bring the case within any of the exceptions to the general rule above stated. The right of the plaintiff is not clear. It is evident from an inspection of the bill that his right must largely depend upon oral testimony.

Held; that the ruling of the court below in sustaining the defendants' demurrer to the bill was correct.

Davis v. *Auld*, 96 Maine, 559, distinguished.

Appeal in equity. Appeal dismissed.

Bill in equity brought by the plaintiff, Seth Sterling, in which he alleged that he is the owner of certain premises on Peaks Island,

to which premises is appurtenant a right of way over land now owned by the defendant Littlefield, across which way the defendant Rounds, as tenant of Littlefield, has erected a building which wholly obstructs this way and completely cuts off the plaintiff from access to the sea shore on Peaks Island. The bill alleged further that the plaintiff, and those through whom he acquired title, have used the way continuously for all purposes connected with the sea shore since the year 1828, when the way was granted. The plaintiff therefore prayed that the defendant Rounds be ordered to remove all obstructions to the use of this way erected by him, or his agents or employees, and that both defendants be enjoined from interfering with the use of this way by the plaintiff. The defendants demurred, alleging as causes that the plaintiff has a plain, adequate and complete remedy at law, and also that it does not appear from the plaintiff's bill that his title or right relative to this way has ever been previously determined in an action at law, or that there is any impediment to such an action being brought, or that there ever was or now is any authentic record of such title.

The presiding justice, in the first instance, sustained the demurrer and dismissed the bill. The plaintiff appealed to this court.

Wm. H. Gulliver; B. D. and H. M. Verrill and C. D. Booth, for plaintiff.

A court of equity has jurisdiction in cases of nuisance, R. S., c. 77, § 6, cl. V, and the obstructing of a private way by a building, or otherwise, is declared by statute to be a nuisance. R. S., c. 17, § 5. *Davis* v. *Auld,* 96 Maine, 559. Since there is no logical ground for distinguishing between different kinds of nuisances, this decision in *Davis* v. *Auld* can be construed to mean nothing else than that the court will take original jurisdiction of all cases involving the abatement of a nuisance. *Miller* v. *Washburn,* 117 Mass. 371; *Nash* v. *New England Life Ins. Co.,* 127 Mass 91; *Gerrish* v. *Shattuck,* 132 Mass. 235; *Middlesex Co.* v. *Lowell,* 149 Mass. 509; *Payson* v. *Burnham,* 141 Mass. 547.

It is a well established rule that a court of equity will grant relief by injunction where the plaintiff's right has been long enjoyed without interruption and has only recently been injured. *Porter* v.

Whitman, 17 Maine, 292; *Moor* v. *Veazie*, 31 Maine, 360; *Morse* v. *Machias Water Power & Mill Co.*, 42 Maine, 119; *Jordan* v. *Woodward*, 38 Maine, 425; *Varney* v. *Pope*, 60 Maine, 192; *Rockland* v. *Water Co.*, 86 Maine, 55, 58.

The plaintiff has not an adequate and complete remedy at law, for the injury complained of constitutes a permanent obstruction of the plaintiff's rights, for which an action for damages is not an adequate remedy. *Proprietors of Maine Wharf* v. *Proprietors of Custom House Wharf*, 85 Maine, 175; *Cadigan* v. *Brown*, 120 Mass. 493; *Lockwood Co.* v. *Lawrence*, 77 Maine, 297; *Smith* v. *Smith*, 148 Mass. 1, 5; *Carpenter* v. *Capital Electric Co.*, 178 Ill. 29.

The injury complained of is irreparable. *Moor* v. *Veazie*, supra. An action at law would lead to a multiplicity of suits, to avoid which equity will take jurisdiction. *Haskell* v. *Thurston*, 80 Maine, 129, 133; *Boston & Maine R. R.* v. *Sullivan*, 177 Mass. 230; *Rockland* v. *Rockland Water Co.*, 86 Maine, 55.

No causes of demurrer other than the two stated in defendants' demurrer are properly before the court. Story's Eq. Pleadings, § 464; 5 Am & Eng. Enc. Law, 553.

There is no cause for demurrer on the ground that the bill does not sufficiently or with certainty allege the plaintiff's right. *Atkins* v. *Bordman*, 2 Met. 457, 463; *Bangs* v. *Parker*, 71 Maine, 458.

If, however, the use under the grant is held not to have been comprehended in the grant, then it must have been an adverse user, which, continued for the length of time alleged in the bill, gives the plaintiff a right.

Clarence W. Peabody and Frederick V. Chase, for defendants.

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

WISWELL, C. J. This court, from the time of its earliest decision upon the subject until the present time, has always adhered to the general rule, that, while, in a proper case, equity will interfere to prevent a threatened and prospective nuisance, it will not take jurisdiction to compel the removal of an alleged nuisance which is already

existing, and restrain its continuance, by injunction, until the alleged infringement of the complainant's rights and the existence of the nuisance resulting therefrom, have first been established in an action at law. To this rule there are undoubtedly various exceptions which have been recognized by the court. The aid of the equity court and its intervention by injunction may be invoked in the case of an existing nuisance, notwithstanding that the right has not been first determined, when the necessity is imperious, or where immediate and irreparable injury is threatened unless relief be given in equity, or where, on account of the necessity of a multiplicity of suits at law, or even for some other sufficient reason, the remedy at law would be inadequate. It is only necessary to refer to some of the decisions of this court in which this rule has been stated. *Porter* v. *Witham*, 17 Maine, 292; *Varney* v. *Pope*, 60 Maine, 192; *Rockland* v. *Rockland Water Company*, 86 Maine, 55; *Tracy* v. *LeBlanc*, 89 Maine, 304.

In the decision of the case of *Davis* v. *Auld*, 96 Maine, 559, it was not intended to depart from this general rule to the slightest extent. Upon the contrary, it is there referred to as the "recognized limitation of equity procedure in nuisance cases." But the court in that case, in construing the statute of 1891, under which the proceeding was commenced, decided that this statute would be superfluous, as the court already had the power to abate the nuisance after verdict, or to stay or prevent the nuisance pending the prosecution, unless the legislature by the passage of the act of 1891 intended to increase the power of the court, or at least to facilitate the exercise of such power as it already possessed in nuisance cases, and that this was the evident intention of the legislature. The question presented in that case depended upon the construction and effect to be given to a particular statute.

In this case the complainant alleges that he is entitled to a right of way from land owned by him to the shore. The easement being thus described in the first deed in which it was created, in 1828: "Together with the privilege of using the wharf on said Trott's land, paying a due proportion of the expense for keeping said wharf in repair, and also a convenient land passage way for an ox team from said wharf through said Trott's land to land first mentioned."

That one of the respondents as lessee or under some license from the present owner of the servient estate had, before the commencement of the bill, wrongfully obstructed this right of way by erecting a wooden building on the servient estate, "which wholly obstructs the plaintiff's said right of way across said lot to the seashore."

There is no allegation in the bill that the complainant's rights have been determined in an action at law. There is no allegation from which it can be inferred that there is any imperious necessity for invoking the aid of equity to remove by injunction the already existing nuisance, if nuisance it is. The allegations do not bring the case within any of the exceptions to the general rule above stated. The right of the plaintiff is not clear. It is evident from an inspection of the bill that his right must largely depend upon oral testimony. The ruling of the court below in sustaining the defendants' demurrer to the bill was correct.

Appeal dismissed with additional costs.

STATE OF MAINE *vs.* JOSEPH P. BASS.

York. Opinion April 27, 1903.

Intox. Liquors. Advertising Sales. Place of Publishing. Municipal Court. Jurisdiction. Stat. 1885, c. 366.

Complaint was made to the Sanford Municipal Court, York County, against the respondent for publishing a newspaper in which were notices "of the sale or keeping for sale of intoxicating liquors," which is made an offense by chap. 366, Public Laws of 1885. This Municipal Court, as provided by the act establishing it, and by the general provisions of law, has jurisdiction only of offenses committed within the limits of York County, with the exception of certain offenses not necessary to be considered.

The publication of the notices complained of was in the Bangor Daily Commercial, of which the respondent was and is the sole owner and publisher. This newspaper is entirely composed, edited and printed in Bangor in the County of Penobscot, where all of the offices, printing and publishing rooms of the newspaper are situated and where all the work of composing, editing, printing and publishing the paper is done. The newspaper is first issued from its publishing rooms in that city, entered as second-class mail matter at the Bangor Post Office, and mailed from there to its subscribers in other cities and towns. The complainant was a regular subscriber to this newspaper, living in Sanford in the County of York, where as such subscriber he received by mail the copy of the newspaper which contained the notices of the sale or keeping for sale of intoxicating liquors.

Held; that the language of the statute must be given its natural and ordinary signification in the connection with which it is used. That the common and universal meaning of the word "publish", as well as the technical meaning of the word, when used with reference to a book, magazine or newspaper, is to issue, to send forth to the public for sale or general distribution; that the newspaper in which these notices were given was published in Bangor, in the County of Penobscot, and was not also published in York County because of the fact that a copy was sent to a subscriber in that county.

It follows that the offense charged was not committed within the limits of York County, and that the Municipal Court before which the proceedings were instituted had no jurisdiction.

Law on agreed statement. Complaint and warrant dismissed.

This was a complaint under Stat. 1885, c. 366, § 8, and originated before the Sanford Municipal Court, York County. The statute is as follows:—

Sect. 8. "Whoever advertises or gives notice of the sale or keeping for sale of intoxicating liquors, or knowingly publishes any newspaper in which such notices are given, shall be fined for such offense the sum of twenty dollars and costs, to be recovered by complaint. One-half of said fine to complainant and other one-half to the town in which said notice is published."

On being arraigned, the respondent seasonably filed before said court, two motions to dismiss the proceedings,—the first to the jurisdiction of the court, and the second because no offense was alleged in the complaint, on which the warrant in said case was issued.

Both these motions were denied by the court and the respondent then entered a plea of not guilty.

The state then introduced its evidence, but the respondent offered none. Thereupon the court adjudged the respondent guilty, and imposed a fine of twenty dollars and costs, from which judgment an appeal was taken to this court, sitting at nisi prius.

It was agreed that the respondent was, on the 14th day of January, A. D. 1902, and from that time up to and including the 26th day of April, A. D. 1902, the sole owner of a plant, consisting of printing presses, boiler, engine, linotype machines, cases, type material and printing appliances, etc., etc., located on Main Street in Bangor, Penobscot County, State of Maine, and all in a building there situate, owned by the respondent; that said plant was from said 14th day of January A. D. 1902, to and including said 26th day of April A. D. 1902, used by the respondent in printing and getting out the Bangor Daily Commercial and Weekly Commercial; that all of the offices of each of said papers were, on and including the aforedays, in said building; that the composition of the matter, the setting of the type, the preparations of the forms for press work, and the press work itself, is all done exclusively in said building, with the material and appliances owned and kept there by the respondent; that said Bangor Daily Commercial is first issued from its office in said Bangor, entered at the Post Office there as second-class mail matter and sent

out thence to the different towns and cities, to its subscribers of which the complainant in this case was one; that the paper mentioned in said complaint was in the usual course of business, printed in said office, entered at the Post Office, in said Bangor, as second-class mail matter, and that in due course of mail was sent to and received by said complainant, at said Sanford, in said York County, as a regular subscriber to said paper, in the same manner as with all out of town subscribers.

By agreement of the parties the case was reported to the law court, for that court to decide:

First—Whether the alleged offense set out in the complaint and warrant, under the foregoing facts and circumstances, was within the jurisdiction of the Sanford Municipal Court:

Second—Whether the complaint and warrant, in the aforesaid case, was sufficient, and whether the offense referred to in the statute, is sufficiently set out therein.

If the court should decide both questions in favor of the State, judgment shall be final, and the judgment of the lower court to be affirmed with costs. Otherwise judgment shall be for the respondent.

W. S. Mathews, County Attorney, for State.

If one personally out of the county puts in motion a force which takes effect in the county, he is answerable where the evil is done, though his presence was elsewhere. Bishop's Criminal Law, Vol. 1, § 110. A person who sends away a libel, or a threatening letter, or one enclosing a forged instrument to defraud the person addressed, or embodying a false pretense in response to which the goods are parted with where it is received, or soliciting to a crime, may be indicted in the county to which it is transmitted, though he does not go there himself. Bish. Criminal Procedure, Vol. 1, §§ 53–4. *Com.* v. *Blanding*, 3 Pick. 304. American Criminal Law, Wharton, p. 280, § 278.

A newspaper may be published in a county, and yet not printed there. A newspaper may be printed in a county and yet not published there. *Bragdon* v. *Hatch*, 77 Maine, 433; *Blake* v. *Dennett*, 49 Maine, 104. To constitute the offense the newspaper must be put in circulation. This was done by the respondent in the County

of York, and the case does not show a publication within the meaning of said statute in any other county in this State.

F. H. Appleton and H. R. Chaplin; Edwin Stone, for defendant.

In construing the statute upon which this complaint is founded the court will not deny to the words "knowingly publishes any newspaper" their common and ordinary signification, and say that circulation and publication are the same thing, and that a newspaper is published wherever it circulates.

If the government's contention is sound, then the Bangor Daily Commercial is published in Lewiston, the Lewiston Journal in Portland, and the Portland Press in Bangor, and each are severally published in as many towns as there are copies in circulation. From which it would follow that the publisher of a newspaper like the Bangor Weekly Commercial with a circulation of 25 or 30,000 copies would, if he published the proscribed notice, be amenable to a fine of from five to six hundred thousand dollars, in gross violation of that wholesome provision of our constitution that "all penalties and punishments shall be proportioned to the offense," "excessive fines shall not be imposed."

The same would be true of the person who advertises the keeping for sale of intoxicating liquors in a newspaper — under this construction of the statute he would commit as many offenses or commit the same offense as many times as there were copies of the newspaper issued, and put into circulation — and that would be true for every day such advertisement was published in the newspaper.

If this is not true, if the advertiser is only liable for a single act of advertising, when he delivers to the publisher of a newspaper to be printed therein the proscribed notice, then if the government's construction is sound this statute discriminates between persons who commit the same offense — between one who publishes a newspaper containing the illegal notice and one who advertises or causes the illegal notice to be published therein.

It seems unnecessary to cite authorities to prove that this statute so construed would be unconstitutional, not only because the penalties and punishments included or that may be included would be disproportionate to the offense committed, but also it discriminates between

persons who commit the same offense but who stand equal before the law.

The statute under which these proceedings are had, being a penal statute, must be construed strictly and not broadly or hypothetically. There is no analogy whatever between this statute and the law relative to the publication of a libel.

The Legislature, by various statutes, recognizes that a newspaper is not migratory, but has a permanent place of abode, and is published in a single fixed place. Stat. 1885, c. 366. R. S., c. 6, § 193. R. S., c. 52, § 9. The place of publication is where the paper is first issued—i. e., given to the public for circulation, and not the place where the paper may be sent for distribution. 16 Am. & Eng. Enc. of Law 1st. ed. 491, citing *Le Roy* v. *Jamison*, 3 Sawy. (U. S.) 369; *Haskell* v. *Bartlett*, 34 Cal. 281; *State* v. *Hoboken*, 44 N. J. L. 131; *Palmer* v. *McCormack*, 30 Fed. Rep. 82; *Hart* v. *Smith*, 44 Wis. 213; *Ricketts* v. *Hyde Park*, 85 Ill. 110; *Rose* v. *Fall River Five Cents Savings Bank*, 165 Mass. 273; *Belfast Savings Bank* v. *Lancey*, 93 Maine, 428; *Hollis* v. *Hollis*, 84 Maine, 96; *Telegram Newspaper Company* v. *Commonwealth*, 172 Mass. 295.

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

WISWELL, C. J. A complaint was made to the Sanford Municipal Court against the respondent for publishing a newspaper in which were notices "of the sale or keeping for sale of intoxicating liquors," which is made an offense by chapter 366 Public Laws of 1885. Upon this complaint a warrant was issued. The respondent upon being arraigned, with other defenses, filed a motion to dismiss the complaint and warrant because of the want of jurisdiction of the court. This, as well as the other objections to the proceedings, was overruled and the case brought to the Supreme Judicial Court upon appeal. There the case was reported to the law court upon an agreed statement of facts.

It is only necessary to consider the jurisdictional question seasonably raised by the respondent. The following facts appear from

the agreed statement relative to this question. The publication of the notices complained of was in the Bangor Daily Commercial, of which the respondent is, and at the time alleged in the complaint was, the sole owner and publisher. This newspaper is entirely composed, edited and printed in Bangor in the County of Penobscot, where all of the offices, printing and publishing rooms of the newspaper are situated, and where all the work of composing, editing, printing and publishing the paper is done. The newspaper is first issued from its publishing rooms in that city, entered as second-class mail matter at the Bangor Post Office, and mailed from there to its subscribers in other cities and towns. The complainant was a regular subscriber to this newspaper, and lived in Sanford in the County of York; as such he there received by mail a copy of the newspaper which contained the advertisement of the sale or keeping for sale of intoxicating liquors, the advertisers being a firm located in the City of Philadelphia.

The Sanford Municipal Court, as provided by the act establishing it, and by the general provisions of law, has jurisdiction only of offenses committed within the limits of York County, with the exception of certain offenses not necessary to be here considered; so that the question to be decided is, whether or not this offense was committed within that county.

The statutes makes it an offense for any one to "knowingly publish any newspaper in which said notices are given," that is, "notices of the sale or keeping for sale of intoxicating liquors." The respondent did publish a newspaper in which such notices were given. Did he publish it in York County, under the facts above stated, because of the fact that a copy of the newspaper was mailed to and received by a subscriber living in that county? Certainly not. The paper was published in Bangor in Penobscot County. The language of the statute must be given its natural and ordinary signification in the connection with which it is used, because the meaning of the word "publish", depends upon the subject with which it is connected. The publication of a slander or libel, or of a will, means something quite different from the publication of a newspaper. When used with reference to a book, magazine or newspaper, the common and univer-

sal, as well as the technical meaning of the word, is to issue, to send forth to the public for sale or general distribution. It follows that the place of the publication of a newspaper is where it is first issued to be delivered or sent by mail or otherwise to its subscribers. It is not necessarily where the newspaper is printed, as it may be printed in one place and yet published in another, as this court has several times decided with reference to the publication of notices of the foreclosure of a mortgage. *Bragdon* v. *Hatch*, 77 Maine, 433; *Hollis* v. *Hollis*, 84 Maine, 96.

It is urged that the word in this connection should be given the same signification as when applied to a libel, in which case there is a publication, both by common law and by statute in this state, "by delivering, selling, reading or otherwise communicating a libel directly or indirectly to any person." But this is a technical meaning of the word peculiar to its connection, and was not the sense in which it was used in the statute under consideration. See *Rose* v. *Fall River Five Cent Savings Bank*, 165 Mass. 273.

It follows that the offense charged in this case was not committed within the limits of York County, and that the Municipal Court before which the proceedings were instituted had no jurisdiction.

Complaint and warrant dismissed.

GEORGE H. FLETCHER, and others, In Equity,

vs.

FRED TUTTLE, and another.

Somerset. Opinion April 27, 1903.

Attachment. Fraudulent Conveyance. Creditors' Remedies. Equity. Bankruptcy. R. S., c. 61, § 1; c. 76, § 14; c. 81, §§ 56, 67.

Where the title to real estate was once in a debtor but has been conveyed by him for the purpose of defrauding his creditors, an attachment may be made by a creditor and the property subsequently seized upon execution precisely as if no such conveyance had been made or attempted, a conveyance under these circumstances being regarded as void as to a creditor who was intended to be defrauded. After title has been acquired by the levying creditor, he may maintain an action at law to recover possession of the premises, or he may resort to equity to have the apparent cloud upon his title removed.

But where the debtor has never had the legal estate, but has paid the purchase money and caused the land to be conveyed by a third person to his wife, or to somebody else, he has never had any title that can be seized or taken on execution. In such a case the creditor must resort to equity in order to take property standing in the name of the wife, which, under the statute, may be taken as the property of the husband to pay his debts contracted before such purchase.

The only object of an attachment of property upon mesne process is to obtain a lien upon the property attached which will continue until final judgment is obtained, and which may then be enforced by a seizure upon the execution. Real estate which cannot be seized upon execution cannot be attached upon mesne process in an action at common law.

The complainants commenced a common law action against Tuttle and attempted to make an attachment thereon of certain real estate, the legal title to which was never in the defendant, but which, it is alleged, was bought and paid for by him, and which he caused to be conveyed to his wife for the purpose of defrauding the complainants who were existing creditors at the time, he being at that time insolvent. While that action was pending, but more than four months after the attempted attachment, the defendant in that action filed his petition in bankruptcy, was subsequently adjudged a bankrupt and still later received his discharge. Thereupon, the plaintiffs discontinued as to the defendant, the cause of action

being one that was provable in bankruptcy, but took judgment against the property claimed to have been attached. Execution was issued upon this judgment upon which the plaintiffs caused the property claimed to be attached to be seized and sold by the sheriff at public auction. The property was bought in by the judgment creditors, the complainants in this bill, who then commenced this bill in equity in which they seek to have perfected the title thus attempted to be acquired by the seizure and sale on execution.

Held; That the attempted attachment was ineffectual; and that as the judgment recovered by the complainants was only against the property claimed to have been attached, and as there was no property attached, the complainants are not entitled to the relief sought for.

Bill in equity heard on bill and demurrer. Demurrer sustained. Exceptions by plaintiffs.

This was a bill in equity praying for the conveyance of certain real estate alleged to have been conveyed in fraud of the plaintiffs.

It was agreed that Fred Tuttle, one of the defendants, filed his petition in bankruptcy Dec. 19, 1899, was declared bankrupt Dec. 30, 1899, and was granted a discharge March 19, 1900; that plaintiffs discontinued as to him and took judgment against the property attached as set forth in the bill. The bill is to be considered as though those facts duly appeared on the docket and were properly set out in the bill. This bill came on for hearing on bill and demurrer and it was ordered, adjudged and decreed that the demurrer be sustained and the bill dismissed.

Geo. W. Gower, for plaintiffs.

A. K. and E. C. Butler, for defendants.

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

WISWELL, C. J. This case comes to the law court upon the complainants' exception to the ruling of the sitting justice sustaining a demurrer to the complainants' bill in equity.

The complainants base their claim for relief upon these facts, either alleged in the bill, or which, it is agreed may be considered as if alleged. On March 6, 1893, certain real estate, paid for out of the property of the respondent, Fred Tuttle, was conveyed to his wife, Ella M. Tuttle, the other respondent; subsequently the husband

made extensive improvements upon this real estate, which were also paid for out of his property. It is alleged that this conveyance to the wife was made for the purpose of defrauding the creditors of the husband, who was at the time insolvent; prior to the time of the conveyance the complainants were creditors of Fred Tuttle, by virtue of a note given by him to them on Nov. 16, 1889, which indebtedness has never been paid; on August 31, 1897, they commenced suit upon this note against Fred Tuttle and caused his real estate, and especially all his right, title and interest in and to the real estate conveyed to his wife to be attached; while that action was pending, on Dec. 9, 1899, the defendant in that action filed his petition in bankruptcy, was subsequently adjudged a bankrupt, and still later received his discharge; the plaintiffs thereupon discontinued as to the defendant, the cause of action being one that was provable in bankruptcy, but took judgment against the property claimed to have been attached; execution was issued upon this judgment, upon which the plaintiffs caused the property claimed to be attached to be seized and sold by the sheriff at public auction, all of the statutory provisions in relation to such seizure and sale having been observed; the property was bought in by the judgment creditors, the complainants in this bill, they being the highest bidders therefor. This bill in equity was then commenced by them in which they seek to have perfected the title thus attempted to be acquired by the seizure and sale on execution, to have the conveyance to the wife adjudged fraudulent, and to obtain a decree ordering the respondents, the defendant in the original action and his wife, to convey the premises to the complainants.

In the case of *Stickney and Babcock Coal Company* v. *Goodwin*, 95 Maine, 246, this court decided, following previous decisions of the court upon the same question under a former bankruptcy act, that an attachment of real estate made more than four months prior to the time of filing the petition in bankruptcy, by or against the defendant, is not dissolved by the filing of such petition and the subsequent proceedings in bankruptcy; and that where there is a valid and existing attachment, which has not been dissolved by the bankruptcy proceedings, the plaintiff may have judgment against the property attached, although the cause of action is provable in bank-

ruptcy and a personal judgment against the debtor is thereby prevented. In this case the petition in bankruptcy was not filed until more than two years after the attempted attachment, so that if there was a valid attachment it was not thereby dissolved and the judgment against the property attached was properly rendered. If, upon the other hand, there was no attachment, then this judgment is of no consequence and the basis of this proceeding in equity fails.

This raises the question as to whether or not an attachment can be made of real estate, in a common law action, the legal title to which was never in the defendant but which was paid for out of the property of the husband and conveyed by a third party to the wife for the purpose of hindering, delaying and defrauding the husband's creditors, the suit being commenced by a creditor whose debt existed prior to and at the time of such conveyance.

It is well settled by numerous decisions that where the title to real estate was once in the debtor but has been conveyed by him for the purpose of defrauding his creditors, an attachment may be made and the property subsequently seized upon execution, precisely as if no such conveyance had been made or attempted, a conveyance under these circumstances being regarded as void as to a creditor who was intended to be defrauded. After title has been acquired by the levying creditor, he may maintain an action at law to recover possession of the premises, or he may resort to equity to have the apparent cloud upon his title removed. The right to make a levy upon premises thus fraudulently conveyed being expressly given by statute. R. S., c. 76, § 14.

It is equally well settled in this State, notwithstanding the provision of R. S., c. 61, § 1, whereby, "when payment was made for property conveyed to her (the wife) from the property of her husband, or it was conveyed by him to her without a valuable consideration, it may be taken as the property of her husband, to pay his debts contracted before such purchase," that property, the title to which is acquired by the wife by a conveyance from a third person, under these circumstances, can not be taken by levy of execution so as to transfer the legal title to the levying creditor. That is, in cases where the debtor has never had the legal estate, but has paid

the purchase money, and caused the land to be conveyed by a third person to his wife, he has never had any title that can be seized on execution. In such a case the creditor must resort to equity in order to take the property standing in the name of the wife, which, under the statute above cited, may be taken as the property of the husband to pay his debts contracted before such purchase. *Corey* v. *Greene*, 51 Maine, 114; *Low* v. *Marco*, 53 Maine, 45, and numerous other cases.

Under these circumstances can a prior existing creditor acquire a lien by attachment of the property which will not be affected by bankruptcy proceedings commenced more than four months after such an attachment was made? Or, in other words, can real estate be attached upon mesne process which can not be seized upon the execution issued on the judgment recovered in the action upon which the attachment was made? The determination of this question necessarily depends upon the statutory provisions in this State.

By R. S., c. 81, § 56, "All real estate liable to be taken in execution as provided in chap. 76; the right to cut and carry away grass and timber from land sold by this State or Massachusetts, the soil of which is not sold; and all other rights and interests in real estate, may be attached on mesne process, and held to satisfy the judgment recovered by the plaintiff; but the officers need not enter on or view the estate to make such attachments." This language, "and all other rights and interests in real estate," is very broad and comprehensive, but an examination of the original acts of the Legislature which have been condensed into this clause, shows specifically what rights and interests in real estate were thereby made attachable. In 1829, the Legislature passed an act making the estate, right, title or interest which any person has by virtue of a bond or contract in writing, to a conveyance of real estate, upon condition to be performed, attachable on mesne process. In 1833, an act was passed to the effect that the right which any debtor may have of redeeming from the purchaser any equity of redemption, which may have been sold on execution against such debtor, and also the right which any debtor may have of redeeming from a judgment creditor after levy on execution, were made attachable upon mesne process. These pro-

visions were preserved more nearly in their original form in the Revision of 1857, but in the Revision of 1871, they were condensed into the language above quoted.

It is a familiar principle that no change of legislative purpose is to be inferred from a mere condensation of prior statutes in a subsequent revision. So that the language of the clause as it now exists in the Revised Statutes, when traced to the original enactments for the purpose of ascertaining its meaning, does not give authority for such an attachment as is here relied upon. And it has been frequently decided that certain interests in land can not be attached, for instance the interest in real estate of a mortgagee. See *Smith* v. *People's Bank*, 24 Maine, 185, and a number of later cases. Again, it would hardly be claimed that the right of a widow to have dower assigned to her out of the real estate of her deceased husband, under the law prior to the amendment of 1895, could be attached, although such a right was certainly a valuable interest in real estate. That this right could not be attached was decided in the case of *McMahon* v. *Gray*, 150 Mass. 289, 15 Am. St. Rep. 202, 5 L. R. A. 748.

But, we think that a consideration of the purpose of attachment upon mesne process will determine the question. The only object of an attachment is to obtain a lien upon the property attached which will continue until final judgment is obtained, and which may then be enforced by a seizure upon the execution. When a lien is thus acquired by virtue of a valid attachment, the subsequent seizure of the property upon execution, within the time allowed by statute, will relate back to the date of the attachment and take precedence of intervening attachments or conveyances, and this is all that is accomplished by an attachment. It follows that an attachment is valueless unless the lien thus acquired can be subsequently enforced by a seizure of the property upon the execution. As we have seen, the only purpose of the attachment is to acquire a lien that may be subsequently enforced by extending the execution upon the property attached. In fact, the language of the statute is, that the property described, "may be attached upon mesne process, and held to satisfy the judgment recovered by the plaintiff." This necessarily means, we think, that the property attached may be held to satisfy the judg-

ment by enforcing the execution issued thereon. Attachment on mesne process and levy upon execution are so inseparably connected, that the former is a useless ceremony unless it can be made effective by the latter.

In regard to all interests in real estate which have been made attachable by legislative enactment, such as the right to redeem real estate under mortgage, levy, sale on execution, or for taxes, or a right to a conveyance under contract, express provision is made by statute as to the manner of proceeding in the seizure and levy or sale upon execution, while in the case of property conveyed by a third person to the wife, and paid for by the husband, no such provision is made, and the court has decided in numerous cases, as we have seen, that a seizure upon execution in such a case can not be made.

We are aware of no statute which gives the right to attach upon mesne process any property which can not be seized upon the execution subsequently obtained, and of no case in which it has been held that such a right exists. Upon the contrary, in *Smith* v. *People's Bank*, 24 Maine, 185, the right to seize upon execution is made the test as to whether or not there is a right to attach. It is there said: "If the interest of a mortgagee can not be taken in satisfaction of an execution, it can not be the subject of attachment upon mesne process."

There is another reason why, we think, it is apparent that an attachment can not be made in such a case. By R. S., c. 81, § 67, "an attachment of real or personal estate continues for thirty days and no longer, after judgment in the original suit," except in cases not applicable here. In order to enforce a lien acquired by attachment, a seizure upon the execution must be made within that period of time. What can be done to enforce a lien acquired by attachment, if no seizure can be made upon the execution? How long after judgment in the original suit would such an attachment continue in force, and how would it eventually be dissolved? These suggested difficulties show such an inherent inconsistency in an attachment of an interest in real estate which can not be taken upon execution to satisfy the judgment, that we are forced to the conclusion that an attachment can not be made under these circumstances.

As the judgment recovered by these complainants was only against the property claimed to have been attached, and as there was no property attached, the complainants are not entitled to the relief they seek in their bill.

Exceptions overruled. Demurrer sustained.

B. ELLSWORTH SPEAR, In Equity,

vs.

WILLIAM SPEAR, and another.

Knox. Opinion April 27, 1903.

Fraudulent Conveyance,—Voluntary. Cloud on Title. Execution. Levy. Intent. Knowledge. Estoppel. Burden of Proof. Equity.

The question as to whether a voluntary conveyance is void as to existing creditors, depends on all the surrounding circumstances and the resulting ability or inability of creditors to collect the indebtedness due them.

A conveyance from a father to his son, when the former is largely in debt and in consideration of an agreement for the grantor's support, is voluntary and prima facie fraudulent and void as to then existing creditors.

A voluntary conveyance, established to be fraudulent and void as to existing creditors, is a cloud upon the title acquired by virtue of the levy of an execution issued on a judgment founded on such a debt.

On a creditor's bill brought against the grantee named in such a deed to compel him to convey the land and thus remove the cloud, it is not necessary to allege or to prove knowledge on the part of the grantee of the fraudulent intent of the grantor.

The burden of proving the facts necessary to constitute a claimed estoppel is upon the party who sets up the defense.

Bill in equity by an execution creditor to compel the grantee, in a conveyance claimed to be fraudulent, to execute a deed of certain real estate in Warren, Knox County, and thus remove a cloud from the title obtained by plaintiff by levy of an execution issued on a judgment founded on a debt existing at the time of making the deed.

The case is stated in the opinion.

J. H. H. Hewett and D. N. Mortland, for plaintiff.

L. M. Staples, for defendants.

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

WISWELL, C. J. On July 6, 1900, while William Spear, one of the respondents, was indebted to the complainant to the extent of about twenty-six hundred dollars, he conveyed to his son, Melbourne A. Spear, the other respondent, his homestead farm, in consideration of an agreement given by Melbourne to him for his support, secured by a mortgage upon the property.

The complainant subsequently commenced suit against William Spear, and at the December term, 1901, of this court for Knox County, recovered judgment for $2623.67 and costs. Execution was issued thereon, upon which the complainant caused the property conveyed, together with two other parcels of real estate, to be seized and levied upon.

In this bill the complainant alleges that this conveyance was fraudulent and void as to him, an existing creditor at the time of such conveyance; but he alleges that the conveyance constitutes a cloud upon his title acquired by seizure and levy, and he asks that the respondent, Melbourne, be required by a decree of this court to execute a sufficient release deed of the premises to the complainant.

The foregoing facts being admitted or proved, the complainant is entitled to the relief prayed for. The conveyance of the father to the son, when the former was largely indebted, and in consideration of an agreement for the grantor's future support, was a voluntary one and was prima facie fraudulent and void as to the then existing creditors. It is true that this presumption is not an absolute one and may be rebutted by proof that at the time of the conveyance the grantor had sufficient available property remaining to pay his indebtedness. The question as to whether a voluntary conveyance is or is not void as to existing creditors depends upon all the surrounding circumstances, and upon the necessary consequences of the convey-

ance upon the ability of creditors to collect their indebtedness. *Gardiner Savings Institution* v. *Emerson*, 91 Maine, 535; *Whitehouse* v. *Bolster*, 95 Maine, 458.

But in this case it does not appear that the grantor, at the time of his conveyance to his son, had any other property, with the exception of the two parcels of real estate that the complainant caused to be seized and levied upon. These two parcels were valued by the appraisers at $750 and $500 respectively, while the property conveyed was appraised at $1500, and the three lots were not quite sufficient to satisfy the execution and the cost of the levy. This conveyance was therefore void as to the complainant; the latter has acquired title thereto by his levy, and is entitled to the relief sought for to remove the cloud from his title. *Wyman* v. *Fox*, 59 Maine, 100.

But it is set up in defense that the complainant, also a son of William Spear, knew of the contemplated conveyance from father to son to secure the former's future support and advised that it be made, so that he is now estopped from claiming that it was void as to him. It would be unprofitable in this opinion to analyze the testimony upon this question. The burden of proving this proposition, relied upon by the defense, is upon the defense, and it is sufficient to say that the evidence fails to satisfy us that the complainant had any knowledge that this transfer was contemplated or that he in any way consented to it.

Where the conveyance claimed to be void as to existing creditors is a voluntary one, as was this, it is not necessary to either allege or prove knowledge upon the part of the grantee of the grantor's fraudulent intent, although it is otherwise where the alleged fraudulent conveyance is made for a valuable and adequate consideration. *Egery* v. *Johnson*, 70 Maine, 258.

Bill sustained. Decree as prayed for.

GERTRUDE G. MERRILL *vs.* ALBERT P. BASSETT.

York. Opinion April 30, 1903.

Removal of Pauper. Physical Condition. Due Care,—Test. Negligence. Jury. New Trial.

The care to be used in removing a person in distress from one town to another under the pauper law, is that care and prudence which a reasonably careful and prudent man would exercise under the circumstances of a like situation.

The test by which to determine whether due care and prudence have been exercised by one charged with the duty of removal of a person in distress from one town to another in ascertaining the ability of the pauper to bear the strain of the journey, is the means employed and effort made to find out, rather than the actual physical condition itself.

A day affording proper weather conditions should be selected; the pauper should be furnished with suitable garments to protect her, considering as well her physical condition as also the state of the weather; and suitable conveyance in a careful and prudent manner should be provided.

A person charged with the performance of a duty toward another in order to be guilty of negligence must have either done or neglected to do something which an ordinarily prudent and careful man acting in the same relation and under like circumstances would not have done or omitted to do, even though damage may have resulted from his conduct.

When, from an examination of a case by the law court on a general motion for a new trial, it is clear that the jury erred by confusing the defendant's legal duty toward the plaintiff to exercise due care to ascertain her physical fitness to make a journey with his duty toward her if based upon absolute knowledge of her condition, the verdict will be set aside.

Motion by defendant for new trial. Sustained.

Case for alleged negligence and want of care and prudence in moving the plaintiff from Mechanic Falls, where she fell into distress, to Norway. The defendant was employed to remove plaintiff by the overseers of the poor of Norway.

The plea was the general issue and brief statement as follows:—

"That whatever acts he did, he did in a careful and proper manner, and in the removal of the plaintiff, as a pauper of the town of Nor-

way, from Mechanic Falls to the said town of Norway, and that in so doing he acted as the servant of the overseers of the said town of Norway, and under their direction at the time, and that said overseers had been notified by the overseers of the said town of Mechanic Falls, that the plaintiff had fallen into distress and in need of relief in said town of Mechanic Falls, and that she be removed to the town of Norway, where she had her pauper settlement, and this was done in the performance of a duty imposed by law upon the said overseers of said town of Norway, the defendant acting as their servant in such removal, which was done in a reasonably careful and proper manner."

The plaintiff had a verdict for $2250. Besides the general motion, defendant also moved for a new trial on the ground of newly-discovered evidence.

The facts appear in the opinion.

Edgar M. Briggs; Geo. F. and Leroy Haley, for plaintiff.

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

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

SPEAR, J. The plaintiff in her writ sets out that on the thirteenth day of January, 1900, she had a pauper settlement in the town of Norway; that she had fallen into distress in the village of Mechanic Falls, in the County of Androscoggin, and had applied to the overseers of the poor of said town for aid and assistance; that she had for a long time prior to said day been confined to her bed, in said town, with rheumatic fever and was then unable in any way to handle herself by her own efforts; that on said day the overseers of the poor of said Norway, by virtue of their said office, employed the defendant to remove the plaintiff from said Mechanic Falls to Norway according to law; "that said defendant was bound in law to remove her as aforesaid in a safe and prudent manner; and to use due care and caution, not to remove her until she was in a suitable condition to be removed." The plaintiff further alleges that the defendant did not, having regard for her physical condition, remove her in a prudent and careful manner, and that he did not exercise

reasonable care and prudence to ascertain whether she was in a condition to be removed.

It was admitted that the plaintiff had a pauper settlement in Norway, had fallen into distress, and was in need of, and received, pauper supplies from Mechanic Falls; that due notice of these facts had been given to Norway, and that the overseers of Norway had a legal right to remove the plaintiff to Norway. Thus we have left for consideration only two propositions, namely, did the defendant exercise due care to ascertain whether she was in suitable physical condition to be moved, and did he move her in a reasonable and prudent manner. We do not deem it profitable or necessary to give an analysis of the testimony in stating our conclusions with respect to the various propositions contained in this case.

Taking the above propositions in their order, the first inquiry is whether Mr. Bassett used due care to ascertain whether the plaintiff was in suitable physical condition to be moved? The plaintiff's own evidence upon this point is conclusive that he did. Her attending physician was carefully inquired of and emphatically assured the overseer of the poor and the defendant that the plaintiff was in condition to be removed to Norway. Whether the plaintiff was or was not, actually in physical condition to bear the strain of the short journey, the defendant discharged his full duty in this respect by the exercise of ordinary care to find out. It was also incumbent upon the defendant to remove the plaintiff in a prudent manner. We think he did. This involved the selection of a day affording proper weather conditions; furnishing her suitable wearing apparel to protect her, considering her condition, from the weather; and a conveyance to and from the train in a careful and prudent manner.

The evidence conclusively shows that all three of these requirements were fully met by the defendant. The day was an average warm one for the time of year. She ordered such clothing as she said she needed to make her comfortable and they were furnished to her. With respect to her conveyance, she makes no complaint of ill treatment of any kind on the part of Mr. Bassett. The plaintiff said that in her removal she suffered some pain, and this may be true, and yet, if the defendant exercised due care in ascertaining her

physical condition, seeing that she was properly clothed, selecting a proper day and moving her in a prudent manner, as we have already found he did, he would not be liable on account of her suffering.

The question before us is not whether, as a matter of fact, the plaintiff was in a fit physical condition to be moved. She may actually have been unfit, but that does not make the defendant liable. Did the defendant do, in moving the plaintiff, under the circumstances in this case, as a reasonably prudent and careful person would under like circumstances have done? Did he, either by himself or through Mr. Sanborn, the overseer, under the rule stated, make proper inquiry into her physical condition? Did he select a suitable day? Did he believe her properly clothed? Did he carefully convey her from place to place? A reasonably prudent and careful person would have done all these things and we think the testimony in this case conclusively shows that the defendant did. This is a case in which it was very easy for the jury to err.

It was difficult for them to distinguish the defendant's legal duty toward the plaintiff, based upon the exercise of ordinary care, from his duty toward her if based upon absolute knowledge of her actual condition. The evidence in the case may have disclosed to the judgment of the jury that the plaintiff was actually too sick and feeble to be moved. Admit it to be true, and yet the defendant was not bound, at his peril, to know it. He was only bound to do, in the premises, what a reasonable and prudent person would have done under the circumstances of the situation. "When a person in the observance or performance of a duty due to another has neither done nor omitted to do anything which an ordinarily careful and prudent person in the same relation and under the same conditions and circumstances would not have done or omitted to do, he has not failed to use ordinary care, and is therefore not guilty of negligence even though damage may have resulted from his action or want of action." Whatever the reason, the jury clearly erred in their verdict.

Motion sustained. Verdict set aside.

ALBERT LITTLEFIELD, and another,

vs.

FRANK A. MORRILL, and lumber.

York. Opinion May 1, 1903.

Lien. Logs. Laborer. Independent Contractor. R. S., c. 51, § 141; c. 91, § 38. Stat. 1889, c. 183.

1. Revised Statutes, ch. 91, § 38, as amended by ch. 183 of Stat. of 1889 giving a statutory lien for labor on logs, was designed for the protection of laborers only and not for independent contractors.
2. The phrase "whoever labors" in the above named statute is equivalent to the word "laborer" and means no more.
3. A "laborer" in the statutory sense is one who performs manual labor for wages under the direction of his employer.
4. One who contracts to do a specific piece of work which he may perform by his own labor or by the labor of others, is not a laborer in the statutory sense, even though he in fact performs the entire work with his own labor. In such case he does not work for wages but to save paying wages.
5. The fact that such contractor's compensation is by the contract made proportional to the extent of the work contracted for, does not make his compensation of the nature of wages, nor make him a laborer.
6. One who contracts to cut and haul all the logs and lumber on a definite tract of land at a fixed price per M. is, as to that work, a contractor and not a laborer, and hence is not entitled to a lien for such labor as he personally performs.

On report. Judgment for defendant lumber owners.

Action for enforcing a lien claim for cutting, hauling and sticking 265,300 feet of logs and lumber by the plaintiffs, by virtue of a contract with one Frank A. Morrill, and by and with the consent of Roscoe K. Morrill, the supposed owner.

The case appears in the opinion.

Fred J. Allen and Geo. F. and Leroy Haley, for plaintiffs.

S. W. Emery, T. H. Simes and G. E. Corey, for defendants.

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

EMERY, J. The evidence shows these facts: One Frank A. Morrill, apparently having bargained for all the log stumpage on a certain tract of land, contracted with these plaintiffs for them to cut and haul at a fixed price of $2.25 per M. all the logs and lumber on that tract. This contract the plaintiffs at first "let out by the thousand" to other parties, who abandoned the work after cutting and hauling about 100 M. The plaintiffs then hired other workmen and with their help and with their own work and teams finished the contract, cutting and hauling in all 265 3-10 M. including the 100 M. above mentioned. During the progress of the work Mr. Morrill paid them $300 on account, all of which they paid over to the men in their employ as their wages for work done on the logs and lumber. All this was done with the knowledge and consent of Morrill.

The plaintiffs now bring this action of assumpsit upon an account annexed for cutting and hauling the 265 3-10 M. at $2.25 per M. giving credit for the $300 paid and claiming a balance of $296.93. For this balance they also claim a statutory lien on the logs and lumber, which latter claim the present owners of the logs and lumber resist, Frank H. Morrill having been defaulted.

The lien is claimed under R. S., (1883) ch. 91, § 38, as amended by ch. 183 of Public Laws of 1889, which is as follows: "Whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, or in shoeing horses or oxen or repairing property while thus employed, has a lien thereon for the amount due for his personal services and the services performed by his team."

The liminal question is whether the evidence brings these plaintiffs within the purview of the statute, and to this question the answer must be in the negative. It is now settled that the statute is designed solely for the protection of laborers performing physical labor with their own hands, and with their teams, under the direction of an employer and for fixed wages, and that the subject matter of that protection is solely the wages earned by such laborers.

Rogers v. *Dexter and Piscataquis Railroad Company*, 85 Maine, 374, 21 L. R. A. 528; *Blanchard* v. *Portland and Rumford Falls Railway*, 87 Maine, 241; *Meands* v. *Parks*, 95 Maine, 527; *Richardson* v. *Hoxie*, 90 Maine, 227.

It is true, these plaintiffs performed some physical labor and also used their own teams to some extent on these logs and lumber, but they did not so do under the direction of an employer and for mere wages. They had not merely hired out their personal labor. They had taken a contract to cut and haul all the logs on the tract, and were independent in their method of doing it, and were carrying out their contract largely through the labor of others employed by them. They were contractors engaged in a business enterprise from which they expected profits which might be more or less according to circumstances. They were not mere laborers working for fixed wages the rate of which would not be varied by circumstances. When they labored themselves it was not for wages, but to increase profits by saving wages. Had the enterprise proved profitable they could, and undoubtedly would, have retained all the profits however much in excess of the customary wages in such work, and would have allowed no rebate to the owners of the logs. Hence, if the enterprise has proved unprofitable they should not, and cannot, repudiate their position as contractors and recover wages as laborers.

In *Rogers* v. *Dexter and Piscataquis Railroad Co.*, 85 Maine, 372, 374, 21 L. R. A. 528, above cited, the plaintiff had contracted to do a certain amount of grubbing for the construction of a railroad bed, at a fixed price per square yard. He employed other men, but also labored personally and physically with them in the manual labor of grubbing. Having thus completed the work and not being paid therefor by the general contractor for the whole road, he sought to recover of the railroad company under R. S., (1883) ch. 51, § 141, making railroad companies liable to "laborers employed, for labor actually performed on the road." It was held he could not recover of the company even for his own labor thus actually performed on the road, since he was not a "laborer" in the statutory sense of the word but was an independent contractor whose personal labor was not for wages but to save paying wages. In *Meands* v. *Parks*, 95 Maine,

527, above cited, the doctrine above quoted from *Rogers* v. *Dexter and Piscataquis Railroad Co.* was affirmed and held applicable to cases of liens claimed on logs and lumber.

The cases *Bondur* v. *LeBourne*, 79 Maine, 21, and *Ouelette* v. *Pluff*, 93 Maine, 168, are cited in argument, but they are easily distinguishable from this case. In those cases the plaintiffs did not engage in a business enterprise out of which they might make a profit or a loss according to circumstances. They simply hired out their own personal labor at a fixed wage, the rate of which was not to be varied by circumstances and they were under the personal direction of their employer. It is true, they were to be paid by the cord instead of by the day or week, &c., and in this respect the cases cited resemble this case at bar, but the rate of wages can be fixed as well by the piece as by time, and they still be wages. That laborers are paid by the piece instead of by time does not change their character as laborers. Their earnings are none the less their wages, and fixed wages which the statute was enacted to protect.

Judgment for the owners, Roscoe H. Morrill and Chas. H. Haines.

NELLIE S. EVANS *vs.* CITY OF PORTLAND.

Cumberland. Opinion May 8, 1903.

Sewer. Municipal Corporation. Land Owners' Rights. R. S., c. 16, §§ 4, 9. Stat. 1857, § 2.

The right of action against a town, for not maintaining and keeping in repair a public drain or sewer, is given by R. S., c. 16, § 9, to those only who have a right to enter the sewer.

Written application to the municipal officers, distinctly describing the land to which it applies, is an essential prerequisite to their power to grant such right.

A permit from the municipal officers to enter such sewer runs with the land; but a party cannot claim under such a permit granted to one who was a stranger to the title at the time it was given.

A permit to enter a sewer upon Fore Street does not authorize the entry of a sewer upon Hancock Street not a part of, nor an extension of, the sewer on Fore Street.

On report. Judgment for defendant.

Action on the case under R. S., c. 16, § 9, to recover damages for failure to maintain and keep in repair a public drain, with which the plaintiff alleged she had the right to connect her premises.

The case appears in the opinion.

D. A. Meaher, for plaintiff.

Counsel cited: *Blood* v. *Bangor*, 66 Maine, 154; *Franklin Wharf Co.* v. *Portland*, 67 Maine, 46, 24 Am. Rep. 1; *Estes* v. *China*, 56 Maine, 407; *State* v. *Portland*, 74 Maine, 268, 43 Am. Rep. 586; *Bates* v. *Westborough*, 151 Mass. 174; *Allen* v. *Boston*, 159 Mass. 324, 38 Am. St. Rep. 423; *Coan* v. *Marlborough*, 164 Mass. 206; *Evansville* v. *Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Burns* v. *Cohoes*, 67 N. Y. 204; *Seifert* v. *Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Carll* v. *Northport*, 11 N. Y. App. Div. 120; *Spangler* v. *San Francisco*, 23 Pac. Rep. 1091; *Child* v. *Boston*, 4 Allen, 41 and 53, 81 Am. Dec. 680; *Emery* v. *Lowell*, 104 Mass. 13; *Taylor* v. *Austin*, 32 Minn. 247; *Chalkley* v. *Richmond*, 88 Va. 402, 29 Am. St. Rep. 730; *Woodward* v. *Worcester*, 121 Mass.

245; *Parker* v. *Macon*, 39 Ga. 725, 99 Am. Dec. 486; *Kiley* v. *Kansas City*, 69 Mo. 102, 33 Am. Rep. 491.

C. A. Strout, City Solicitor, for defendant.

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

POWERS, J. This is an action to recover damages resulting from the failure of the defendant city to maintain and keep in repair a public drain or sewer along Fore Street, with which the plaintiff alleges she had a right to connect the premises owned by her on the northwesterly side of said street.

The right of action is given only to those who have a right to connect with the sewer. R. S., c. 16, § 9. The plaintiff, among other things, must prove that she, or her predecessor in title, made written application to the municipal officers to enter and connect with this sewer, and that the municipal officers gave the applicant a written permit so to do. *Estes* v. *China*, 56 Maine, 407. She relies upon a permit from the City of Portland to James R. Dockray, dated March 17, 1857, "to enter a side drain from a lot of land belonging to him, situate on the northwest side of Fore Street, between the land of F. Lewis on the southwest, and land formerly belonging to Judah Chandler on the northeast, into the drain owned by the city extending along Hancock Street to tide waters." This permit was granted under Public Laws of 1854, c. 77, which, so far as this case is concerned, is the same in substance as R. S., c. 16. By section two of said act, "All applications for permits shall be in writing, and shall distinctly describe the land to which they apply. The privilege granted by such permit shall be available to the owner of the land described, his heirs and assigns, and shall run with the land." See R. S., c. 16, § 4. Application in writing distinctly describing the land is an essential prerequisite of the power of the municipal officers to grant the permit. The object of such a provision is manifest, to preserve a definite description of the land to which the permit applies, and the wisdom of it is well illustrated in the present case. This court in *Estes* v. *China*, above, held that the

plaintiff must prove such written application. The plaintiff has offered no evidence upon that point, and fails to sustain her action.

There are other and perhaps more meritorious objections to her case. The permit is to be available to the owner, his heirs and assigns, and is to run with the land. Plaintiff cannot claim under a permit granted to one who was a stranger to the title at the time it was given. The permit is dated March 17, 1857, and the documentary evidence introduced by the plaintiff shows that from April 25, 1854, to October 21, 1867, the plaintiff's premises were owned by one Lois Dunlap.

If neither of these objections existed, there is no proof that the plaintiff's premises are the same as those described in the permit. The only thing in common between them is that they are both on the northwesterly side of Fore Street. One of the deeds introduced by the plaintiff does show, however, that James R. Dockray prior to March 17, 1857, owned other land adjoining that of the plaintiff, for which it is not improbable he obtained the permit in question.

Finally, the complaint in the writ is of a public sewer or drain along Fore Street, and the permit is "to enter into the drain owned by the city extending along Hancock Street". The plaintiff never entered the drain on Hancock Street, but was connected with the one on Fore Street. After a careful examination of the case we are of the opinion that the weight of evidence is decidedly against her contention that the drain or sewer along Fore Street, of which she complains, is a part of or an extension of the one extending along Hancock Street, and named in Dockray's permit.

On all these several grounds the plaintiff has failed to show any right to enter the sewer along Fore Street, and the entry must be,

Judgment for defendant.

RICHMOND L. MELCHER

vs.

THE INSURANCE COMPANY OF PENNSYLVANIA.

Oxford. Opinion May 18, 1903.

Release. Compromise and Settlement. Requisites. Consideration. Fire Insurance. Transfer.

The compromise of a doubtful claim is a sufficient consideration for a promise to pay money for the settlement of such claim, and it is immaterial upon which side the right ultimately proves to be.

The surrender of a groundless claim, which is known by both parties to be unenforceable, is not a sufficient consideration to uphold a promise to pay money for the settlement of such a claim.

To support such a promise the claim must be made in good faith with a belief by the claimant that there is some chance of its successful enforcement. It is necessary that the parties should at least have supposed, at the time of the compromise, that the validity of the claim made was doubtful, either on account of uncertainty as to what facts might be proved or as to the law applicable thereto.

A policy of insurance which provides that it shall become void if the property insured be conveyed without the assent in writing of the insurer, is equally avoided although the conveyance by the insured is to his wife.

On report. Judgment for defendant.

Assumpsit on an alleged agreement by defendant insurance company to pay $400 as a compromise settlement of plaintiff's claim of $500.

Plaintiff made his claim as mortgagee of the wife of the insured to whom the destroyed premises were conveyed without the consent of the company required by the terms of the policy.

Plaintiff's declaration was as follows:—

"In a plea of the case — For that whereas the said defendant company on the thirteenth day of January, 1897, in consideration of a premium in money, then and there paid to it by one Simon P. Baker of Andover, in said county, made a policy of insurance, number 80,285, upon a certain dwelling-house of the said Baker, situated

on Farmer's Hill in said Andover, at the corner of the Andover and Rumford roads: and the said defendant company by said policy promised the said Baker to insure five hundred (500) dollars thereon from the said thirteenth day of January, 1897, until the thirteenth day of January, 1900, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever: and the plaintiff avers that afterwards, and before the expiration of the time limited in said policy, to wit: on the second day of August, 1899; to wit: on the second day of August A. D. 1899, the said dwelling-house was accidentally and by misfortune totally consumed by fire; and the plaintiff avers that he was then, and still is, interested in said real estate as mortgagee, and that the amount of the debt secured by said mortgage was, and is, the sum of seven hundred (700) dollars and interest, which mortgage is still unpaid or satisfied; and the plaintiff further avers that after the destruction of the said dwelling-house by fire as aforesaid that he duly notified the said defendant company that he held a mortgage of the said real estate and claimed a lien on the said policy of insurance, by virtue of the statutes in such case made and provided, for the full amount of the insurance, to wit: five hundred (500) dollars: whereupon a dispute arose between the said plaintiff and the said defendant company as to the liability of the said company to pay said claim, and also as to the amount that should be so paid; and the said plaintiff was about to sue said company to recover said five hundred (500) dollars; and the said defendant company on, etc., to wit: on the eleventh day of October, 1899, and on divers other days and times, at, etc., to wit: at said Paris, with full knowledge of the premises, and after due investigation of the plaintiff's claim, in order to settle and compromise the same, and to avoid litigation, and in consideration of the said plaintiff's promise to forbear to sue said claim, and to forever relinquish and release to the said defendant company all his right of action by reason of the same, promised the said plaintiff, both orally and in writing, to pay him the sum of four hundred (400) dollars, which offer the said plaintiff agreed to accept in settlement and in compromise of his said claim of five hundred (500) dollars against said

defendant company; and the plaintiff avers, that confiding in the said promise of the said defendant company, he has hitherto foreborne to sue the said defendant company, and never commenced an action against the said defendant company on this behalf; and, although a reasonable time for the payment of the said sum of four hundred (400) dollars, so owing by the said defendant company has long since elapsed: yet the said defendant company, though often requested, has not paid the same, but neglects and refuses so to do, to the damage of said plaintiff, as he says, the sum of eight hundred dollars."

The plea was the general issue with no brief statement.

The facts are stated in the opinion.

Geo. D. Bisbee and R. T. Parker, for plaintiff.

A. M. Goddard, for defendant.

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

WISWELL, C. J. By a policy of insurance dated January 13, 1897, the defendant company insured one Simon P. Baker against loss by fire upon his dwelling-house, for a period of three years from that date, in the sum of five hundred dollars. By the same policy the furniture therein was also insured. At that time Baker was the owner of the property, real and personal, covered by the insurance, but the real estate was subject to a mortgage to one Caldwell. The policy contained a provision to the effect that it should become void if the property insured be conveyed without the assent in writing of the insurer. January 7, 1898, while the policy was in force, Baker conveyed the real estate to his wife, Dorothy A. Baker, but the policy was never assigned, and no notice was given to the insurance company or its agent, of this conveyance. On January 8, 1898, Mrs. Baker mortgaged the premises to Richmond L. Melcher, the plaintiff, and on August 2, 1899, during the period of time covered by the insurance policy, the dwelling-house was entirely destroyed by fire.

At the time of the fire, therefore, Baker had an unexpired policy of insurance, but had entirely parted with his title to the property

insured; Mrs. Baker owned the property, subject to a mortgage, and the plaintiff held a mortgage upon the property given by Mrs. Baker after the conveyance from her husband to her.

It is clear, from the foregoing statement, that the policy of insurance, so far as it covered the dwelling-house, had become void prior to the loss by the conveyance of the property without the knowledge or consent of the insurance company, and without the assignment of the policy. Neither the husband, the wife, nor the mortgagee could maintain an action upon the contract of insurance to recover for the loss of the property insured, because the person with whom the contract of insurance was made had ceased to own the property, while the owner and the mortgagee were not insured. *Richmond* v. *Phoenix Assurance Company*, 88 Maine, 105. And the policy was equally avoided although the conveyance by the insured was to his wife. *Clark* v. *Dwelling-House Insurance Co.*, 81 Maine, 373.

But this action is not brought by the insured, nor by the owner of the equity of redemption, upon the policy, but by Melcher, the mortgagee, to recover upon a promise alleged to have been made by the defendant corporation to pay him the sum of $400 made after the destruction of the buildings by fire, and, to quote from the declaration, "after due investigation of the plaintiff's claim, in order to settle and compromise the same, and to avoid litigation, and in consideration of the said plaintiff's promise to forbear to sue, and to forever relinquish and release to the said defendant company all his right of action by reason of the same." Which offer, it is alleged, was accepted by the plaintiff, who thereafter forebore to commence an action upon the policy.

The case comes to the law court upon report. It appears from the testimony that shortly after the fire the plaintiff wrote a letter to the defendant's agent, notifying him of the loss by fire, and saying: "Now I hold a mortgage on the place and Baker wishes the insurance to be paid to me. I simply write you so that you can act accordingly." The agent replied to this, acknowledging the receipt of the letter, and said: "This loss will not be paid until the mortgagee joins in the receipt for the insurance. I will see that you are protected in it." It is evident that, at the time this letter was

written, the agent had no knowledge of the transfer of the property from the insured to his wife, nor of the mortgage from the latter to the plaintiff. On September 4, 1899, the agent replied to another letter of the plaintiff, in which reply he said: "When I went to settle this loss I found that Mr. Baker had deeded the property to his wife a year ago last January, and she in turn had mortgaged it to you, without transferring the policy from Mr. Baker, or making the policy payable to you in case of loss. Now this left Mr. Baker without any insurance except on his personal property. The conveyance of this property to his wife, of course vitiates the policy without transferring it." He goes on in this letter to say that he had submitted the facts to the company and asked to be allowed to settle the loss, and said that he had no doubt that his request would be granted. On September 25, 1899, the agent again wrote the plaintiff, saying: "I have received word from the company that insured Mr. Baker's building, that, under the circumstances, they would pay what they considered the actual cash value of these buildings at the time of the fire, that is, that the actual cash (value of the) buildings at the time of the fire was $400 and they will pay that on the building. If this is satisfactory to you please advise me and I will come to Andover and close it up. The company denied any liability under the circumstances, but I made the suggestion to them that they should protect your mortgage and they have decided to do it, which I think myself is very liberal." Further correspondence and communication, orally and by telephone, followed between the plaintiff and the agent of the insurance company, from which it appears that the plaintiff sought to have the company pay the remaining one hundred dollars, and that the agent was making efforts to have the company assent to this. Later the matter was put into the hands of counsel by Mr. and Mrs. Baker and by the plaintiff, with full authority to adjust this matter in any way that seemed best to him, and on October 11, 1899, this counsel saw the insurance agent and unconditionally accepted the offer to pay $400. But subsequently the offer was withdrawn.

The question is as to whether or not there was any consideration for this promise. The plaintiff's contention is as shown by his

declaration, that the offer was made and accepted as a compromise of the plaintiff's claim against the company. It is abundantly well settled that the compromise of a doubtful claim is a sufficient and valid consideration for a promise to pay money for the settlement of such claim. It is immaterial upon which side the right ultimately proves to be, provided the parties believe, at the time of the compromise, that there is a doubtful question involved, and, for the purpose of settling the dispute and of preventing litigation, one of the parties to the controversy promises to pay a sum of money in compromise of such doubtful claim, which offer is accepted by the other party.

But in order for such a compromise to constitute a sufficient consideration for the promise, it is necessary that the parties should at least have supposed, at the time of the compromise, that the validity of the claim made was doubtful, either because of a question as to what facts might be susceptible of proof, or of a doubt as to the law applicable thereto. The claim must be one that is made in good faith, with a belief by the claimant that there is some chance of its successful enforcement. The surrender of a mere groundless claim, which is known by both parties to be unenforceable, is not a sufficient consideration. This limitation of the rule is recognized by all the decisions upon the subject, a few of which only we cite. *Allis* v. *Billings*, 2 Cush. 25; *Kidder* v. *Blake*, 45 N. H. 330; *Pitkin* v. *Noyes*, 48 N. H. 294, 97 Am. Dec. 615; *Bellows* v. *Sowles*, 55 Vt. 391, 45 Am. Rep. 621; *Smith* v. *Farra*, 21 Oregon 395, 20 L. R. A. 115.

In this case we do not think that the offer relied upon by the plaintiff was made for the purpose of effecting a compromise, or that there was any doubt whatever as to the claim made by the plaintiff against the insurance company, if he made any claim. The plaintiff could not have supposed that he had any chance of successfully maintaining a suit against the company upon the contract of insurance. It cannot be believed that, under the circumstances of this case, he would have commenced any action against this company, if the offer had not been made. We do not think that he made any claim to recover the insurance, as a matter of legal right. He simply sought

a gratuity from the company because of the fact of the previous insurance. Nor could the insurance company have supposed in making this offer, that it was attempting to settle a doubtful claim. The company and its agent must have known that no claim could be enforced against it, and that there was no danger of its being involved in litigation. The first letter of the agent to the plaintiff, after he had become aware of the fact of the transfer of the property clearly states the fact, about which there was no question, that "the conveyance of this property to his wife, of course, vitiates the policy without transferring it." There is no suggestion in any of the correspondence that this was an offer of a compromise. Upon the contrary, the whole correspondence shows that the agent was endeavoring to get the company to pay, notwithstanding that there was no liability, and the offer made by the company, through its agent, was not to pay a sum of money for the sake of settling a claim about which there was any question or doubt, but to pay the full cash value of the property destroyed, according to its estimate of such value. The case does not come within the limitation to the rule, above stated, that the parties must at least have believed that there was some doubt as to the validity of the claim.

Under these circumstances, we are forced to the conclusion that the promise sued in the plaintiff's writ was not a binding and enforceable one, because it was made without any consideration whatever. According to the stipulation of the report, the entry will be,

Judgment for defendant.

SUSAN R. WHITMAN *vs.* CITY OF LEWISTON.

Androscoggin. Opinion May 18, 1903.

Way. Defect. Want of Due Care. Contributory Negligence.

A statutory action to recover damages caused by a defective highway cannot be maintained if the negligence of the plaintiff, or any other efficient cause for which neither the plaintiff nor the municipality is responsible, contributes to produce the injury.

While the plaintiff was being driven by her husband in an open wagon drawn by one horse along one of the public streets of Lewiston, the wheels upon one side of the carriage struck an obstruction in the traveled way, so that the carriage was overturned, the plaintiff as well as her husband thrown out, and she sustained some bodily injury.

The accident occurred at about nine o'clock in the evening. At the time, the moon, nearly full, was shining very brightly, and there was not a cloud in the sky, so that objects in the street could be seen for a considerable distance. The horse that the plaintiff's husband was driving was wholly blind and had to be entirely guided by the driver.

The court is satisfied from the situation and the undisputed facts, that if the plaintiff's husband had been exercising, just prior to the accident, such a degree of care as was made necessary by the fact that his horse was totally blind, he could not have failed to see and could have easily avoided the obstruction in the street.

Held; that the alleged defective condition of the street was not the sole cause of the accident and the plaintiff was not entitled to a verdict in her favor.

Motion by defendant. Sustained.

Action on the case, under R. S., chap. 18, § 80, to recover for bodily injuries sustained by plaintiff by reason of the overturning of the one-horse open wagon in which plaintiff was traveling with her husband, who was driving. The wheels next to the northerly sidewalk curbing struck a pile of dirt extending into the traveled portion of Main Street in Lewiston. Both occupants of the wagon were thrown out. The accident occurred on a clear moonlight night, four days before the full of the moon, about ten minutes before nine o'clock. The horse was totally blind.

Tascus Atwood, for plaintiff.

The jury evidently recognized that it is one thing to see in the moonlight an object you are looking for and know to be in a certain location, and quite another thing having no knowledge of the existence of the object and have it attract your attention.

Thomas F. O'Connor the man who excavated the dirt at the scene of the accident was careful, as he admits, to light this dirt pile the two nights immediately preceding the accident, and was also so impressed that there was a responsibility incident to that dirt pile that he was careful to notify Mr. Fisher when he secured his connection with the work. The two nights when he lighted it were moonlight nights and this fact doubtless also helped the jury to decide a light was necessary to make the way safe or rather to warn travellers there was an unsafe place in the way. There is no claim it was lighted the night in question.

Counsel cited: *Glidden* v. *Reading,* 38 Vt. 52, 88 Am. Dec. 639; *Brackenridge* v. *Fitchburg,* 145 Mass. 160; *Smith* v. *Wildes,* 143 Mass. 556; *Daniels* v. *Lebanon,* 58 N. H. 284; *Monroe* v. *Hampden,* 95 Maine, 111; *Park* v. *Libby,* 92 Maine, 137; *Cayford* v. *Wilbur,* 86 Maine, 414; *Weeks* v. *Parsonsfield,* 65 Maine, 285.

A. T. L'Heureux, City Solicitor; *Ralph W. Crockett,* for defendant.

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

WISWELL, C. J., While the plaintiff was being driven by her husband in an open wagon drawn by one horse along one of the public streets of Lewiston, the wheels upon one side of the carriage came in contact with, and went onto, an obstruction in the street, so that the carriage was overturned, the plaintiff, as well as her husband, thrown out and she sustained some bodily injury. In the trial of the action to recover damages for the injuries sustained by reason of the alleged defective condition of the street, the plaintiff recovered a verdict. The case comes here upon the defendant's motion for a new trial.

Assuming, without deciding, that the jury may have been authorized in its finding that the condition of the highway was defective in the respect complained of, we come to the equally important question as to whether or not the jury was also authorized in its finding, necessarily involved in the verdict, that the defective condition of the highway was the sole cause of the accident; because it is well settled in this State, that in this statutory action, if the negligence of the plaintiff, or even if any other efficient cause, for which neither the plaintiff nor the municipality is responsible, contributes to produce the injury, the action cannot be maintained.

The defective condition complained of was a quantity of earth taken from an excavation made for the purpose of obtaining connection with the public sewer, and left upon the side of the street. The pile of earth was estimated to be about four feet in height at the highest place and extended for several feet from the curbing into the street. It was to some extent guarded by at least one barrel and perhaps by some boards or planks, but upon the evening of the accident there was no lantern placed at the obstruction.

The accident occurred at about nine o'clock in the evening of the twenty-fourth of September; at the time, the moon, nearly full, was shining very brightly, there was no cloud in the sky to obstruct the moonlight, so that objects in the street could be seen for a considerable distance. All the witnesses upon both sides agree that it was an especially clear and bright night. The street at this point was about fifty-four feet wide with a street car track nearly in the center. The horse that the plaintiff's husband was driving was wholly blind, so that it had to be entirely guided by the driver.

Under these circumstances, we think that it necessarily follows that the negligence of the driver contributed in some degree to the accident. In driving a blind horse, which has to be entirely guided by the driver, a great degree of care is required. In this case, the plaintiff's husband could not have failed to see the pile of earth, with the barrel or barrels about it, if he had exercised such a degree of care as the occasion demanded. The fact that he did not see the obstruction, upon his side of the street, in the very bright moonlight, is almost conclusive evidence that he was not looking, although it was especi-

ally necessary for him to look. In fact the husband testified, when asked if he saw the pile of earth before he struck it: "No sir. I was looking for nothing but teams ahead." This is not reasonable care for the driver of a blind horse; he should also have been on the look out, especially when no reliance in this respect could be placed upon the horse, for such temporary obstructions as are liable to exist at any time through the necessity of making repairs upon the streets and of making excavations for various purposes. If he had exercised the care that was necessary because of the situation, he would certainly have seen, and could have easily avoided, the obstruction. Although this question of negligence is primarily for the jury, we are satisfied that in this case the jury erred in its finding that no cause, other than the alleged defect, contributed to the injury.

Motion granted. Verdict set aside.

FRANK E. BURGESS, Executor, In Equity,

vs.

ALVAH J. SHEPHERD, and others.

Penobscot. Opinion May 27, 1903.

Will. Construction. Executor. Equity. R. S., c. 77, § 6.

A bill in equity to obtain the construction of a will cannot be sustained, unless the construction may affect the rights of the complainant, in person or property, or unless it may affect the performance of his duties under the will, as executor, trustee or otherwise.

Held; that the complainant, who is executor, has no personal interest which may be affected by a construction of the will; nor can the performance of his duties as executor be in any way aided or affected by such a construction.

Baldwin v. *Bean*, 59 Maine, 481, examined.

On report. Bill in equity. Dismissed.

Bill of interpleader by the executor of the will of Joseph M. Heseltine, late of Dexter, deceased.

The case appears in the opinion.

F. D. Dearth; F. J. Martin and H. M. Cook, for plaintiff.

Counsel cited: *Baldwin* v. *Bean,* 59 Maine, 481; *Richardson* v. *Richardson,* 80 Maine, 585; *Baxter* v. *Baxter,* 62 Maine, 540.

The court does not consider it a condition precedent to determining the construction of a will disposing of real estate that the executor should be the owner of, or in any way interested in said real estate. But even if it was a condition precedent that the executor should have some interest in the real estate in order to enable him to maintain such a bill, it can hardly be said that in this case, or in any case, the executor is not interested, or may not be interested in the real estate. The devise is subject to the payment of the debts of the deceased, and until it appears that the debts have all been paid, the executor certainly is in a sense interested in the real estate. If the bill had been brought in the name of the widow and devisee as plaintiffs, and the other persons interested under this clause in the will as defendants, the defendant would have claimed, and rightly so, that the executor should have been made a party to the bill. If he is a necessary party defendant, it cannot be consistently contended that he cannot be a party plaintiff.

D. D. Stewart; E. C. Ryder, for defendants.

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

SAVAGE, J. Bill in equity under R. S., ch. 77, § 6, to obtain the construction of the will of Joseph M. Haseltine, deceased. The bill is brought by the executor of the will, and the widow and other devisees are made parties defendant. The clause in the will which it is sought to have construed is as follows:–

"To my beloved wife, Catherine F. Haseltine, I give, bequeath and devise all the rest and residue of my estate, both real, personal and mixed, and all rights and credits thereunto belonging, to have and to hold to her sole use and benefit during the full term of her

natural life, unless she shall marry again, in which event her rights in said property shall cease and determine the same as if she were dead. But until said death or remarriage she shall have the full power to control and dispose of said property or any part thereof, if needed for her support and benefit.

"To the children of my daughters Mary and Elizabeth before named, I give, bequeath and devise whatever may remain of said property at the decease or remarriage of my said wife, Catherine F. Haseltine, the same to be divided equally among them."

And the prayer of the bill is that the court will determine (1) "whether said Catherine F. Haseltine, the devisee named in said will can sell and convey said real estate in fee simple in her lifetime before remarriage," and (2) "whether the rights and interests of said Catherine F. Haseltine to the property bequeathed and devised in said paragraph of said will above quoted will terminate should she marry again."

We are met in limine by the objection that the court, under the statute named, has no jurisdiction to construe a will on a bill brought by an executor who has no interest as such in the estate, nor any duties to perform with relation to it, which may be affected by a construction of the will, and whose rights and duties will remain the same whatever may be its proper construction. In fine, these defendants, or some of them, say that this executor can have no possible reason for needing to know in his said capacity whether the widow has the right to convey the real estate in fee, or what the effect of her remarriage might be; that his sole duty is to administer under the plain provisions of the will; to convert the personal estate, so far as necessary to pay debts, into cash, and pay the debts and expenses, and turn over the remainder to the widow as life tenant; or if the personal estate is insufficient, to cause the real estate, or enough of it, to be sold to pay the debts; that his right to administer the personal estate, and to have enough of the real estate sold under license of Probate Court to pay the debts, is absolute, and does not in any way depend upon the construction of the will; that he has no other interest in or under the will; and that when he has performed his duties as his position requires, regardless of the construction of the will, his

office will be functus officio. These defendants claim that as to this executor, the questions raised are moot questions, and his interest merely a speculative curiosity, and they earnestly ask that the widow and other devisees or heirs may be left to settle their own controversies, as they will, in their own way.

If the defendants' premises are sound, we think that their position is impregnable. The statute is silent as to who may bring such a bill. But it is a bill in equity, and on general principles, such a bill cannot be maintained by one who has no interest in the subject matter of the controversy. So it would follow that a bill for the construction of a will cannot be maintained unless the plaintiff has such interest, personal or official, legal or equitable, in the estate, or under the will, as would be served by a construction of the will. If an executor has no such interest, why should he be permitted to maintain a bill and interfere with the interests of others? He has no more rights in that respect than a neighbor would have. He is an intermeddler. Non constat, that those who are interested in the will have any controversy about it, or care to have it construed.

But the complainant says that *Baldwin* v. *Bean*, 59 Maine, 481, was on all fours with the case at bar, and that inferentially at least the right of an executor or an administrator with the will annexed to maintain such a bill without allegation or proof of interest was recognized by that case. It will be noticed, however, that in *Baldwin* v. *Bean* no question was raised as to the interest of the complainant, and that the sole question decided, besides construing the will, was, that in enacting the statute in question, "it was the intention of the legislature to secure to the *parties in interest* the right in all cases of doubt, to have the opinion of the court as to the legal effect of a will, even *in advance of any actual controversy.*" That was all.

The case of *Baldwin* v. *Bean* is, in a sense, imperfectly reported. No statement of facts accompanies the opinion, and indeed there was need of none, in view of the questions actually decided. But inasmuch as the case has been cited as a precedent, we have examined the papers on file in the court in Androscoggin County, and we find that the bill was brought originally by Abby A. Richardson, who

was both executrix of the will and widow of deceased. Afterwards she intermarried with Baldwin, and her marriage, under the law as it was then, terminated her powers as executrix. Later Baldwin, the husband, represented as being the administrator with the will annexed of Richardson's estate, was summoned to appear and prosecute, and thereafter the case was docketed in his name as complainant. Clearly the widow had such an interest as would have supported the bill. Just how she was regarded with reference to it after her marriage does not appear. The question probably was not thought of. Under the circumstances, we do not think that *Baldwin* v. *Bean* can be regarded as authority for the plaintiff's position. We have been unable to find a case,— unless *Baldwin* v. *Bean,* in its remodelled condition, was one,— in which the complainant did not have an interest, present or remote, vested or contingent, either as heir, legatee or devisee, or as trustee, or as executor or administrator with the will annexed having duties to perform concerning which he sought the construction of the will and the advice of the court. And unless a complainant can bring himself within one of these classes, we should be unwilling to sustain a bill. It is a statutory proceeding, and should not be carried beyond the fair intent of the statute. Even if the objection seems to be a technical one, it is one which parties have a right to make, and, if well founded, must be sustained. Orderly procedure in litigation is the safeguard of the personal and property rights of the litigant.

But the court has given a liberal construction to the statute, as it indicated in *Baldwin* v. *Bean* it would do, and any interest that was real has served, and when the complainant has been properly in curia, and the court has had jurisdiction, it has usually answered all his pertinent questions.

We must now inquire whether this executor has such interest in the subject matter of his questions as entitles him to answers. It will not be necessary to elaborate fundamental and familiar principles which must control. One is, as already stated, that the executor, unless some duty is imposed upon him by the will (and there is none in this case) has no interest in the real estate, except the right to have so much of it as may be necessary appropriated to the payment of

legacies, debts and expenses; that this right is in no way contingent upon the construction of the will, and that when the right has been exercised, or where there is no occasion for its exercise, he has no concern in what becomes of the real estate. Another principle is that when, as we assume in this case it is, or will be, true, that he has paid all specific legacies, debts and expenses out of proceeds of the estate in his hands, and has turned over the remainder to the life tenant of the same, he has completed his duty. He will have administered the estate according to the will. He will be no longer responsible. The receipt of the life tenant will be his sufficient voucher in the settlement of his account. If the testator saw fit to authorize the life tenant to hold the life estate without giving security to the remaindermen, he had that right, although this court will under some circumstances require a life tenant to give such security. But the point is this, that whatever happens to the property after the executor has administered upon it according to the will, it is nothing to the executor. If the life tenant here should die, questions might arise between her estate or her assigns and the residuary legatees; or if she should marry, questions might arise between her or her assigns and the legatees. But we think the executor now is not entitled to seek an answer to those questions. And we are the less unwilling to come to this conclusion, for the reason that our decision will not bar the widow or the legatees from seeking a construction of this will by the court hereafter, if they may be thereto advised.

While such bills are bills of prevention and are in a literal sense of the word, bills of peace, the line must be drawn somewhere, and we must draw the line where we think the legislature intended to draw it. We think in this case the line has been crossed. A bill to construe a will cannot be sustained upon the complaint of any person, executor or otherwise, unless the construction may affect his rights in person or property, or unless it may affect the performance of his duties under the will as executor, trustee or otherwise.

Bill dismissed, with one bill of costs for the resisting defendants.

LOTTIE I. DAY, Admx., *vs.* BOSTON AND MAINE RAILROAD.

York. Opinion June 11, 1903.

Verdict. Practice. Trial. Contributory Negligence. Stat. 1891, c. 124.

The court is not bound to submit a case to the jury, but may direct a verdict for the defendant, when all the inferences which a jury may justifiably draw from the testimony are insufficient to support a verdict so that it would be the duty of the court to set aside such a verdict, if it had been rendered.

A new trial having been granted on general motion, the case was heard a second time before the jury, and the presiding justice at the close of the evidence directed a verdict for the defendant.

Held; that the conclusion announced in the former opinion was justified and required by the established principles of law applied to the facts there stated, and that the evidence with the additional testimony before the court does not warrant a different result.

Also; that the inference from all the testimony considered in the light of the undisputed situations, is almost irresistible that the plaintiff's intestate did either see, or hear, the approaching train but over-estimating its distance or miscalculating its speed, with an absence of caution which is incomprehensible, inconsiderately and rashly undertook to cross the track in front of the train instead of waiting for it to pass. If so, the consequences of such mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind; and if one chooses in such a position to take risks, he must bear the consequences of failure.

If the positions most favorable to the plaintiff be assumed to be correct, the accident cannot be attributed wholly to the negligence of the defendant, if the plaintiff's intestate after discovering the train might have avoided the fatal consequences by the exercise of reasonable and ordinary vigilance and caution on his own part. In such a case the negligence of the injured party is deemed a proximate cause which contributes to the injury and bars his right to recover.

Day v. *B. & M. Railroad*, 96 Maine, 207, sustained.

Exceptions by plaintiff. Overruled.

Upon a second trial of this case granted by the court, as reported in 96 Maine, 207, the presiding justice ordered a verdict for the defendant.

The parties agreed that if a verdict in favor of the plaintiff would have been authorized by the evidence, judgment should be rendered for the plaintiff for such sum as the law court believe the plaintiff was entitled to.

The case is stated in the opinion.

E. P. Spinney, for plaintiff.

G. C. Yeaton, for defendant.

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

WHITEHOUSE, J. This action is founded on the statute of 1891 giving a right of action for injuries causing death, and is brought against the defendant company to recover damages for negligently causing the death of the plaintiff's intestate, Edwin Day, at the Junkins railroad crossing in North Berwick on the 21st day of July, 1899. The former trial of the action at the September term of court, 1900, resulted in a verdict of $4,000 in favor of the plaintiff. This verdict was set aside by the law court for reasons clearly and sufficiently stated in the opinion of the court, 96 Maine, 207. The cause came on for trial a second time at the September term of court, 1902, and after the evidence had been introduced for both the plaintiff and the defendant, the presiding judge directed the jury to return a verdict for the defendant. The case comes to this court a second time on the plaintiff's exceptions to this ruling, with a stipulation that "if a verdict in favor of the plaintiff would have been authorized by the evidence, judgment shall be rendered for the plaintiff for such sum as the law court believes the plaintiff is entitled to."

After a careful examination of the evidence disclosed by the record now presented, it is the opinion of the court that the conclusion announced in the former opinion was justified and required by the established principles of law applied to the facts there stated, and that the evidence with additional testimony now before the court will not warrant a different result.

The leading and most essential facts involved in the decision of the vital issue in the case do not appear to be in controversy. In the forenoon of July 21, 1899, a "bright and clear day," the plaintiff's

intestate, Edwin Day, a man thirty-five years of age, with faculties and senses unimpaired, was driving a single horse attached to an unloaded hay-cart along Wells Street from North Berwick towards the grade crossing above named which intersects the Eastern division of the defendant's railway at an angle of 43½ degrees. He was leaning against the front rail of the hay-rack, one rein in each hand, and driving at the moderate pace of about five miles an hour. When within about "thirty or forty" feet of the crossing he stopped his team for "two or three seconds" and then urging his horse into a trot attempted to drive over the defendant's railroad crossing, but was struck and immediately killed by a special train from Boston to Portland approaching from a direction thus partially in his rear.

The railroad crossing in question was 1832 feet from North Berwick railroad station, and the track of the Eastern division is on a descending grade and nearly straight for a distance of about six miles towards Kennebunk. It was admitted that this crossing was not provided with gates, flagman or automatic signals, and it may be assumed, though it was not conceded by the defendant, that it was "near the compact part of the town." It was not in controversy that at the time of the accident the special train was running "at a greater speed than six miles an hour," the plaintiff contending that it was from 50 to 60 miles an hour, and the defendant conceding that it was from 20 to 25 miles an hour. Whether or not the bell was rung and the whistle blown on this train as required by law, was one of the controverted questions in the case. The plaintiff's evidence, which was necessarily to a great extent of a negative character, tended to show that these statutory signals of the approach of the train were not given, while the defendant's evidence and the weight of all the positive testimony in the case, showed that these customary warnings were duly sounded. But assuming that there was sufficient evidence to support a finding of the jury in favor of the plaintiff's contention respecting the speed of the train and the signals of approach, the defendant invokes the settled rule of law that no such omission of duty or violation of statute on the part of the defendant would relieve the traveler from the obligation to use his own senses of sight and hearing to inform himself of an approaching

train, and confidently insists that the plaintiff's intestate either failed to exercise the requisite degree of care and vigilance to discover the train at the time in question, or, discovering it, rashly attempted to cross in front of it.

The distance on Wells Street from its junction with Portland Street to the crossing is 471 feet, and the defendant contended and introduced photographs with other evidence to show that at every point in this distance of 471 feet on Wells Street, some portion of the train or smoke-stack, or the smoke and steam rising from it, must have been plainly visible to the traveler throughout the entire distance of 911 feet on the railroad as the train approached from Drew's overhead bridge to the crossing. The plaintiff contends, however, that through a large portion of this distance the traveler's view of the train was obstructed by a high embankment on the northerly side of the railroad, and also by a tight board snow-fence 27 feet from the center of the track, and that it was impossible for Mr. Day, standing on his hay-rack at any point on Wells Street between the crossing and a point 75 feet distant therefrom, to see the approaching train until it came within 253 feet of the crossing. But it could not reasonably be contended that no possible means were available to the traveler for the discovery of an approaching train in season to avoid a collision, and the existence of extraordinary difficulties in discovering it by sight should have suggested to a person of ordinary care and prudence the necessity of exercising greater precaution and making stronger efforts to ascertain the facts in some other way. It is common knowledge that a vast increase in the speed of railroad trains has been required in recent years in order to meet a constant demand for the most rapid transit consistent with the safety of public travel, and ordinary care and prudence accordingly demand of the traveler upon our highways greater vigilance and more thoughtful attention in order to discover the approach of railroad trains and avoid collisions on the crossings at grade.

In the case at bar it has been seen that Mr. Day was driving on Wells Street at the rate of about five miles an hour, and according

to an average of the estimates of the distance made by the plaintiff's witnesses, he stopped at a point about thirty-two feet from the crossing and just outside of the line of the snow-fence twenty-seven feet from the center of the track. It is not in controversy, as already noted, that at any point on Wells Street within 75 feet from the crossing, some portion of the train must have been visible to Mr. Day after it approached within 253 feet of the crossing; and at a distance of 27 feet from the center of the track, being inside of the line of the snow-fence, there was an unobstructed view of the whole train.

After stopping "two or three seconds," Mr. Day "hurried his horse right up into a trot" towards the crossing; and it is a reasonable inference that this "hurried trot" was not less than five miles an hour, or seven feet per second, the speed at which he was "jogging along" before he stopped. The plaintiff's evidence tended to show that the train was running at a speed of at least 50 miles an hour, or 73 feet per second. If so, it traversed the entire distance of 253 feet in three and one-half seconds, and the whole train must have been within the limit of 253 feet and in plain view of Mr. Day before he had advanced to a point within 15 feet of the track. Under the circumstances thus disclosed by the plaintiff's own evidence, it is inconceivable that if Mr. Day had been vigilant and alert and exercised the circumspection of a careful and prudent man, he could have failed to see some indication of an approaching train, or, if he had listened attentively, that he could have failed to hear some signal or sound of an approaching train, before he reached the point of dangerous proximity to the railroad track.

In the former opinion in this case (96 Maine, 213) it is said: "There is no evidence that in approaching the railroad crossing Mr. Day took any precaution 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." But the record now before the court, with the additional evidence presented

at the second trial of the case, tends to modify this view and to strengthen the probability of the alternative suggested at the close of the opinion that "being aware of the approaching train, he recklessly undertook to cross before it." James B. Walker was not a witness at the former trial, but testified at the second hearing that as he was approaching the crossing from the opposite side he saw Mr. Bragdon and Mr. Day pass each other, and in regard to the conduct of Mr. Day, says: "Mr. Day hauled up and stopped and looked around, and then he came right along, he took his reins and started his horse right into a trot. . . . He stopped two or three seconds; he turned his head and looked up the track towards the bridge. After he started the horse, he was looking ahead and crosswise and he put the whip right on his horse; he took his reins and urged his horse up and drove right on to the crossing. He was looking to the right, up towards the depot." This is corroborated by Mr. Bragdon, a witness at both trials, and also by the fireman, a witness for the defendant, who observed the movements of Mr. Day from the engine and assumed that he would not attempt to cross in front of the train. He says: "When he approached the crossing he was looking up the track, and he drove up and stopped, looking towards us coming down the track. . . . When he hit the horse I hollered 'Whoa.' I thought Mr. Day was going to stop; instead of that, after he drove up there, he thought he had time to go ahead, and so I hollered to the engineer, when I saw he was going to drive ahead, to stop."

The inference from all this testimony considered in the light of the undisputed situations, is almost irresistible that Mr. Day did either see, or hear, the approaching train but over-estimating its distance or miscalculating its speed, with an absence of caution which is incomprehensible, inconsiderately and rashly undertook to cross the track in front of the train instead of waiting for it to pass. If so, "the consequences of such mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind; and if one chooses in such a position to take risks, he must bear the consequences of failure." *Chicago, Rock Island and Pacific R. R. Co.* v. *Houston*, 95 U. S.,

697; *Smith* v. *Me. Cent. Railroad Co.*, 87 Maine, 351. When a railroad track crosses or is crossed by a highway, the traveler with a team and the railroad company have concurrent rights and obligations with respect to the use of the way at the place of intersection. It is not ordinarily reasonable or practicable for a train to stop and give precedence to a team approaching on the highway. It cannot be required to do so except in cases of manifest danger when it is apparent that a collision could not be otherwise avoided. It is the duty of the traveler on the highway to wait for the train. The train has the preference and the right of way. *Continental Improvement Co.* v. *Stead*, 95 U. S. 161; 2 Wood on Railroads, 1510; Pierce on Railroads, 342; *Lesan* v. *M. C. R. R. Co.*, 77 Maine, 85.

On the other hand, the management of a railroad train must be conducted with due regard to all of the provisions of the statute designed to insure the safety of the traveler both upon the railroad and the highway. The train "is bound to give reasonable and timely warning of its approach to a crossing, but it cannot be reasonable and timely if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of a coming shot, but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and 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. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing." *Continental Imp. Co.* v. *Stead*, 95 U. S. 161, supra. If, therefore, the special train in question was approaching a crossing near the compact part of the village at the great speed of 50 miles an hour without flagmen at the crossing and without giving the statutory warnings of its approach, the officers and servants in charge of it were guilty of gross and culpable recklessness which would justly have subjected them to the severest censure. But if these positions, most favorable to the plaintiff, be assumed to be correct, the accident cannot be attributed wholly to the negligence of the defendant if the plaintiff's intestate after discovering the train

might have avoided the fatal consequences by the exercise of reasonable and ordinary vigilance and caution on his own part. In such a case the negligence of the injured party is deemed a proximate cause which contributes to the injury and bars his right to recover. This principle has been so often enunciated in the recent decisions of this court that no further exposition of it is required at this time. *Atwood* v. *Bangor, O. & O. R. R. Co.*, 91 Maine, 399; *Conley* v. *Me. Cent. R. R. Co.*, 95 Maine, 149; *Ward* v. *Me. Cent. Railroad Co.*, 96 Maine, 137. See also *Schofield* v. *Chicago, Milwaukee & St. Paul R. R. Co.*, 114 U. S., 615, a case in which the court directed a verdict for the defendant, and one presenting striking analogies to the case at bar.

After a patient and critical examination of the case it is the opinion of the court that with all the inferences which the jury could justifiably have drawn from it, the evidence now presented is insufficient to support a verdict for the plaintiff, so that it would be the duty of the court to set aside such a verdict if it had been rendered. Under such circumstances it is the established rule of procedure in this State that the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Heath* v. *Jaquith*, 68 Maine, 433; *Jewell* v. *Gagne*, 82 Maine, 431; *Moore* v. *McKenney*, 83 Maine, 80, 23 Am. St. Rep. 753; *Market & Fulton Nat. Bank* v. *Sargent*, 85 Maine, 349, 35 Am. St. Rep. 376; *Bennett* v. *Talbot*, 90 Maine, 229; *Coleman* v. *Lord*, 96 Maine, 192. The mandate must therefore be,

Exceptions overruled.

HERBERT BOWDEN *vs.* SAMUEL DERBY.

Knox. Opinion June 16, 1903.

Negligence. Master and Servant. Road Commissioner. Public Officer. Pleading.

The relation of master and servant is not created between a road commissioner and the men employed by him in repairing a street, although he has the right to select and discharge them, and to determine what work shall be done, and the way and manner in which it shall be done.

Sound public policy forbids that public officers should be held responsible for the negligence of those whom they are obliged to employ in the discharge of their duties in the execution of public works, when such officers are not chargeable with any want of diligence or due care on their part.

The defendant, a road commissioner, supplied to the plaintiff and other men employed by him in repairing the street a derrick as a completed appliance, to be used in doing the work in which they were engaged. While he may have been under no obligation to furnish the derrick, yet having done so he assumed the obligation towards those who were to use it of exercising reasonable care to see that it was safe and suitable, and so maintained.

In the execution of public works, he who selects the place in which the work is to be done, and invites and directs the workmen who labor therein, assumes towards them the obligation of seeing that such place is reasonably safe.

See *Bowden* v. *City of Rockland*, 96 Maine, 129.

Exceptions by plaintiff. Sustained.

Action on the case for personal injuries.

At the return term, defendant filed a general demurrer to the declaration.

The presiding justice without argument, in order that the law of the case might be first settled, sustained the demurrer. To this ruling plaintiff alleged exceptions.

The case is fully stated in the opinion.

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

D. N. Mortland, for defendant.

A street commissioner or superintendent of streets is a public officer. Such obligations as rest, to an extent, upon employers to

their employees, do not apply to public officers in the discharge of public duties. *Prince* v. *Lynn*, 149 Mass. 193.

The plaintiff was not in the employ of defendant but in the employ of the city. Unless defendant injured plaintiff by some malfeasance or misfeasance individually and aside from the discharge of his duties as a public officer, he cannot be held liable. The doctrine of respondeat superior does not apply here.

The declaration charges defendant simply with a non-feasance in failing to do what the declaration states to be his duty as street commissioner or highway surveyor, but which is not required by statute law. Defendant is charged with failing to do what the law does not require him to do.

SITTING: WISWELL, C. J., EMERY, STROUT, POWERS, PEABODY, SPEAR, JJ.

POWERS, J. Exceptions to a pro forma ruling of the presiding justice sustaining a demurrer to the plaintiff's declaration.

The declaration alleges "that on the sixth day of August A. D. 1900, the defendant was, and for a long time prior thereto had been, the duly elected and qualified street or road commissioner of the City of Rockland and received from said city for the performance of his duties as such a salary of eight hundred dollars per year; and having prior to said date, in performance of his said duties as road commissioner determined that repairs were necessary upon a certain street in said city, known as Maverick Street, and having determined to build a retaining wall in repairing said street, said defendant undertook to construct and was constructing said retaining wall for the purpose of supporting the southerly side of said street:

"That said defendant selected and employed the workmen engaged thereon, had the power to remove and discharge them and directed what work should be done, and the way and manner in which it should be done, and procured necessary tools and machinery to be used in prosecuting said work, and had full charge and power over and control thereof, and of all details entering into said work;

"That the plaintiff was employed as a laborer on said work, and

during all the time he worked upon said wall, was under the direction and control of said defendant, who was doing said work in the discharge of his duties as road commissioner.

"That in constructing said wall certain heavy rock and large stone had to be moved, handled and placed therein, for the handling of which said commissioner had procured, erected and equipped a derrick upon the bank far above the place where this plaintiff was at work and nearly on a level with said street;

"That the plaintiff knew nothing as to the sufficiency of said derrick or of its equipment and had never been near to or examined the same, but had been instructed and directed by the said defendant to work at the base of said wall and far below the level on which said derrick was erected and operated.

"That it was then and there the duty of said defendant to the men employed by him and under his control in doing said work, he having full and immediate charge, control and direction of said work, to provide a suitable and safe derrick and equipment, erect and set the same up in a suitable and safe manner and keep and maintain it in a safe and suitable condition, and to employ only suitable and careful persons in erecting and maintaining said derrick and in the prosecution of said work, and it was the duty of said defendant to this plaintiff, having undertaken to provide a derrick for use in doing said work, to provide only such derrick as was safe and suitable for the purpose, and such as was, when prepared for use upon said work, in a safe and suitable condition and such as would not endanger the employees working thereon;

"That said defendant unmindful of his duty in this behalf did not provide as plaintiff avers, a suitable and safe derrick, nor did he cause it to be set up in a suitable and safe manner, and did not cause it to be kept and maintained in a safe and suitable condition and did not employ suitable and careful persons in erecting and maintaining said derrick, and in the prosecution of said work;

"That upon the sixth day of August A. D. 1900 the plaintiff, relying upon the performance by the defendant of his duty in this behalf and being himself then and there in the exercise of due care and diligence and without any knowledge or means of knowledge

of the defective, unsuitable and unsafe condition of said derrick was at work near the base of said wall when the boom of said derrick by reason of the defective, unsuitable and unsafe condition thereof, and by reason of its being an unsuitable appliance for the work there being done, and the negligent and unsafe manner in which it had been set up for use, all of which was or by the exercise of reasonable care and skill might have been known to said defendant, and the failure of said defendant to employ suitable and careful persons to erect, maintain and operate said derrick, all of which was the result of the failure of said defendant to perform his duty aforesaid suddenly fell a great distance striking" and injuring the plaintiff.

There can be no negligence where there is no duty. Does this declaration charge the defendant with a failure to perform any duty which the facts therein averred show that he owed to the plaintiff?

While the defendant was a public officer, the work in which he was engaged was none the less ministerial. It is claimed that the relation existing between the defendant and the plaintiff was that of master and servant; and if this be the true construction of the facts set forth in the declaration, the defendant is undoubtedly liable under the well recognized principles of law applicable to that relation. In repairing the street and building the wall the defendant was acting solely for the public. He had no interest in the work other than that which arose from the discharge of his duty as a public officer. The nature of that duty was such that he could not perform it alone. It could not be executed without availing himself of the services of others. Not that he was obliged to employ any particular man or men. He had the right to select and discharge the men, the power to determine what work should be done, and the way and manner in which it should be done. None the less he was compelled to employ men who were paid not by him but by the city, who labored not for his benefit but for the public. He should not be held liable for the misconduct of those whom he is thus obliged to employ. Such employees are not his servants, and the rule of respondeat superior does not apply. *McKenna* v. *Kimball*, 145 Mass. 555. The foundation of the liability of one person for the acts and negligence of another is found in the doctrine of principal

and agent. The fact that the defendant had the right to select and discharge the men whom he was compelled to use might be a good reason why he should be holden to exercise reasonable care in their selection, but we do not think that under the circumstances of this case it is sufficient to establish the fact that the plaintiff was the defendant's servant, and charge him with the onerous consequences which flow from that relation. Few men would be found willing to accept an office whose burdens were so disproportionate to its benefits. Sound public policy forbids that public officers should be held responsible for the negligence of those whom they are obliged to employ in the discharge of their duties in the execution of public works, when such officers are not chargeable with any want of diligence or due care on their part. *Bailey* v. *The Mayor &c. of N. Y.* 3 Hill, 531, 38 Am. Dec. 669.

The declaration charges that an unsafe and unsuitable derrick was furnished as a completed appliance for the prosecution of the work, that the place in which the plaintiff was set to work was dangerous and unsafe, and that all this was, or by the exercise of reasonable care might have been, known to the defendant. These matters pertain to the conduct of the defendant himself. The plaintiff had nothing to do with fitting up the derrick. The defendant supplied it to him as a complete appliance to be used in doing the work in which he was engaged. He had a right to rely that it was all right, that it was not subject to such defects as could be discovered by the exercise of reasonable care on the part of the defendant who furnished it. *Poor* v. *Sears*, 154 Mass. 539, 26 Am. St. Rep. 272. The defendant may have been under no obligation as road commissioner to furnish the derrick, but having done so he assumed the obligation towards those who were to use it of seeing that it was reasonably safe and suitable, and so maintained.

The defendant selected the place in which the plaintiff was to work. He invited and directed him to work there. When the defendant did this he assumed toward the plaintiff the duty of seeing that the place was reasonably safe, and he must answer for any injury suffered through his failure to perform that duty. In *Breen* v. *Field*, 157 Mass. 277, the defendants were the selectmen of the town

of Greenfield engaged in building a public sewer. They hired the plaintiff and set him to work in the bottom of the trench. He was injured through the sides of the trench falling in for want of proper support. It was held the defendants were liable, if the injury was due to any neglect on their part to take proper precautions for the plaintiff's safety. Mr. Justice Morton in delivering the opinion of the court says:

"The defendants were not bound to hire the plaintiff and set him to work in the bottom of the trench, but having done so they are liable to him for any injury which occurred to him in the course of his employment through any negligence on their part. Whether they were acting as public officers or agents, or not, could under the circumstances make no difference as to their duty to the defendant. They were bound, when they hired him to work in a particular place to see that it was reasonably safe, and that materials were furnished to make it so, and if any injury occurred to him through their neglect in these respects, they are liable. They voluntarily assumed the responsibility of setting him to do a particular kind of work in a particular place, and they cannot avoid the duty which that act imposed upon them as to him."

The dictates of humanity, and a proper regard for the lives and safety of the workmen engaged upon public no less than private works require that some one should be bound in law to furnish a reasonably safe place in which to do their work. Upon whom then does this duty rest? We think it rests upon the man who selects the place in which the work is to be done, and invites and directs the workmen to labor therein. His is the master mind. It is for him to command and the workmen to obey. He is not an insurer, but the laborer has a right to rely, whether the work be public or private, that the man who directs and selects the place, means, manner and method of his work shall use reasonable care to see that the means and the place are reasonably safe. If the defendant failed in this, it was his own fault and not that of another, and he cannot shield himself behind the defense that he was a public officer. That plea cannot be interposed to shield him from the consequences of his own negligence. While he need not answer for another he must answer

for himself. A personal liability attaches to him for his failure to exercise reasonable care in providing safe machinery with which, and a safe place in which, the defendant might work.

In regard to the other ground claimed by the plaintiff, failure to exercise reasonable care to select the men who set up, maintained and operated the derrick, we find no sufficient allegation in the writ. The only allegation is that it was the defendant's duty to employ suitable and careful persons, and that he did not employ suitable and careful persons. This is not enough, even from the plaintiff's stand-point. The duty of the defendant in this respect cannot be an absolute duty to employ suitable and careful persons. At the most he can only be liable for the want of reasonable care in this particular, and there is no allegation that he failed to exercise such care in their selection and retention.

It is further urged against the declaration that it is bad for duplicity, but this objection is not open to the defendant upon general demurrer. The same is true of the other claims which relate to the form of the declaration.

Exceptions sustained. Demurrer overruled.

WALTER COWETT, Pro Ami,

vs.

THE AMERICAN WOOLEN COMPANY.

Somerset. Opinion June 16, 1903.

Negligence. Master and Servant. Machinery. Risks Assumed.

The master is bound to provide and maintain machinery which is reasonaly safe in view of the uses that are to be made of it, and the work that is to be performed upon it and around it. He is responsible for any defect in the machinery which was or ought to have been known to him, and was unknown to the servant.

He is not bound to anticipate and guard against every possible danger, but only such as can be foreseen by the exercise of reasonable care.

In this case the plaintiff's own testimony shows that he did not receive the injury in the manner he thinks he did; but if it be admitted that he is correct in his theory as to the manner in which the injury was sustained, such an accident or injury was a possibility so remote, a thing so unlikely to happen, that it could not be foreseen or anticipated by the defendant by the exercise of reasonable care.

Motion by defendant for new trial. Motion sustained.

Case for negligence.

This was an action brought by Walter Cowett against the American Woolen Company for an accident resulting in the loss of the fourth finger of his left hand, while in the employ of said company in its mill at Skowhegan, Jan. 12th, 1901.

The plaintiff alleged in his writ, first, that the defendant adopted and maintained an unsafe, unsuitable, improper and dangerous carding-machine, with its cog-wheels and rollers improperly and insecurely guarded and protected; second, that he was not given proper warning or instructions as to the dangerous character of the machine; and that being about sixteen years old, he did not know or appreciate the danger.

The case was tried at the March term of the court and a verdict for the plaintiff was rendered for $1034.88. The defendant filed a

motion to set the verdict aside, which motion was filed in due season, in the usual form.

Forrest Goodwin, for plaintiff.

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

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

POWERS, J. This is an action on the case for negligence, and comes before the court on motion to set aside the verdict, which was for the plaintiff.

At the time of the injury the plaintiff was employed in the card room of the defendant's mill, and it was a part of his duty to feed and clean the cards. He undertook to clean the waste out of the cog-wheels at the end of the rollers while the machinery was running. To pick the wool from the cogs he was obliged to use his left hand in the narrow space between the wheels and the rollers, employing his thumb and forefinger for that purpose. This brought his little finger very near to the rollers, and while so employed it was caught between the large cylinder and one of the smaller strippers on top of the cylinder, drawing in and partially crushing the hand. He was sixteen years of age, and had worked in the card room for two years and a half. The cog-wheels, cylinders, and strippers were all in plain sight, and his testimony shows that he knew and appreciated the danger of getting his hand between the cylinder and roller, and as to this he must be held to have assumed the risk. The plaintiff's claim, however, is that there was another and a hidden danger, of which he did not know, and could not have known in the exercise of reasonable care and diligence, and which was the real cause of the injury he received. In the collar on the shaft of and at the end of the stripper, near to the plaintiff's hand, there was a small set screw with an oval head, in which was a slot with sharp edges. The head of this screw was about one-quarter of an inch broad, and projected about one-sixteenth of an inch from the rapidly revolving collar. The plaintiff claims that the head of this screw hit his hand, surprising him and causing him, by a sudden and involuntary movement, to

draw his hand into the machinery where it was caught and injured. It is claimed that it was the master's duty to place a guard over the head of the screw, or to warn the plaintiff of its existence, which was not ordinarily perceptible, and of which he had no knowledge.

The plaintiff's theory as to the manner in which the injury happened is not supported by his own evidence. He says something hit his finger, and that whatever hit it was away from the roller and on the other side. The screw in the collar of the roller or stripper might possibly be said to be away from it, but it could hardly be said to be upon the other side of it. He states positively that he does not know what hit his finger, but we think his testimony shows what it was in fact. He says, "Something struck my finger, and I went to draw my hand out and it began to draw in."

"Q. How long was it from the time this something hit your hand before your hand went into the collar?

A. It went in right off. The minute I went to draw my hand out it began to draw in."

At the time the plaintiff was standing with his side to the machinery, facing the same way as the cards, and using his thumb and forefinger to pick the wool from the cogs. This would bring his little finger very near to that part of the machinery in which it was caught. His testimony shows that there was not a hitting of the finger, a drawing away of the hand, and then a catching of the finger. The contact and the catching were simultaneous, and at the same point, and it is impossible to resist the conclusion that the only object which hit his finger was that part of the machinery in which it caught. The space was a narrow one. On the one side the cogs, and on the other the rollers. He says the wool which he was picking out was packed tight into the cogs. To extricate it must have required the use of some strength, and a slight sudden and unexpected giving away of the wool would have a tendency to carry his hand away from him and into the rollers. If the finger had been hit by the screw head, causing a sudden and involuntary starting on the plaintiff's part, it would seem that the natural and instinctive movement would have been to have drawn his hand toward him, and away from the point of contact, rather than away from him and by the screw head. We

are of the opinion that the jury failed to appreciate the force of the plaintiff's testimony, and that the verdict is clearly erroneous.

Even if the plaintiff's theory in regard to the manner in which the injury was received had been sustained by the evidence, there is another objection which is fatal to his recovery. It was not the duty of the plaintiff to provide absolutely safe machinery. The law imposes no such burden upon the master. He is not an insurer. It is his duty to provide and maintain machinery which is reasonably safe, in view of the uses that are to be made of it, and the work that is to be performed upon it and around it. He is responsible for any injury arising through any defect in the machinery which was or ought to have been known to him, and was unknown to the servant. He is not required to anticipate and guard against every possible danger, but only such as are likely to occur. The degree of care should rise with the danger; but assuming as true the plaintiff's position, that it was within the contemplation of the parties that he should clean the machine while running, we do not think the defendant ought to have known that such an injury was likely to occur. That the oval head of the set screw, projecting one-sixteenth of an inch from the revolving collar near the plaintiff's hand, by coming in contact with his finger, would cause him injury, or cause him to make any such involuntary movement as would be the occasion of such an accident or injury as that complained of in the present case, was a possibility so remote, a thing so unlikely to happen, that it could not be foreseen or anticipated by the defendant by the exercise of reasonable care. Such being the fact, neither his failure to place a guard over the head of the screw, nor his omission to warn the plaintiff of the danger, constitute negligence on his part. The facts of the case do not justify a finding that the defendant was negligent, and allowing to the verdict of the jury all the weight to which it is entitled, the court is of the opinion that it is clearly wrong, and that justice requires it to be set aside.

Motion sustained. Verdict set aside. New trial granted.

PATRICK F. TREMBLAY *vs.* ÆTNA LIFE INSURANCE COMPANY.

Androscoggin. Opinion June 26, 1903.

Foreign Judgment. Res Judicata. Jurisdiction. Service. Parties. Default. Life Insurance. Assignment of Policy. Assent of Company. Beneficiary—Vested Interest.

A foreign judgment is merely prima facie evidence of what it purports to decide.

The doctrine of res judicata extends only to those facts which must necessarily be made to appear as a basis of the judgment, and without a showing of which the judgment could not have been rendered.

It is necessary before a court can render a valid judgment that it shall first acquire jurisdiction over the parties, the subject matter of the suit and the process.

A writ, declaration, summons, publication, default and judgment against the heirs of J. O. T., defendants, giving no name or names, would not give the courts of this State jurisdiction to render a valid judgment in personam; nor upon their face, would they furnish a basis for a judgment in rem.

In a case where judgment is rendered on default without personal notice to the defendant, the false allegation by plaintiff of a fact so material that without its existence his pleading fails to set out a cause of action, operates as a fraud and is well calculated to deceive the court.

The acts and recitals of a court acting without jurisdiction cannot conclusively bind the defendant; nor can such acts and recitals serve as conclusive evidence of facts which would give the court jurisdiction.

An assignment of a life insurance policy executed in compliance with the terms of the policy by the assured and the only beneficiary, divests both of them of, and vests the assignee with the entire legal interest in the policy.

A letter from an insurance company, acknowledging the receipt of such an assignment of a life policy issued by it, in which letter the company states that it will place the assignment "on file for such attention as it may deserve when such policy becomes a claim," is a sufficient indication of the company's assent to the assignment.

The mere statment or recital in such an assignment that it is subject to a claim, if there be in fact no claim, would be surplusage, and would not affect the assignment of the entire sum.

A foreign judgment based upon an invalid assignment of a life insurance policy can have no binding force upon the courts of this State either by way of estoppel or under the doctrine of res judicata.

On report. Judgment for plaintiff.

Action of debt on a policy of life insurance.

Plaintiff claimed under an assignment executed both by the assured and his wife who was the beneficiary named in the policy.

One J. B. Cloutier claiming the fund under color of a prior assignment executed in fact by the husband alone, had brought suit in the Superior Court of the Province and District of Quebec and recovered judgment for the insurance money, which had been previously deposited with the Provincial Treasurer in accordance with the Revised Statutes of the Province of Quebec. This judgment the Insurance Company interposed as a defense to this action of debt commenced in this court below in Androscoggin County.

The facts appear in the opinion.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden; P. F. Tremblay, for plaintiff.

R. W. Crockett, for defendant.

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

SPEAR, J. This is an action of debt to recover the amount alleged to be due upon a life insurance policy. On August 13, 1885, the Ætna Life Insurance Company of Hartford, Connecticut, issued a policy through its Canadian branch on the life of Jean O. Tremblay of the Province of Quebec, in the sum of $2000, payable at his death to his wife Arthemise D. Tremblay, or in event of her death before his, to his executors, administrators, or assigns. On November 24, 1891, this policy was assigned by Jean O. Tremblay, without the joinder of his wife, to J. B. Cloutier of Quebec as collateral security. On January 14, 1901, Jean O. Tremblay and Arthemise D. Tremblay executed two other assignments of the same policy to their son Patrick F. Tremblay of Lewiston, Maine, the plaintiff in this case. A duplicate of but one of these assignments was forwarded to the

company. This assignment was made upon the company's blank form and is as follows: "For value received, we hereby transfer, assign and turn over unto Patrick F. Tremblay, Attorney at Law and Notary Public of Lewiston, Maine, as collateral, all our right, title and interest in Policy of Life Insurance 149,296, issued by the Ætna Life Insurance Company of Hartford, Connecticut, and all benefit and advantage to be derived therefrom to the extent of such interest as he may have when said policy becomes a claim, subject to J. B. Cloutier's claim.

Dated at Quebec this 14th day of January, 1901."

This assignment was duly executed and forwarded to the company and its receipt acknowledged in a letter, as follows:

"Ætna Life Insurance Company.
Hartford, Conn., January 19, 1901.

P. F. Tremblay, Esq.,
256 Lisbon St.,
Lewiston, Me.

Dear Sir:—

We have your favor of the 16th inst. enclosing an assignment of policy No. 149,296 on the life of Jean O. Tremblay, executed by said insured and Arth. D. Tremblay, in favor of yourself, under date of January 14, 1901 subject to the claim of J. B. Cloutier, which we place on file for such attention as it may deserve when such policy becomes a claim.

Yours truly,
J. L. English."

The assignment was executed by both the assured and the only beneficiary, and consequently divested both of them of, and vested the assignee with, the entire legal interest in the policy, the exception to Cloutier being an equitable interest only, to which allusion will be made later.

J. O. Tremblay died January 21, 1901. At his death there was due on the policy $1959.49. Proofs of death were filed accompanied by the affidavit of both J. B. Cloutier and P. F. Tremblay as assignees, and of Arthemise D. Tremblay as beneficiary. P. F. Tremblay in his affidavit claims "all but what is excepted by assignment

between $500 and $1000." Arthemise D. Tremblay in her affidavit states that the policy was assigned to Cloutier as above stated and that the assignment is still in force; and also that a further assignment was made to her son January 14, 1901. Cloutier in his affidavit claimed the full amount due upon the policy. This dispute having arisen between the claimants, the company, in accordance with the Revised Statutes of the Province of Quebec, deposited the money due, in the office of the Provincial Treasurer, which exonerated the company from the payment of costs in any litigation which might arise upon the policy. All the claimants were properly notified of the deposit. On April 22, 1901, J. B. Cloutier commenced proceedings to secure the money thus deposited, in the Superior Court at Quebec, against the heirs of J. O. Tremblay, defendants, and Dame Arthemise Dumais et al., mise-en-cause. The defendants and the Ætna Life Insurance Company, Arthemise Dumais Tremblay, widow, and Patrick F. Tremblay, these latter two of Lewiston, Maine, U. S. A., mise-en-cause, the said Patrick F. Tremblay furthermore, one of the defendants aforesaid, mise-en-cause, were condemned to appear at court on a day certain, and service upon all these parties was made by publication. On the 8th day of June no appearance having been made by any of the defendants or by Arthemise Dumais Tremblay or Patrick F. Tremblay, the court upon an ex parte hearing rendered judgment for the plaintiff which was that it "maintains the present action, consequently adjudges and condemns the defendants to pay to the plaintiff the sum of $2118.39, with interest from the 23rd day of April last and costs." It does not appear that any steps were taken to have administration upon the estate of Jean O. Tremblay and no administrator was mentioned in this suit, as the judgment shows. The plaintiff, notwithstanding the judgment rendered by the court at Quebec, has brought an action against the Ætna Life Insurance Company in the Supreme Judicial Court for Androscoggin County, as assignee of the policy. To this action, the defendant interposes the following defenses:

1. The suit is brought in the name of the assignee the assignment not having been assented to by the Insurance Company.

2. The assignment is of a part of an entire sum.

3. The matter is res judicata and the plaintiff is bound by the record in the Canadian suit.

4. The evidence shows that the claim of J. B. Cloutier exceeds the amount due under the policy.

The plaintiff in reply controverts all of the above defenses and in addition asserts that, even if the Canadian judgment was in other respects valid, the claim of J. B. Cloutier as presented in the Canadian suit, upon which the judgment was issued, was to a large extent clearly a fraudulent one.

The first matter of defense interposed, is to the right of the plaintiff to maintain his action on the ground that, being assignee of the policy and the assent of the company being required to make the assignment valid, the plaintiff had not, at the date of his action, secured such assent. Such objection cannot prevail. The letter of the company, acknowledging the receipt of the assignment, was a sufficient indication of their assent. The assignment was upon a printed blank prepared and furnished by the company. The assignors, by their assignment, conveyed to the assignee "to the extent of such interest as they may have *when said policy becomes a claim.*" The acknowledgment of the receipt of the assignment was "for such attention as it may deserve *when said policy becomes a claim.*" The language of acknowledgment is as broad as the language of the assignment. The assignment became a claim upon the death of Jean O. Tremblay. What did the company mean when they wrote the assignee that they had placed the assignment on file? That it was an act of dissent? What, when they said that, upon its becoming a claim, they would give it such attention as it deserved? That it was invalid and hence entitled to no attention? Did they intend to convey to the plaintiff the idea that his assignment, after they had written him this letter, was invalid? If they did, they were very unfortunate in their form of expression, for it must necessarily have operated as a complete deception upon his mind. If it was their intention to decline to accept the assignment, they could easily have made their purpose clear. It cannot be possible that they so intended. It would be a contradiction of terms to hold that they did. On the other hand, construing the phraseology of their letter "according to

the common meaning of the language" and no violence will be done in evolving the conclusion that, placing the assignment on file, and agreeing, when the occasion arose, to give it due consideration, operated as an express acceptance. Nothing seems to be wanting to clothe their conduct with the idea of consent. We think the language used by the defendant company in acknowledging the receipt of the assignment was not only sufficient in its terms but intended by the company to convey their consent to the assignment. But consent is held to effectuate a new contract with the assignee.

Grant v. *Eliot and Kittery Mutual Fire Insurance Company*, 75 Maine, 196, is a case in which the widow of the owner succeeded to the title of the premises insured under his will. Later she conveyed all her right, title and interest in the premises to Mark A. Libby and on the same day by written assignment made over to said Libby the policy of insurance issued to Hiram R. Roberts, her husband in his lifetime, and the directors of the company indorsed their consent to the assignments. Still later Mark A. Libby conveyed the premises to the plaintiff and on the same day assigned the same policy to him, and the directors of the defendant company indorsed thereon their consent to this second assignment. The court, p. 204, say: "The defendants were paid for insuring a given sum to Hiram R. Roberts for a fixed term, and their contract was to pay to his assigns. By consenting to the assignment made by his executrix and devisee to her grantee, Libby, they agreed that Libby might be substituted and that the policy should represent to him just what it had to the party originally insured. The same thing was done when Libby conveyed the property and assigned the policy to the plaintiff. No element of a valid and binding contract between the plaintiff and defendant seems to be wanting." *Donnell* v. *Donnell*, 86 Maine, 518, is a case in which Kingsbury Donnell owned certain real estate with buildings thereon upon which he procured two policies of insurance. Later he conveyed his real estate to his sons and on the same day assigned to them the insurance policies. The court say, p. 522: "The conveyance would have rendered the contracts of insurance with Kingsbury Donnell null and void if the companies had not consented to the assignment of the policies. The effect of this transaction was to

make a new and original contract of indemnity with the assignees who were not indebted to the plaintiff and had no contract relations with him." "The assent of the company to the assignment was a renewal of the original contract to the assignee with all its force, effect and liabilities as well as its conditions and limitations." *Biddeford Savings Bank* v. *Dwelling-House Insurance Company*, 81 Maine, p. 571. The same doctrine obtains in Massachusetts. "The policies are in terms payable to the assured and his assigns. The assignments to the plaintiff, assented to by the insurers, transferred to him the legal title in the policies and the right to sue thereon." *Burroughs* v. *State Mutual Life Assurance Company*, 97 Mass. p. 360. "But we are of opinion that the assignments of the policy, with the express consent of the defendants, enables the assignees to sue on it in their own name; that such consent to the assignments operates as a promise to pay the loss to them." *Kingsley* v. *New England Mutual Fire Insurance Company*, 8 Cush. 400.

The second matter of defense is that the assignment is a part of an entire sum. This defense is based upon the clause in the assignment "subject to J. B. Cloutier's claim." There is no question but the assignment, if not modified by this clause, conveyed the entire legal interest in the policy to Tremblay, the assignee. Unless the clause attaches to the assignment a legal modification, it can have no effect. The mere statement that it was subject to a claim if in fact there was no claim, would be surplusage. This leads us to the consideration and determination of the validity in law of Cloutier's alleged assignment. The policy in question was made payable to Arthemise Dumais Tremblay, wife of the assured. It is well settled in this State that this policy being payable to her became a vested right. *Small* v. *Jose*, 86 Maine, p. 124. Neither the company, the husband nor a creditor could deprive her of it without her consent. *National Life Insurance Company* v. *Haley*, 78 Maine, p. 268, 272, 57 Am. Rep. 807. Applying these principles to the assignment of Cloutier and it becomes evident that it was entirely inoperative to vest in him any legal interest, as the beneficiary did not join in the assignment. But the defendant claims that the assignment, though not signed by the wife, is of such an equitable

character as to vest in him an interest that will be protected and enforced by a court at law; but *Palmer* v. *Merrill*, 6 Cush. 282, 286, 52 Am. Dec. 782, holds that "in order to constitute such an assignment two things must concur," the second of which is, "the transfer shall be of the whole and entire debt or obligation, in which the chose in action consists, and as far as practicable place the assignee in the condition of the assignor to receive the full debt due and to give a good and valid discharge to the party liable." The record clearly shows that Mrs. Tremblay did not assign to Cloutier her "whole and entire" interest in the policy. It may be, however, that, although she did not join in the assignment, she had by her acts conveyed to Cloutier an equitable interest which the assignee holds in trust for his benefit and which may be enforced by proceedings in equity. *Unity Mutual Life Assurance Association* v. *Dugan*, 118 Mass. 219; *Burroughs* v. *State Mutual Life Assurance Company*, 97 Mass. 359; *National Life Insurance Company* v. *Haley*, 78 Maine, 268, 57 Am. Rep. 807; *Duffy* v. *Metropolitan Life Ins. Co.*, 94 Maine, 418. Cloutier therefore had no interest, by virtue of his alleged assignment, which he could enforce in law, hence the phrase "subject to J. B. Cloutier's claim" did not affect the capacity of the assignment to effect a transfer of the entire legal interest in the policy to P. F. Tremblay.

The third defense offered is, that the whole matter is res judicata. "It has been repeatedly adjudged, that foreign judgments are prima facie evidence merely of the right and matter which they purport to decide." *McKim* v. *Odom*, 12 Maine, p. 94. This doctrine has been repeated by our courts, from the time is was above promulgated to the opinion of *Tourigny* v. *Houle*, 88 Maine, 406. Upon foreign judgments "the merits as well as the jurisdiction of the courts which rendered them may be inquired into." *Middlesex Bank* v. *Butman*, 29 Maine, p. 23. This opens to inquiry the validity of the Quebec judgment. The record of the case, showing the proceedings and judgment in the court at Quebec, discloses, upon inspection, that the plaintiff's complaint, corresponding to our declaration, was based entirely upon the evidence, and the assumed validity, of Cloutier's assignment; the judgment followed the complaint, hence, was neces-

sarily based upon the assignment; but we have already determined that the assignment, claimed by Cloutier, was invalid in law; therefore the judgment based upon the assignment was also invalid, there being no proof of facts upon which it was founded, and "a verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered." *Hill* v. *Morse*, 61 Maine, p. 543.

Upon another ground the proceedings, if not tainted with intentional fraud, operated as such upon the honesty of the judgment. The complaint, item 14, sets out that "the plaintiff (Cloutier) is regular assignee of the aforesaid policy, assignment being made to him by the late J. O. Tremblay *and his wife*, the said mise-en-cause." Without this allegation Cloutier set out no cause of action whatever. But the statement is not true. The assignment was not executed by the wife. It was signed by J. O. Tremblay only. It was therefore not made by the wife, as alleged in the complaint or declaration. The allegation operated as a fraud upon the court and was well calculated, especially in a case decided ex parte, without personal notice and upon default, to deceive it. Nor was the assignment filed with or assented to by the Insurance Company. The law invoked to defeat the validity of Tremblay's assignment, for want of consent, applies with force with respect to the validity of Cloutier's assignment. The case shows that it was neither signed by the wife nor consented to by the company, as required by the policy, to make it a valid assignment. "In all judgments by default, whatever may be their competency or regularity, every proceeding, indeed, from the writ and indorsements thereon down to the judgment itself, inclusive, is part of the record and is open to examination." *Penobscot R. R. Company* v. *Weeks*, 52 Maine, 460. "And the records of all courts are liable to be impeached if it can be done by inspection alone." Ib. 459. The judgment was upon default, but it is well settled that a default does not admit allegations in the complaint of fraud extrinsic to the cause of action." American Encl. of Law, vol. 5, 466. "The acts and recitals of a court not having acquired a jurisdiction, cannot be conclusively binding on him; *nor can acts and recitals be conclusive evidence of facts which*

would give them jurisdiction." *Carleton* v. *Bickford*, 13 Gray, p. 591, 596, 74 Am. Dec. 652. No more can a false statement in the declaration give jurisdiction.

Therefore the plaintiff, in the case at bar, did not admit by default, even if proper service had been made upon him, the untrue allegation set out in the declaration of Cloutier's writ. Nor did the proof presented to the court at Quebec sustain the allegation. It was evident, upon inspection of the proof offered, that Cloutier's alleged assignment was not executed by Tremblay's wife, and that her agreement to transfer a part of her interest in the policy, as collateral security, was not in law even an equitable assignment of her right. Hence there being no legal proof of the allegation set out in the declaration, that the assignment was made by the wife, the Quebec judgment was not founded upon the evidence of any legal claim, and therefore void.

"And if the judgment is wrongfully obtained by a fraud between the parties for the purpose of defeating the title of a third party, the latter may plead the matter in avoidance of a judgment. If the judgment has not been obtained by collusion with the debtor or with any fraudulent design, yet if it was unlawfully recovered to the injury of a third person, who cannot reverse it from error in being a party thereto, he can avoid it in the same manner." *Caswell* v. *Caswell*, 28 Maine, p. 237. "If, upon these facts, the judgment appears to be fraudulent against the creditors, any creditor on whom it is a fraud may give them in evidence." *Pierce* v. *Jackson*, 6 Mass. p. 244. Apply these principles to the proceedings before the court at Quebec and we think the judgment there rendered, even upon the ground of fraud, is not entitled to be considered res judicata against the right of the plaintiff to have his case determined on its merits.

There is still another reason why the proceedings at Quebec are not res judicata. "No court can rightfully render judgment in a cause until it has acquired complete jurisdiction over the parties, the subject matter of the suit, and the process." *Penobscot R. R. Company* v. *Weeks*, 52 Maine, p. 458. "But the records of *all* courts are liable to be impeached if it can be done by *inspection* alone; and if such inspection discloses want of jurisdiction over the person of the defendant, the judgment will be void against him for

that purpose." Ib. p. 439. "If the record negative the jurisdiction, or if it had not been extended, and the original papers do so, then the supposed judgment is void." *Tourigny* v. *Houle*, 88 Maine, p. 408. "Where it appears by the record itself that there was no appearance and no notice which he was bound to attend to, the judgment against him is a dead letter beyond the territory in which it was pronounced." *Middlesex Bank* v. *Butman*, 29 Maine, p. 25. Under these decisions the plaintiff in the present case is not bound by the proceedings in Quebec. No legal service of the writ was made upon him. He was a resident of a foreign country and the plaintiff knew his residence and alleged it in his writ to be in Lewiston, Maine, U. S. A. Service of the writ was by publication. The writ, declaration, summons, publication, default and judgment were against the heirs of Jean O. Tremblay, defendants, giving no name or names. Such a writ and such a service would not give our courts jurisdiction upon which a valid judgment could be rendered in personam.

Nor would the proceedings upon their face furnish a basis for a judgment in rem, even if we assume that the statutes of the Province, or the lex rei sitæ, are the same as our own. By our statutes a judgment in rem can be entered only against the property of the debtor certain liens excepted. *Plurede* v. *Le Vasseur*, 89 Maine, 172. P. F. Tremblay was not the debtor; therefore no valid judgment in rem could be entered against the insurance money, in the hands of the Provincial Treasurer of which he held a legal title. The Quebec court therefore had no jurisdiction over the plaintiff Tremblay in personam or in rem, and could not render a binding judgment. The Revised Statutes of the Province of Quebec applying to this case and made a part of the exhibits are as follows: "Art. 1198. Whenever any person desires to pay any sum of money which is demanded of him by contending claimants, he may deposit the money he so desires to pay in the office of the Provincial Treasurer." "Art. 1199. In the case mentioned in the preceding article, the Treasurer shall pay over the amount deposited to the claimant, who shall produce and file an authentic copy of a competent judgment entitling him to the money, saving the right of the depositor,

if the deposit receipt has not been registered, and if the money has not been paid into court as a tender, to withdraw his deposit, before the same shall have been demanded by the claimant." There is no evidence in this case that the receipt was registered or that the money had been paid into court as a tender. The company, therefore, had full power and ample opportunity, being a party to the proceedings, even after the judgment was rendered, to fully protect itself against any doubt of the legality of the Quebec proceedings by withdrawing its deposit from the treasury. Although having a full knowledge of all the transactions of Cloutier and P. F. Tremblay with respect to their claimed assignments, and of the conditions imposed by themselves in order to make an assignment valid, together with a presumed knowledge of the law, yet they stood by and allowed the proceedings of Cloutier to be consummated without the slightest intervention. It would not be a great strain upon the imagination, under the circumstances in this case, to read between the lines of these proceedings the subtle goodwill of the company contributing to the result attained. They can neither legally nor morally complain of the fall of the Quebec judgment. The case was reported with the stipulation, "if the law court is of opinion that the action is maintainable, it shall render such judgment as the rights of the parties require." The action is maintainable. In accordance with the stipulation,

Judgment for the plaintiff for $1959.49, and costs, and interest from April 21st, 1901, ninety days after the death of the insured.

STATE OF MAINE *vs.* WEBB'S RIVER IMPROVEMENT COMPANY.

Franklin. Opinion June 30, 1903.

Indictment. Nuisance. Dams. Flooding Highway. Criminal Pleading. Corporation Charter. Public Act. R. S., c. 17, § 5; c. 1, § 6, par. XXVI. Spec. Laws 1891, c. 84.

Since the passage of R. S., c. 1, § 6, par. XXVI, acts of incorporation are public acts and bound to be noticed by the courts as part of the law of the land.

In criminal pleading it is not ordinarily necessary to make negative averments, unless the clause defining the crime contains exceptions.

An act of incorporation, which modifies a general statute declaring the obstruction or encumbering of a highway to constitute a nuisance, is equivalent to an exception reserved in the clause of the statute which defines the crime.

An indictment for a nuisance by overflowing a highway, against a corporation whose charter authorizes the maintenance of dams, etc., at the outlet of a pond, should contain a negative averment to the effect that the dam complained of is not erected and maintained in accordance with the charter.

If the dam complained of is erected by the respondent in accordance with its charter and so maintained no indictment for nuisance will lie, even though individuals or the public have been injured.

See *State* v. *Godfrey*, 24 Maine, 232.

Exceptions by respondent. Sustained.

Indictment for a nuisance under R. S., c. 17, § 5. Respondent was charged with raising the water in Webb's Pond in the town of Weld, in Franklin County, by means of a dam, to such a height that the highway around the head of said pond was overflown, obstructed and rendered impassable.

The indictment was as follows:—

"STATE OF MAINE.

Franklin, ss.

At the Supreme Judicial Court, begun and holden at Farmington, within and for the County of Franklin, on the first Tuesday of February in the year of our Lord one thousand nine hundred and two,

the jurors for the State aforesaid, upon their oaths present that there is and for a long time, to wit, for the space of eighty years last past, has been a public road and common highway, situated, lying and being in the Town of Weld in the County of Franklin aforesaid, leading from Webb Post-Office around the westerly side of Webb's Pond to Carthage in said County, of great length, to wit, of the length of ten miles, and of great breadth, to wit, of the breadth of four rods, over and upon which the citizens of the State aforesaid have been accustomed to pass and repass freely and at their pleasure with their horses, teams, carts and carriages.

And the jurors aforesaid further present that the Webb's River Improvement Company, a corporation existing under and by force of the law of this State, duly organized and doing business, and having an office in Lewiston, Androscoggin County, Maine, on the fifteenth day of March in the year of our Lord one thousand nine hundred, erected and has since maintained to the day of the finding of this indictment dams at the outlet of said Webb's Pond in said Franklin County.

Whereby and by reason of said dams the water in said pond has been raised to a great height and has overflown, obstructed and encumbered said highway around the head of said Webb's Pond, and rendered the same impassable, so that the citizens of the State aforesaid over and upon said highway with their horses, teams, carts and carriages, at and during the time aforesaid since said dams were erected, could not nor yet can, pass and repass with safety and convenience, to the great damage and common nuisance of all the citizens of said State over and upon said highway, passing and repassing as aforesaid, against the peace of the State and contrary to the form of the Statute in such case made and provided.

A true bill.

A. V. HINDS, Foreman.

H. S. WING, Attorney for the State."

The respondent, having obtained leave to plead over, filed a general demurrer to the indictment. The presiding justice overruled the demurrer and the respondent alleged exceptions.

Sections 3 and 4 of respondent's charter are as follows:

"SECT. 3. Said corporation is hereby authorized to construct and maintain dams and side dams, piers, abutments, booms, side booms and sluices at the outlet of said pond and in said river, and to blast, excavate and deepen said outlet and the channel of said river, remove any obstructions therein and make any and all other improvements thereon which will facilitate the transportation of logs, wood and other lumber down said stream into the Androscoggin river; to hold and occupy by lease or purchase, and to enter upon and take such land and materials as may be necessary to make its said improvements, and to flow such land, so far as it may be necessary to accomplish its object. Provided, said corporation shall not enter upon and take for the purpose aforesaid any mill site otherwise than by lease or purchase, and said corporation shall pay to the owners of said land and material so taken, such sums as the parties may agree upon, or if they cannot agree, such damages as may be adjudged by the county commissioners of the county in which said land and materials are taken, in the same manner and under the same conditions and liabilities as are provided in the case of damage by the laying out of public highways, and for lands flowed by said corporation the owners shall be entitled to the same remedies as are now provided by law in cases of flowing lands by the erection of dams for mills.

"SECT. 4. Any dam erected or maintained by said corporation at the outlet of the pond under the authority of this act, shall be of such height as not in ordinary seasons to flow the water in the pond above ordinary high-water mark, and the authority to hold said water shall be limited solely to the purpose of floating logs, wood and lumber out of said pond and down said river during the spring driving season. It shall be the duty of said corporation to use reasonable diligence in running said logs, wood and lumber down the river, completing the same by June fifteenth, and thereupon to so manage the dam that the water in the pond and the flow in the river shall continue in its natural state as near as may be, until another driving season begins."

The contentions of counsel on both sides concerned the question as to whether the indictment should allege that the dam was not erected

in pursuance of authority of statute, or whether the privilege conferred by its charter should be pleaded by the respondent.

H. S. Wing, County Attorney, for the State.

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

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

PEABODY, J. This is an indictment against the Webb's River Improvement Company, a corporation doing business in Lewiston, in the County of Androscoggin and State of Maine, for nuisance in which it is alleged that the respondent corporation maintained certain dams at the outlet of Webb's Pond, in Franklin County, in said State, by which the water of the pond was raised so as to overflow, obstruct and encumber the highway around the head of the pond rendering it impassable.

By R. S., chap. 17, § 5, "The obstructing or encumbering by fences, buildings, or otherwise, highways, private ways, streets, alleys, commons, common landing places, or burying grounds, are nuisances within the limitations and exceptions hereafter mentioned."

The respondent demurred to the indictment as insufficient in law. The demurrer was overruled by the presiding justice, and the cause is brought before the law court on exceptions.

It appears that the Webb's River Improvement Company was incorporated by an Act of the Legislature, chap. 84, Private and Special Laws of 1891, referred to and made part of the bill of exceptions. Its charter gave the corporation the right to maintain dams and other structures at the outlet of this pond, and it is claimed by the respondent that the indictment alleges nothing which it has done not authorized by the act of incorporation.

The charge constitutes an indictable offense to which corporations, as well as individuals, are amenable, and unless privileged by the special act of incorporation, the respondent would be chargeable with the offense defined in the section and chapter of the R. S. quoted. The test of its rights and privileges is the statute conferring them.

The alleged insufficiency of the indictment is that it fails to show that the dam was not erected and maintained in accordance with the rights and privileges granting it.

It is an elementary rule of pleading that every material fact essential to the commission of a criminal offense must be distinctly alleged in the indictment. *Williams* v. *The People*, 101 Ill. 385; *State* v. *Paul*, 69 Maine, 215; *State* v. *Chapman*, 68 Maine, 477; *State* v. *Bushey*, 84 Maine, 459.

Ordinarily it is not necessary to make negative averments unless the clause defining the crime contains exceptions. Bishop New Criminal Procedure, par. 631.

While the statute quoted has in its terms no exception or limitation exempting the respondent from its effect, the law creating the corporation gave it authority to do what the indictment alleges it has done. The Act of the Legislature was a public act, and the courts are bound to notice its provisions as part of the law of the land. R. S., chap. 1, § 6, par. XXVI.

So that as to the respondent, the act of incorporation modified the statute which declares such obstructions nuisances as fully as if it had been incorporated therein. The corporation if it has erected and maintained the dam in accordance with its charter is protected against indictment for nuisance even though individuals or the public have been injured. *Crittenden* v. *Wilson*, 5 Cowen, 165, 15 Am. Dec. 462; *Commonwealth* v. *Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

If the acts of the respondent described in the indictment are only such as it might legally do, no law has been violated and no offense is charged in the indictment. *State* v. *Godfrey*, 24 Maine, 232, 41 Am. Dec. 382; *State* v. *Turnbull*, 78 Maine, 392.

The indictment is therefore insufficient in not alleging that the respondent corporation exceeded its charter rights and privileges. This case is substantially identical with *State* v. *Godfrey*, supra.

Exceptions sustained. Demurrer sustained.

GEORGE W. BROWN *vs.* JONAS EDWARDS, et als.

Penobscot. Opinion June 30, 1903.

New Trial. Warranty. Sale. Horse. Whistler.

When it is obvious that the jury reached their conclusion by inferences not sustained by facts proved, a new trial will be granted.

In a case where the evidence consists principally of testimony which is neither discredited nor conflicting, and the cross-examination of the witnesses indicates no distrust of their truthfulness, the law court has the same opportunity as the jury to weigh the evidence.

In such a case, on a general motion for a new trial, the questions in dispute will be examined by the law court by a review of the evidence from the point of view of the parties.

The disease of whistling in a horse sold with a warranty was not known to the parties or any of their witnesses, until nearly two months after the sale, although nearly all of them were experienced horsemen, and the usual tests were applied.

Within a few days after the symptoms were first recognized the disease resulted fatally.

Held; that a theory that the disease existed in the horse in question, in a primary stage, at the date of the sale and warranty, is not well founded.

Motion by defendants. New trial granted.

Assumpsit, brought after rescission, for an alleged breach of warranty in the sale of a horse. Plaintiff's declaration was as follows:

"In a plea of the case, for that whereas the said defendants on the 24th day of January, A. D. 1901, at said Auburn, offered to sell to the plaintiff a certain brown horse of the said defendants, and thereupon then and there in consideration that the plaintiff at the special request of the said defendants would buy of the said defendants the said brown horse at a large price or sum, to wit, one hundred dollars, to be paid by the plaintiff to the said defendants upon request, the said defendants promised the plaintiff that the said brown horse was sound and the plaintiff in fact saith that he confided in the said promises of the defendants, and then and there at the special request of said defendants, did buy of the said defend-

ants the said brown horse at and for the price of one hundred dollars, and did then and there pay to the said defendants the sum of one hundred dollars, yet the said defendants did not regard their promise aforesaid but craftily and subtly deceived the plaintiff in this, that the said brown horse at the time of making the promise aforesaid was not sound, but on the contrary thereof was unsound and was afflicted with a certain malady or disease, called whistling or wind broken, and was of no value whatever; and the plaintiff alleges that as soon as he ascertained that said horse was unsound and afflicted with disease as aforesaid, he returned him to the said defendants on the 30th day of March, A. D. 1901, and has requested the said defendants to pay back to him the said sum of one hundred dollars thus paid them as aforesaid, whereby and by reason of which the said defendants became liable to the plaintiff and promised to pay him said sum of one hundred dollars.

Yet though often requested, said defendants have not paid said sum nor any part thereof, but neglect and refuse so to do, to the damage of said plaintiff (as he says) the sum of two hundred dollars."

The plea was the general issue. The verdict was for plaintiff.

The facts appear in the opinion.

P. H. Gillin and T. B. Towle, for plaintiff.

Counsel contended that under the light of the testimony the plaintiff has proven by a fair preponderance of the evidence, first: That the horse was warranted. Second: That there was a breach of this warranty, to wit; that this horse, sold and delivered to Mr. Brown, the plaintiff, was a whistler and a blower at the time he received him.

The evidence shows even in the light of the testimony of defendants' own witnesses, that this horse might have been kept by the plaintiff for a long period of time, and not until occasion presented itself, would he or any other person have found out that the horse was a whistler. It would indeed be hard and unreasonable in a case of this kind were plaintiff compelled to show that the horse was a whistler and a blower before the sale, other than by circumstantial evidence.

Counsel contended that taking the testimony as it was offered in the case, connecting link with link, the jury could not have done otherwise than to have found a verdict for plaintiff. The disease of whistling existed in this horse in a primary stage at the date when defendant sold him to plaintiff with a warranty of soundness.

Tascus Atwood; F. J. Martin and H. M. Cook, for defendants.

SITTING: EMERY, WHITEHOUSE, STROUT, SAVAGE, PEABODY, SPEAR, JJ.

PEABODY, J. Assumpsit to recover the price paid for a horse sold and delivered to the plaintiff after rescission of the sale for breach of warranty. The case is brought before this court on motion of the defendants to set aside the verdict of the jury because against law, evidence and the weight of evidence. The evidence consists principally of the testimony of witnesses not discredited or conflicting. From facts not in dispute the jury by their verdict must have found that the defendant warranted the horse sound except as to quarter cracks in the forward feet, and that it was at the time of the sale unsound by being affected with a disease called whistling. The warranty we think is proved; but the breach of warranty is a question which must be decided by a review of the evidence from the point of view of the parties.

It appears that the horse in question was purchased for the defendants just previous to the sale to the plaintiff by an experienced buyer who applied the usual tests to determine its soundness and discovered no evidence of whistling; and the defendants, making use of similar tests, and parties who used the horse in hauling coal failed to notice such defect. After the sale to the plaintiff the horse, being noticeable in its general appearance, was for weeks under the casual observation of experienced horsemen, and to them it appeared in good condition. Afterward it was sold by the plaintiff to a man by the name of Smith who was familiar with horses, and his examination failed to disclose unsoundness in respect to the horse's breathing until he was driving it home, a distance of twelve miles. The whistling became so manifest that in about a week he returned the

horse and the price which he had paid was refunded. The plaintiff thereupon, finding that the horse was unsound, shipped it back to the defendants by rail with notice to him of his reason for rescinding the sale. The horse when removed from the car was found to be sick and upon the advice of a veterinary surgeon it was chloroformed. The sale was made January 24th, and the rescission March 30th, 1901. It appears by the evidence that the disease was not known to the parties or any of their witnesses during a period of nearly two months, and that within a few days after its symptoms were recognized it resulted fatally.

The theory of the plaintiff is that the disease existed at the time of the sale and warranty in its primary stage, induced either by acute laryngitis or by paralysis caused by working in an ill-fitting collar, and that it had not become sufficiently developed to attract the attention of himself or those about his stables until after the sale to Smith. And he relies upon the testimony of the experts to show that if the horse was not driven fast or loaded heavily, no person could tell whether he was a whistler or not; and he claims that the condition of the weather was such that there had been no opportunity or occasion to use the horse in a way to develop symptoms of the disease.

The theory of the defendant is that the disease was contracted while in the possession either of the plaintiff or Smith from exposure in severe weather or from contagion; and he relies upon the fact that the horse was taken from a close stable and actually used in hauling snow and subsequently driven a considerable distance to Smith's home; and upon the further fact that when the horse was returned to him it bore evidence of having taken a sudden cold or of being affected by some other malady in an acute form inconsistent with the plaintiff's theory of the gradual development of the disease.

The parties were large dealers who must have had special knowledge in reference to conditions affecting the soundness of horses, and their acts do not indicate bad faith on the part of either, but that in fact neither of them knew that the horse was unsound, except the obvious defects in its feet, until it had been returned by Smith to the plaintiff. The cross-examination of the witnesses does not indicate

distrust of their truthfulness. This court has the same opportunity as the jury to weigh the evidence, and it is obvious that they must have reached their conclusions by inferences not sustained by facts proved. Nearly two months after the horse was warranted sound the disease which constituted the alleged breach of warranty was first discovered. It is possible that it might not have been so far developed as to be observed under the existing circumstances, but it seems improbable that it could have existed at the date of the warranty when we consider the tests made by the purchasing agent, the three days of heavy work in hauling coal, the good general condition indicated by the appetite and appearance of the horse until a few days before its death. Beach on Contracts, § 281.

Motion sustained. New trial granted.

ORREN DAVIS *vs.* AVERY STARRETT.

Knox. Opinion June 30, 1903.

Slander. Words Actionable Per Se. Privileged Communication. Malice. Evidence. Repetition of Slander. Probable Consequence. Special Damages. Boycott. Pleading. Excessive Damages.

1. To say of one that he is the greatest rumseller in town, taking the words in their natural and ordinary signification, either imports a criminal charge ex vi termini, or is susceptible of that construction, and as imputing a criminal charge, is actionable per se.
2. An action for slander may be sustainable upon proof of facts from which malice may be implied, which is called malice in law. But the plaintiff may also show malice in fact, that is, actual malice, a desire and intention to injure.
3. To show actual malice, it is competent for the plaintiff to prove that the defendant has repeated the slander charged, or has used the same or similar words upon other occasions.

4. The materiality of evidence of other statements than the one sued for, depends not upon whether they are privileged or not, but upon whether or not they have a tendency to show actual malice in the utterance of the slander in suit.

5. Another statement, otherwise privileged, may therefore be admissible to show actual malice in making the statement sued for.

6. The plaintiff alleged special damages, in that he "had been greatly injured in his business as a trader by persons boycotting his store," on account of the slander charged: —

Held; that the word "boycott" in such connection does not necessarily imply a combination to injure, and that it was open to the plaintiff to show refusal to trade on the part of old customers, on account of defendant's slander, and that, with or without combination.

7. While one who utters a slander is not responsible, either as on a distinct cause of action, or by way of aggravation of damages for the original slander, for its voluntary and unjustifiable repetition without his authority or request, by others over whom he has no control, it is nevertheless true that the slanderer is responsible for the natural and necessary consequences of his act, and it may well be held that the repetition of a slander is a natural consequence of the original publication, and may be regarded as fairly within the contemplation of the original slanderer, and a consequence for which he is responsible.

Held; that the jury in this case were justified in returning a verdict for the plaintiff, but taking into account all the elements of damage which were open to the plaintiff, for loss of reputation, mental suffering, loss of business, and even punitive damages, the court is further of the opinion that the verdict is unwarrantably large.

Exceptions and motion by defendant. Motion sustained.

Exceptions overruled.

Action on the case for slander uttered by defendant concerning plaintiff.

The declaration contained two counts; the first in the common form, in which it was alleged that the plaintiff said of the defendant, "Orren Davis is the greatest rumseller in Warren, Maine."

The second count alleged a boycott of plaintiff's store as the result of the slanderous reports concerning him circulated by the plaintiff and was as follows: —

"Also for that the said plaintiff is a good, true, and honest citizen of this State and from his birth hath hitherto always behaved and governed himself as such, and during that time hath been held and esteemed and respected to be of good name, character and reputation

as well, among a great number of his fellow citizens as among all his neighbors and acquaintances and during all that time has never been guilty of committing any crime such as selling intoxicating liquor or any such hurtful or disgraceful crime, and whereas the said defendant well knowing the premises aforesaid but contriving and maliciously intending to hurt, injure, degrade and disgrace the plaintiff in his aforesaid good name, reputation and character to subject him to the pains and penalties of the laws of the State provided against those who sell intoxicating liquors, did on the fifteenth day of September, A. D. 1901, at Warren, in the County of Knox and on divers other days and times since the said fifteenth day of September and on the day of the purchase of this writ, in the presence and hearing of divers good citizens of this State, of and concerning the plaintiff did falsely and maliciously speak and utter in substance the following false, scandalous and defamatory words of and concerning the plaintiff; "Orren Davis," meaning the plaintiff, "is a rumseller," meaning that the same plaintiff was engaged in the selling of intoxicating liquor in this State contrary to law by speaking and publishing of which said several false, malicious and scandalous and defamatory words and of the false and malicious charge the plaintiff has been greatly injured and prejudiced in his own good name and character and reputation aforesaid, and his business as a trader by persons boycotting his store on account of the slanderous reports spoken and published by the defendant aforesaid greatly injured and he has been rendered liable to be prosecuted for the crime of selling intoxicating liquors in the State contrary to law and has suffered and undergone great pain and distress and trouble both of body and mind and likewise greatly injured and prejudiced.

To the damage of the said plaintiff (as he says) the sum of three thousand dollars."

Defendant moved for a statement of particulars and the motion was allowed. The plaintiff complied with the order by filing the following specifications:

"The plaintiff will undertake to prove that the defendant, Avery Starrett, on or about the sixteenth day of Aug. 1901, said in substance to C. H. Webster at Warren in said County of Knox, 'Orren

Davis is a rumseller.' Also the said Avery Starrett at Warren, Sept. 10, 1901, in the presence of divers citizens among whom was one Newel Eugley made the following statement that 'Orren Davis,' meaning the plaintiff, 'is the biggest rumseller in town,' and that he (Starrett) 'could back it up.'

And the plaintiff expects to prove further by Dexter B. Hahn, that in Sept., 1901, Avery Starrett said that 'Orren Davis is a rumseller,' and that at the same time said to Joseph W. Hahn and Augustus Hahn, that 'Orren Davis is a rumseller,' also that the said Avery Starrett said in the presence of divers other witnesses, whose names are at the present time unknown to the plaintiff, in Warren aforesaid and at the time aforesaid, 'Orren Davis is a rumseller.'"

The plea was the general issue with the following brief statement:

"And for brief statement of special matter of his defense, the defendant, not confessing the utterance of any of the alleged slanderous words charged in the plaintiff's declaration, says:

1. That he will prove the essential truth of whatever words the plaintiff shall prove that he has spoken of and concerning the plaintiff.

2. That if it shall appear that the defendant spoke the alleged slanderous words of and concerning the plaintiff set out in the plaintiff's declaration, it will also appear that such words, if they would otherwise have been slanderous, were spoken under such circumstances as made them a privileged communication, and without malice to the plaintiff, and that therefore they were not slanderous."

The facts are stated in the opinion.

L. M. Staples, for plaintiff.

L. F. Starrett, for defendant.

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

SAVAGE, J. Action for slander in which the plaintiff recovered a verdict for $1500. In one count of the writ it is alleged that the plaintiff said of the defendant, "Orren Davis is the greatest rumseller

in Warren, Maine," and in another that he said, "Orren Davis is a rumseller." Special damages are averred.

EXCEPTIONS.

1. The plaintiff offered the testimony of one Joseph Hahn to prove that the defendant said that the plaintiff was the "worst" or the "greatest" rumseller in Warren. Hahn also testified that the statement was made to himself, and that no one else was present. The defendant claimed and testified that he did not make this statement to Hahn, but that he did say to one Webster in the presence of Joseph Hahn, that he considered the defendant the worst rumseller in the town of Warren. The defendant further testified that he made no such statement about the defendant to Hahn at all, or in his presence or hearing at any other time than the occasion of the conversation with Webster. Hence he claims that the conversation testified to by Hahn must be the same one he admits having had with Webster, but varying in details.

The defendant claims that the communication to Webster was privileged by the occasion and circumstances under which it was uttered. His version is as follows: "In the field we (defendant and Webster) were together at work, and he asked me to bring up a package for him from Mr. Davis previously; I brought it up and gave it to him, and he told me it was an application for membership in the Order of Odd Fellows in the village. . . I asked him if he was going to send in his name or his application by Orren Davis, and he said he was, and I told him I should rather send it in by any other member that I knew of in the order other than by him. He asked me why, and I said, because he doesn't have a good reputation, and further he asked me what I meant by that, and I said that I considered him the worst rumseller in the town of Warren. . . . . Joseph Hahn was at work there in the field." Webster testified that Hahn was not over a rod away.

The presiding justice ruled that the communication to Webster was not privileged, and the defendant excepted.

We think, as claimed by the learned counsel for the defendant, that it is made fairly certain by reference to the plaintiff's specifications and the instructions of the court, that neither the conversation

with Joseph Hahn, nor that with Webster, whether they were the same conversation or not, was the slander for which the plaintiff recovered damages, and thereupon it is suggested that the question whether the communication to Webster was privileged or not was immaterial, because not relating to the slander which was the basis of the action.

It does not seem to us that the question whether the communication to Webster was technically privileged or not, is material to any issue presented by the case. In slander, as is well settled, while an action may be sustainable upon proof of facts from which malice may be implied, which is called malice in law, the plaintiff may also show malice in fact, that is, actual malice, a desire and intention to injure. *True* v. *Plumley*, 36 Maine, 466. And as bearing upon the question of actual malice, it is competent for the plaintiff to show that the defendant has repeated the slander charged, or has used the same or similar words upon other occasions. *Smith* v. *Wyman*, 16 Maine, 13; *True* v. *Plumley*, supra; *Conant* v. *Leslie*, 85 Maine, 257. Such other communications, whether claimed to be privileged or not, are admissible, but solely for the purpose of showing actual malice in the slander sued for,—to show the state of mind, the purpose and intention of the slanderer.

Upon examination of the charge of the presiding justice, which is made a part of the bill of exceptions, we find that in this case the jury were told that the slanderous communications, other than the one which was the basis of the action, were not admitted to prove the allegation of slander charged in the writ, but "as bearing upon the question of motive and intent and actual malice on the part of the defendant." Such communications are to be viewed not only in the light of the words themselves, but in the light of the surrounding circumstances. The words themselves, when spoken, where spoken, and to whom spoken, the occasion of their utterance, the spirit and purpose of the speaker are all to be taken into consideration, in pursuing the single inquiry whether such words spoken under such conditions have any tendency to show that in uttering the slander sued for, the defendant was moved by actual malice. If yes, then they are properly to be considered. If no, then they are to be disregarded.

It is easily apparent that slanderous words, otherwise privileged, may be uttered in such a spirit or under such circumstances as to indicate that they themselves are the product of a hostile or malevolent disposition. If so, they certainly would have a tendency to show that in uttering some other but similar, slander, the speaker was moved by the same disposition. The materiality, then, of evidence of other statements than the one sued for depends not upon whether they are privileged or not, but upon whether or not they have a tendency to show actual malice, in the utterance of the slander in suit.

It was immaterial, therefore, upon the only question to which it could be referred, whether the defendant's communication to Webster was privileged or not. The jury were entitled to consider it as bearing on the question of the actual malice of the defendant in the substantive slander sued for. The defendant's exception to the instruction under consideration must be overruled. *Blake* v. *Parlin*, 22 Maine, 395; *Neal* v. *Paine*, 35 Maine, 158. And the defendant asked for no other instructions relating to this issue.

2. It is alleged in one count that on account of the slanderous reports uttered by the defendant he had been greatly injured in his "business as a trader by persons boycotting his store." The defendant requested a ruling that "because the word 'boycotting' necessarily involved the idea of combination, before special damages could be proved, the plaintiff must lay a foundation by showing a combination of parties to injure the plaintiff's business," which ruling the presiding justice refused to give. This refusal was right. The defendant relies upon etymological definitions to show that the idea of "combination to injure" is necessarily involved in the word "boycott." The word is comparatively new. As it first came into use in connection with the treatment which the tenants of Captain Boycott extended to their landlord, it undoubtedly did embody the notion of a combination. But the word quickly and generally came to have a more enlarged sense. The defendant's counsel frankly concedes that "the word is sometimes loosely used in conversation to express a certaim amount of injurious discrimination without any special agreement or understanding on the part of those who discriminate." That is indeed a common colloquial use of the word. So is refusal

by one's customers to trade, for some reason that is common, though there be no combination. And under that allegation in the plaintiff's writ, it was open to him to show refusal to trade on the part of old customers, on account of defendant's slander, and that, with or without combination.

The defendant does not press the remaining exception. We perceive no error in the ruling.

MOTION. It is not seriously controverted that in this State to say of one that he is the greatest rumseller in town, taking the words in their natural and ordinary signification, either imports a criminal charge ex vi termini, or is susceptible of that construction, and as imputing a criminal charge, is actionable per se. What is sought is not ingenious interpretation, but ordinary significance, and the import of the language used is for the jury. *Usher* v. *Severance*, 20 Maine, 9, 37 Am. Dec. 33. The defendant denying the use of the precise language alleged, admitted the use of language of similar purport, and as to the language proved, he pleaded the truth in justification. The jury found that he did use the language charged, and that the justification failed. The evidence warranted both findings.

The only remaining question open under the motion is whether the jury manifestly erred in the amount of damages awarded. The plaintiff claims damages to reputation, for mental suffering and for loss of business, and in addition to this he claims that punitive damages were allowable. The defendant urgently contends that nominal damages at the most are all the plaintiff is entitled to recover, that as to the one slander, upon which he claims the jury have based their verdict, namely the communication to Augustus Hahn in the presence of Eugley, as testified to by Eugley, there is no proof that it caused injury to the plaintiff, that it was induced by the inquiries of Hahn, and that if repeated to the injury of the plaintiff, he is not responsible for the repetition. We do not agree with the defendant's conclusion. In the first place plaintiff is entitled to recover compensation which the law will presume must naturally, proximately and necessarily result from the utterance of the slander, such as injury to the feelings and injury to the reputation, and these damages may be

more or less according to circumstances. They are by no means confined to the limit of nominal damages. The plaintiff is also entitled to recover such special damages alleged and proved as have resulted exclusively from the utterance of the slander. But the defendant says that none have been proved, that there has been no casual connection proved between the defendant's language and the plaintiff's loss of trade. And the defendant relies upon the familiar rule that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages for the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control. *Hastings* v. *Stetson*, 126 Mass. 329, 30 Am. Rep. 683. But this rule has one important qualification. It is a general principle that every one is responsible for the natural and necessary consequences of his act. And it well may be that the repetition of a slander may be the natural consequence of the defendant's original publication. Odgers on Libel and Slander, p. 294. The same thought is expressed in the note to *Gilson* v. *Delaware & Hudson Canal Co.*, 65 Vt. 213, 36 Am. St. Rep. at p. 844, where the editor says:—"If the test of natural and probable consequence is to be applied, there should certainly be no difficulty in holding that the original slanderer must be taken to have intended all the damages that the widest possible spread of the slander could produce, for it is the most threadbare of truisms to say that nine persons out of every ten to whom a slander is spoken are certain to repeat it." Without going to the full extent of this last citation, we think it may be said with reason in this case that the repetition of the slander by those to whom it was uttered, and after that by others, may be regarded as fairly within the contemplation of the original slander, and a consequence for which the defendant may be held responsible.

Aside from the damages to reputation and for injury to feelings, which can only be estimated, but not computed, there is evidence which warranted the jury in finding that the plaintiff had suffered a loss of business as a trader on account of the slanderous statement uttered by the defendant. The plaintiff himself places it at one-third of his trade, which before this slander he says was from one hundred

to one hundred and fifty dollars a month. His pecuniary loss of course is only the loss of profits on that one-third, at his own estimate. We think however that it is clearly proved that all of this loss was not due to the defendant's slander. It is evident that after this suit was commenced the people in Warren to some extent "took sides", and that the defendant lost some custom in this way. Also it appears that after the slander and before the trial, a new store with new goods in the plaintiff's line was opened in Warren, and to this fact some of the plaintiff's loss of trade was undoubtedly due.

And as bearing upon the loss to reputation, it is shown that the plaintiff for some years prior to this slander, had been suffering from the reputation of being a rumseller, though the scandal was manifestly increased after the defendant uttered his slander. The plaintiff also claims that punitive damages were recoverable, on the ground that express malice was shown. Repetitions of a slander by the defendant, even after suit brought, are admissible to show express or actual malice, and to enhance damages. *Smith* v. *Wyman*, 16 Maine, 14; *True* v. *Plumley*, 36 Maine, 466; *Jellison* v. *Goodwin*, 43 Maine, 287, 69 Am. Dec. 62. Such repetitions are not conclusive of actual malice. They are evidence from which the jury may infer it. The defendant claims that his acts and words were proper and lawful even, and that he did no more than any citizen should do in an endeavor to repress crime. The law permits and even encourages good citizens to aid in the enforcement of law. If this defendant believed and had reason to believe that the plaintiff was a rumseller, the law authorized him to make a complaint under oath against the plaintiff. And if he had done so, he would have been protected, whether the charge turned out to be true or not. But if he chose to talk rather than to act, he came under the necessity of proving that his charges were true unless privileged.

So it has been held that to justify by pleading the truth, if the justification fails, may be regarded as an aggravation of damages. *Smith* v. *Wyman*, supra; *Sawyer* v. *Hopkins*, 22 Maine, 268; *Jackson* v. *Stetson*, 15 Mass. 48. But taking all considerations into account, after carefully weighing all the evidence, we are of opinion that the verdict is unwarrantably large. We think that in any event

upon the evidence now presented, no verdict for more than six hundred dollars ought to stand.

Exceptions overruled. If the plaintiff remits all of the verdict in excess of $600, within thirty days after the rescript in this case is received, motion overruled; otherwise motion sustained, new trial granted.

HARRY R. VIRGIN, EXOR.,

vs.

ERNEST H. MARWICK, and others.

Cumberland. Opinion June 30, 1903.

Adoption. Life Insurance. Will. R. S., 1857, c. 59, §§ 28, 29; 1871, c. 67, §§ 30, 31; 1883, c. 75, § 10.

The term child, by the statutes of this State regulating adoption of children, has a broader significance than issue.

When a statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child; and is under the same duties.

A policy of life insurance, issued in 1863 in this State, payable to the assured, his executors, administrators or assigns, for the benefit of his widow, if any, otherwise for the benefit of his surviving children, passes by the will of the assured to a child adopted afterward, no widow or issue surviving, it being the intention of the testator to provide for that person surviving him who stood in the legal relation of a child.

Such beneficiary must be regarded as the testator's child, not by birth, but by law, and entitled to the proceeds of the policy as clearly as if he had been designated by name in it.

Held; that the adopted child's right thereto was by virtue of the contract in the policy; and so vested in him that it could not be altered or taken away by will or otherwise.

The provisions of R. S., c. 75, § 10, relating to the premiums for the last three years, do not apply to one who takes, not by descent, but as a beneficiary designated in the policy.

On report. Bill sustained and decree according to the opinion.

Bill in equity asking for the construction of the will of Edward A. Marwick, of Portland, deceased.

The case appears in the opinion.

Franklin C. Payson and Harry R. Virgin, for plaintiff.

Frank W. Butler, for defendant Marwick; *Robert T. Whitehouse, Jed F. Fanning, Charles E. Burbank,* for other defendants.

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

STROUT, J. This is a bill asking construction of the will of Captain Edward A. Marwick, but to facilitate settlement of the estate, the parties request that it may also be regarded as a bill of interpleader, so far as the disposition of money received upon two life insurance policies is concerned, and as all parties interested in the fund are before the court, we accede to the request.

July 17, 1863, Captain Marwick took a policy of insurance upon his life in the New England Mutual Life Insurance Company, for five thousand dollars, in which the company promised to pay that sum to "the said assured, his executors, administrators or assigns sixty days after due notice and proof of the death of the said assured" . . . . "for the benefit of his widow, if any, otherwise for the benefit of his then surviving children."

January 28, 1865, he took another policy for five thousand dollars in the same company, with the same provisions as to payment as in the first policy,—"for the benefit of his widow, if any, and his then surviving children, in equal shares to each." Marwick was married in 1860. His wife was living when these policies were issued. In 1861 she gave birth to a child, which deceased in about two weeks after its birth. She never bore another child, and died before her husband who did not again marry. Marwick died February 16, 1895, leaving neither widow nor issue of his body.

In October, 1872, Captain Marwick and his wife petitioned the Probate Court for leave to adopt a boy named Ernest H. Gruntzow, and that court at a term held on the first Tuesday of October, 1872, after hearing,—"decreed and declared that from and after the date hereof the said child shall be to all legal intents and purposes the child of said petitioners, and that his name be hereby changed to that of Ernest Herman Marwick", and delivered to Captain Marwick and his wife a certificate signed by the judge, under seal of the court, in which it was stated "that from this day said child shall to all legal intents and purposes be your child". . . . "You therefore assume the relation of parents to said child, and will hereafter cherish, support, educate and otherwise provide for him as though you were his natural parents." Thenceforward Ernest was the legal child of Captain Marwick, from whom he was entitled to receive the same respect, obedience and service as from a natural child, and to whom he owed all the duties of a parent. This relation existed until the death of Captain Marwick.

Ernest now claims the proceeds of these policies of insurance, which have been paid to the executor, as legal child of Captain Marwick. The claim is resisted by other parties interested in Captain Marwick's estate.

If Ernest is to be regarded as a child of Captain Marwick, within the scope and meaning of these policies, then he is entitled to their proceeds as clearly as if he had been designated by name in them. His right thereto was by virtue of the contract, and so vested in him that it could not be altered or taken away by Captain Marwick by will or otherwise. The estate of Captain Marwick can take no part of them.

The statute in force when this adoption was had, R. S. of 1871, c. 67, provided in section 30 that after the prescribed proceedings in the Probate Court had been taken, the judge of probate "shall make a decree setting forth the facts, and declaring that from that date such child is the child of the petitioners", and by section 31, such adopted child "shall be, for the custody of the person and right of obedience and maintenance, to all intents and purposes, the child

of the adopters, as if they had been his natural parents", except as to the right of inheritance.

Revised Statutes of 1857, c. 59, §§ 28 and 29, in force when these policies were issued contained the same provisions as those in R. S. of 1871, c. 67. They applied to these policies, with such consequences as might legally result therefrom, in case of any future adoption. The contract was not limited to issue. The term child has a broader significance than issue.

The status of an adopted child is well defined by the court in *Power* v. *Hafley*, 85 Kentucky, 674: "It is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise. And when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties." See also *Humphries* v. *Davis*, 100 Ind. 274; *Wagner* v. *Varney*, 50 Iowa, 532.

In *Waldoboro* v. *Friendship*, 87 Maine, 211, it was held that an adopted child took the pauper settlement of the party adopting him. PETERS, C. J., in that case said,—"the common law established certain legal relations between a father and his child, and the statute substitutes the same legal relations between the father and his adopted child. The latter are as legal as the former,—both are legal, the latter superseding the former." The adoption in that case was under the Revised Statutes of 1871, which also govern the present case, and under the statute which provided that legitimate children have the settlement of the father. The same doctrine was held in Massachusetts in *Washburn* v. *White*, 140 Mass. 568, under a statute which provided that "legitimate children shall follow and have the settlement of their father." The court said: "One of the legal consequences of the natural relation of a child born to parents in lawful wedlock is, that it shall take the settlement of its father

if he has any within the State. To this legal consequence the adopted child Dora became subject immediately upon her adoption." The law of that State in regard to adoption of children was no broader than that of this State at the time of the adoption of Ernest, except that it gave the adopted child the right of inheritance.

In *Warren* v. *Prescott*, 84 Maine, 483, a legacy was given to a person who died before the testator—the legatee had an adopted child. The question was whether that child took the legacy, and it was held that he did, not by inheritance as heir,—"but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth".

With two exceptions as to inheritance, the statute made an adopted child "to all intents and purposes the child of his adopters, as if they had been his natural parents".

In *Martin* v. *Ætna Life Insurance Co.*, 73 Maine, 25, a policy upon the life of John Wall, Jr., was issued to his wife and payable to her or her legal representatives for her sole separate use, and in case of her death before that of her husband, the amount to be paid to "their children". They had no child by birth, but had one by gift and adoption. It was held that the adopted child took the insurance under the express terms of the policy. The court said: "The word child in legal documents is not always confined to immediate offspring. It may include grandchildren, step-children, children of adoption, etc., as may be necessary to carry out the intention. See also *Warren* v. *Prescott*, 84 Maine, 483.

We think it clear that Ernest must be regarded as the child of Captain Marwick, not by birth but by law.

Does he come within the intention of Captain Marwick, when he effected these policies? By them he intended to provide for a wife, which he then had, in the event of her surviving him, and in case of her death, that the beneficiary should be his child or children that might be living at his decease. His wife had given birth to a child in 1861, which lived only two weeks. For eleven years thereafter no child had been born, and it is altogether probable that he had abandoned expectation of a natural child. Both he and his wife adopted Ernest, and must have desired and intended him to take the

place of a child by birth. The law invoked by them made Ernest their child, to all intents, except right of inheritance.

To ascertain the intention of parties to a contract, its language is to be considered in the light of conditions existing at the time of its execution. Their position and relations to the subject matter often afford aid in its interpretation. When these policies were taken, Captain Marwick had a wife, but no child. He contemplated the probability that a child might be born to him — probably desired it. With that end in view he made the provisions contained in these policies. It was not in his power to change the beneficiary of the fund, by will or otherwise, if either wife or child survived him.

It was manifestly the intention of Captain Marwick, when he took these policies, to provide for that person surviving him who stood in the legal relation of a child. He asked the law to make Ernest his child. It did so, by formal decree. The rights and duties of parent and child then arose. It would be a reflection upon the sense of justice of Captain Marwick, as a statutory father to the child, to hold that he did not intend this policy to apply to him. There is no evidence that, when these policies were written, he intended to exclude from its provisions any one who should occupy the relation of a child, by birth or otherwise. The contract, construed according to the intention at the time, if not inconsistent with its language, must govern.

It is urged that when in 1885 Captain Marwick made a will, and later in 1895, one month before his death, when he made his last will, he treated the money to be paid upon these insurance policies as belonging to his estate, and made legacies the full payment of which could not be effected without including it, he thereby indicated an intention that Ernest should not be a beneficiary under these policies. Whether so or not, it was many years after the contracts were made, and it was beyond his power to change them or the beneficiaries under them. Making bequests beyond the ability of the estate to pay, is not very uncommon, and is entitled to little weight in ascertaining the scope of a contract made many years previous. *Hathaway* v. *Sherman*, 61 Maine, 475; *Gould* v. *Emerson*, 99 Mass. 157.

Upon the death of Mrs. Marwick the adopted son became the beneficiary designated under each of the policies, as the only surviving child, and is entitled to the whole fund realized from them, less the expense of collection, if any. We cite as bearing upon the question, *Sewall* v. *Roberts*, 115 Mass. 276.

The provisions of R. S., c. 75, § 10, in regard to the premiums for the last three years, do not apply. Ernest does not take by descent, but under the contract, as the beneficiary designated therein.

Certain releases were given by Ernest and other legatees under the will in deference to the supposed wish of Captain Marwick, but these appear to have been without consideration and of no effect. They are not relied on by any of the parties to this suit. We therefore do not consider them.

Our conclusion, that Ernest H. Marwick is entitled to the entire proceeds of the insurance policies, affords an answer to all the questions propounded in the bill, which are now insisted upon.

By the agreement of parties, the decree to be filed shall allow to each of the attorneys in defense the sum of fifty dollars for services, to be paid by the executor from the fund in controversy in this case.

Decree in accordance with this opinion.

CHESTER E. FURBER *vs.* LYMAN S. FOGLER.

Somerset. Opinion June 30, 1903.

Sales. Stock. Consideration—Mere Inadequacy. Fraud. Release. Accord and Satisfaction. Declarations of Party. Verdict. New Trial. Equitable Influences on Jury.

In the absence of inquiry, the omission to mention an indebtedness of a corporation, a transfer of whose stock is the consideration for a promissory note, would not justify a jury in finding fraudulent concealment of facts, in a suit on the note.

In a suit on a promissory note given for the purchase price of stock in a corporation, the defense of fraud is not made out when the defendant's own version of the transaction fails to show such fraudulent representations as to the value of the property as would render the notes invalid.

A distinction is to be observed between want or failure of consideration, which is a defense pro tanto to an action between the parties, and inadequacy of consideration which does not, in law, constitute a defense.

In the absence of fraud a party will not be allowed to interpose, as a defense to an action for the purchase price, the fact that the property was not pecuniarily worth what he supposed it to be.

When the consideration for a promissory note consists of the payee's agreement to transfer to the maker certain stock in a corporation, the agreement is no less valid because the value of the stock becomes depreciated by subsequent events.

Such a depreciation no more gives the defendant a right to avoid his obligation to pay the stipulated price than an enhanced value would avail the plaintiff as an excuse for the non-fulfillment of his agreement.

A purchaser of stock, who paid $300 down and gave his note for the balance, offered to lose the $300 already paid and be released from further liability. There was no evidence of any verbal or written acceptance or of any release; and the notes were not surrendered.

Held; that a declaration by the payee that the maker "was out of the mill business and that he was $300 ahead by the transaction," is not sufficient ground on which to sustain a verdict based upon the defense of a release.

Where it appears that the jury must have been moved by seemingly equitable influences, instead of weighing the evidence under the rules of law given them, their verdict will be set aside.

Motion by plaintiff for new trial. Sustained.

Assumpsit brought to recover the amount due on two promissory notes given by the defendant to the plaintiff, in part payment for the transfer to him of plaintiff's holdings in the capital stock of the Gate City Lumber Company of Port Angeles, on Puget Sound, in the State of Washington.

A witness whose deposition was taken on behalf of defendant testified in answer to one of the direct interrogatories as follows:—

"8. Did Mr. Furber prior to making of said mortgage tell you that he had got $300, which Mr. Fogler had paid in cash and that Mr. Fogler was out of it, and that the transaction between himself and Mr. Fogler was ended?

"To interrogatory eight, he answers: Mr. Furber, in the presence of myself and C. A. Cushing, my father, said that he had got $300 from Mr. Fogler and that Mr. Fogler was out of the mill business and that he was just $300 ahead by the transaction."

The case is stated in the opinion.

S. J. and L. L. Walton; A. A. Beaton, for plaintiff.

C. E. and A. S. Littlefield; A. K. Butler, for defendant.

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

PEABODY, J. This is an action of assumpsit to recover upon two promissory notes, dated June 2, 1900, respectively for $300, eighteen days after date, and $500 six months and eighteen days after date, given by the defendant to the plaintiff as part of the purchase price, $1200, of one-sixth part of the total number of shares of the entire capital stock of the Gate City Lumber Company of Port Angeles, in the State of Washington, which the plaintiff, being an owner of one-third interest in the corporation, agreed in writing to assign and transfer to the defendant; and as no certificates of the capital stock had, at the date of the notes and agreement, been printed or issued by the company, the plaintiff in said writing further agreed upon the printing and issue of the certificates to assign and deliver them to the defendant and cause the transfer to be entered upon the books of the corporation.

The plea was the general issue, with a brief statement of special matters of defense:

1. That the defendant was induced by false and fraudulent representations of the plaintiff to give the notes.

2. That there was no consideration for the notes, or if there was, it has wholly failed.

3. That he has been released by the plaintiff.

The verdict of the jury was for the defendant, and the case comes to the law court on the plaintiff's motion that the verdict be set aside.

At the date of the transaction between the parties, a saw-mill was owned by the Gate City Lumber Company, a corporation whose entire stock was held by the plaintiff and two other persons in equal proportions, but no certificates of stock had been issued.

The location of the mill was on Puget Sound at Port Angeles, in the State of Washington, a town of eleven thousand inhabitants. On the same site there had previously been a mill which was destroyed by fire. The surrounding country was well timbered and a railroad to the mill had been chartered, and the work upon it had been commenced.

The defendant had bought stock in the railroad and had come to the place under guaranty of employment in the enterprise. While waiting he boarded at the house of the plaintiff and spent a part of his leisure around the mill. There was an indebtedness of the corporation of about one thousand dollars, and subsequently a mortgage was placed upon the mill-plant by the three original owners of the capital stock without notice to the defendant. Neither in this matter nor in other business was he ever recognized by the managers of the company as having any interest in the mill, although he had knowledge that a mortgage was contemplated for the purpose of raising money to purchase a planer, and this he favored as he believed the machine would add to the profits of the business.

Soon after the defendant's purchase the railroad through failure to place its bonds was abandoned. The opportunities for successful mill operations were thereby lessened, the prospective value of the

property was greatly diminished, and it was finally taken under foreclosure of the mortgage.

There is some conflict of testimony as to the representations of the plaintiff in regard to the capacity of the mill, but even the defendant's version falls short of such fraudulent representations affecting the value of the property of the corporation as would render the notes invalid. The defendant was on the ground and had opportunity to observe all the conditions affecting the value of the property and must have relied mainly upon his own judgment. The omission of the plaintiff to mention the indebtedness of the corporation in the absence of any inquiry by the defendant would not justify the jury in finding fraudulent concealment of facts.

It is claimed by the defendant that his theory of a discharge gave the jury the right to decide in his favor, not only on the ground of substantial justice, but by the rules of law.

It appears that the defendant paid $300 of the purchase price when the memorandum of agreement was signed and the notes in suit were given; and he testifies that he made a proposition to the plaintiff by which he offered to lose the sum paid, provided the company would release him from the terms of the memorandum. This is denied by the plaintiff, though he subsequently recognizes the fact that "Fogler was out of the mill business and that he was just $300 ahead by the transaction." But there is no evidence that such a proposition was acted upon by the plaintiff, either by verbal or written acceptance, or any release of the defendant from his obligation under the memorandum. There was no surrender of the notes or any consideration for the alleged discharge. There was consequently no release of the defendant in accord and satisfaction within the meaning of the law, and no statutory discharge of the demand. And upon this ground the jury were not justified in their verdict. *Deering* v. *Moore*, 86 Maine, 181, 41 Am. St. Rep. 534; *Burgess* v. *Denison Paper Manufacturing Company*, 79 Maine, 266; R. S., chap. 82, § 45.

The evidence bearing upon the consideration of the notes consists of facts which are not in controversy. A distinction is to be observed between want or failure of consideration, which is a defense or defense

pro tanto to an action between the parties, *Edwards* v. *Pyle*, 23 Ill. 295; *Maxfield* v. *Jones*, 76 Maine, 135; *Shoe and Leather National Bank* v. *Wood*, 142 Mass. 568; *Savage* v. *Whitaker*, 15 Maine, 26, and inadequacy of consideration which does not in law constitute a defense. Norton on Notes & Bills (3d ed.) 277; *Worth* v. *Case*, 42 N. Y. 362; *Earl* v. *Peck*, 64 N. Y. 596; *Hamer* v. *Sidway*, 124 N. Y. 538, 21 Am. St. Rep. 693.

The consideration of the notes in suit consisted of the plaintiff's agreement to transfer and assign to the defendant one-sixth of the capital stock of a corporation and to assign to him certificates of this amount when printed and issued by the corporation. It was a valuable consideration in the sense of the law. *Currie* v. *Misa*, 10 L. R. Exch. 153. It was at the inception of the notes a valid agreement and is not less valid because the value of the subject matter has become depreciated by subsequent circumstances. This depreciation gives the defendant no greater right to avoid his obligation to pay the stipulated price for the property than an enhanced value would avail the plaintiff as an excuse for the non-fulfilment of his agreement. In the absence of fraud a party will not be allowed to interpose as a defense the fact that the property was not pecuniarily worth what he supposed it to be. "The courts do not sit to make contracts but only to enforce those the parties have already made."

Our conclusion is, that the jury must have been influenced by what they deemed equitable considerations, and erred in weighing the evidence given them under rules of law.

Motion sustained.

APPENDIX.

QUESTIONS SUBMITTED BY THE SENATE, MARCH 23 AND 25, 1903, WITH ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THEREON.

The Legislature is not inhibited by any provision in the Constitution of the United States, or of this State, from exercising the power of limiting incorporated insurance companies to the issuance of one standard fire insurance policy, even though such standard form contain a clause that there shall be no right of action on the policy until the amount of the loss or damage be determined by three arbitrators, or there be a waiver of such clause by both parties.

STATE OF MAINE.

In Senate, March 23, 1903.

Ordered, The Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution in this behalf, their opinion on the following questions, viz:

1. Is so much of the Public Law of Maine for 1895, section 1, chapter 18, constitutional? that reads as follows:

"In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months.

"No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of

law or equity in this State unless commenced within two years from the time the loss occurred."

2. Is section one, chapter 18, of the Public Laws of 1895 constitutional?

In Senate Chamber, March 23, 1903.

Read and passed.

KENDALL M. DUNBAR, Secretary.

By an order passed on March 25, the Senate requested the Justices to give to the Senate by July first their opinion upon the questions submitted in the foregoing order, and stated for their information that his Excellency, Hon. John F. Hill, Governor of Maine, had submitted to the Legislature during the present session a message touching the subject. The Commissioners in Maine for Promotion of Uniformity of Legislation in the United States, had reported to the Governor that the statute in question was deemed to deprive insurers of the right of a jury trial upon the question of the extent of loss or damage arising under fire insurance policies; also that the constitutionality of the statute could well be questioned.

Bills were afterward introduced in both branches of the Legislature giving the right of trial by jury on any question of fact; and these bills are now pending on the files of the Legislature.

TO THE SENATE:

The undersigned Justices of the Supreme Judicial Court give the following as their opinion on the questions submitted to the Justices in the foregoing Senate order of March 23, 1903.

The two questions submitted are practically identical, since they both are as to the constitutionality of the same section of the same statute.

In considering the question we confine ourselves exclusively to the statute cited in the Senate order, viz: Sect. 1 of ch. 18 of Public Laws of 1895. We also confine ourselves to the question of constitutionality, ignoring all other questions. The first clause in that section is as follows: "Sect. 1. No fire insurance company shall

issue fire insurance policies on property in this State other than those of the standard form herein set forth, except as follows":— Then follow certain exceptions allowed, none of which affect the questions submitted. In the standard form set forth in this section is the clause, cited in the Senate order, stipulating in effect that the amount of the loss or damage under the policy shall be determined by three arbitrators instead of by a jury—unless such stipulation be waived.

We assume as too evident for argument or discussion that the words "fire insurance company" in such a statute and in such connection mean incorporated companies, or corporations, and are not to be extended beyond them. Again, it not being otherwise stated in the Senate order, we understand we may assume that in none of the charters of domestic fire insurance companies is there any limitation upon the power of the Legislature "to amend, alter or repeal" their charters as reserved in R. S., (1883) ch. 46, § 23. The question submitted is, therefore, narrowed down to this: Is the Legislature inhibited by any provision in the Constitution of the United States, or of this State, from exercising the power of thus limiting incorporated insurance companies to the issuance of one standard form of fire insurance policy, even though such standard form contain a clause that there shall be no right of action on the policy until the amount of the loss or damage be determined by three arbitrators, or there be a waiver of such clause by both parties? It may be assumed, arguendo only, that by accepting such a fire insurance policy, the assured waives any right to a jury trial upon the question of the amount of his loss or damage; but there is no statutory compulsion on fire insurance companies to issue such policies nor upon property owners to accept them.

We do not find in either Constitution, Federal or State, any section or clause in terms inhibiting such an exercise of the legislative power over fire insurance companies. While the individual has existence and consequent rights independent of the Legislature, the corporation or incorporated company derives its existence and rights solely from legislative action. The Legislature may refuse to grant any corporate rights or powers whatever and even existence, or it

may grant one only. Until the Legislature acts, these do not and cannot exist. So the Legislature may by general law, or special act "amend, alter or repeal" any corporate charter, or corporate right or existence once granted (except of course where it has stipulated not to do so), and in so doing it may cut away the powers of a corporation one after another and from time to time, and finally destroy the last one and the corporation itself. It cannot, of course, confiscate the property of the corporation once lawfully acquired. It cannot impair the obligation of a contract once lawfully made by a corporation. So far, the Legislature is restrained by the State and Federal Constitutions. But it can prohibit the acquisition of any more property by the corporation; it can prohibit the making of any new contracts whatever by the corporation, or any new contract except one of a particular prescribed kind and form with prescribed stipulations therein. This power, sweeping as it is in its scope, is necessarily implied and included in the reserved power to amend, alter or repeal the very legislative acts which gave life, powers and rights to the corporation. This power is inherent in the Legislature unlimited by any section or clause in the Federal or State Constitution which we have been able to find. *Head* v. *Providence Insurance Co.*, 2 Cranch, 127; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Miller* v. *New York*, 13 Wall. 478; *Greenwood* v. *Union Freight Co.*, 105 U. S. 13; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Norfolk and Western Railroad Company* v. *Pennsylvania*, 136 U. S. 114; *State* v. *Brown Manufacturing Co.*, 18 R. I. 14; *Schaffer* v. *Union Mining Co.*, 55 Md. 74; *State* v. *Maine Central R. R. Co.*, 60 Maine, 488, affirmed in 96 U. S. 499.

As to foreign fire insurance companies those incorporated in other states and countries, they, of course, are equally subject to the legislative power of this State so far as the exercise of their rights or powers, and their presence or existence within this State, are concerned. They are not protected by the interstate commerce clause of the Federal Constitution. *Hooper* v. *California*, 155 U. S. 648. The Legislature can wholly exclude them from the State, and hence can impose such conditions and limitations upon the exercise of any rights and powers and business and evenpresence in this State as it

sees fit. *Norfolk and Western Railroad Company* v. *Pennsylvania*, 136 U. S. 114; *Hooper* v. *California*, 155 U. S. 648; *Dryden* v. *Grand Trunk Ry. Co.*, 60 Maine, 512.

The statute does not offend against the XIVth Amendment to the Constitution of the United States, since it bears equally upon all fire insurance companies domestic and foreign without attempting any discriminations, and does not deprive any person of life, liberty or property without due process of law.

There is another phase of the question which may be suggested and should be considered, viz: Whether the statute infringes any constitutional right of the individual irrespective of its limitation of the powers of insurance corporations. The constitutional right of trial by jury is a right, not a duty, and may be waived by the individual. It is waived by him as to the assessment of his damages if he voluntarily enters into a contract like the statutory standard insurance policy wherein it is mutually stipulated that the damages provided for shall be determined by arbitration. It may be urged, however, that this contract, the terms of which are prescribed by statute, is not voluntary in that the individual is practically prevented from making contracts for the protection of his property by insurance, except such contracts as require him to waive his right of trial by jury; in that he is practically compelled to enter into that particular contract or go without insurance protection.

But the broad question of the constitutional right of the individual to make and enforce contracts for the acquirement, possession and protection of property by insurance or otherwise free from legislative interference is not presented here. Whatever the extent of the constitutional right of the individual to make insurance contracts with other individuals, or unincorporated associations of individuals, we think it clear from the principles above stated that he has no constitutional right to make any particular insurance contract with a corporation. True, the complete power of the Legislature to limit or destroy the right of a corporation to make contracts necessarily includes the power to limit or destroy the right of the individual to make contracts with it, but this incidental result cannot be held to limit the power of the Legislature over its own creature, the corpora-

tion. The Legislature is not required by the Constitution to create corporations for individuals to make contracts with, nor is it prohibited from limiting or dissolving corporations with which indviduals may wish to contract.

It follows that the statute cited and inquired about is constitutional, being within the legislative cognizance and not forbidden by any section or clause of the Constitution, State or Federal.

We answer both questions in the affirmative.

Portland, July 1, 1903.

ANDREW P. WISWELL.
LUCILIUS A. EMERY.
WM. P. WHITEHOUSE.
SEWALL C. STROUT.
ALBERT R. SAVAGE.
FREDERICK A. POWERS.
HENRY C. PEABODY.
ALBERT M. SPEAR.

QUESTIONS SUBMITEED BY THE HOUSE OF REPRESENTATIVES, MARCH 25, 1903, WITH ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THEREON.

In levying a State tax, the Legislature is prohibited by the Constitution, Section 8, Art. IX, from fixing a higher rate of taxation upon lands outside of corporated cities, towns and plantations than the rate upon lands within such municipalities.

STATE OF MAINE.

In House of Representatives, March 25, 1903.

Ordered, That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to this House, according to the provisions of the Constitution in this behalf, their opinion on the following questions:

Question One: Assuming that the rate of State tax in cities, towns and plantations is fixed at two and three-fourth mills on the dollar of their valuation, would the bill entitled "An Act relating to taxation of land in unincorporated places," now pending in this House,

and a true copy of which said bill is hereunto annexed, if the same should become a law, be in violation of the provisions of section eight of article nine of the Constitution of the State?

Question Two: Assuming as above, would said bill, if the same should become a law, be in violation of any of the provisions of the Constitution of the State?

House of Representatives, Mar. 27, 1903.

Read and passed.

W. S. COTTON, Clerk.

STATE OF MAINE.

In the year of our Lord one thousand nine hundred and three.

AN ACT relating to taxation of land in unincorporated places.

Be it enacted by the Senate and House of Representatives in Legislature as follows:

Section 1. Section sixty-nine of chapter six of the Revised Statutes is hereby amended by striking out all of said section and by substitution make said section, as amended, read as follows:

"Section 69. The board of State assessors shall annually assess a tax upon all lands situated in this State in places not incorporated as a town or plantation, and not paying a municipal tax, at the rate of fifteen mills on the dollar upon the valuation as made by said assessors for the year the assessment is made: and said assessment shall be made and deposited with the treasurer of state on or before the first day of August in each year."

Section 2. Section seventy-one of said chapter six of the Revised Statutes is hereby amended so as to read as follows:

"Section 71. When the board of state assessors has assessed such state tax and has deposited the assessment with the treasurer of state, the treasurer of state shall within three months thereafter, cause the list of such assessments, with the lists of any county tax so certified to him, both for the current year, to be advertised for three weeks successively in the state paper and in some newspaper, if any, printed in the county in which the land lies. Said lands are

held to the state for the payment of such state and county taxes, with interest thereon at the rate of twenty per cent to commence upon taxes for the year in which said assessment is made, at the expiration of one year."

Section 3. This Act shall take effect when approved.

To the House of Representatives:

The undersigned Justices of the Supreme Judicial Court have considered the question submitted to them by the House of Representative in its order of March 25, 1903, and above set forth and give their opinion as follows:

Inasmuch as the State tax imposed upon cities, towns and plantations is necessarily imposed upon the lands as well as upon the personal estate therein, the question may be correctly stated as follows: In levying a State tax, is the Legislature prohibited by the Constitution from fixing a higher rate of taxation upon lands outside of incorporated cities, towns and plantations than the rate upon lands within such municipalities? We think the Legislature is so prohibited by Sec. 8 of Art. IX which is as follows: "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."

This command of the Constitution is absolute and comprehensive. No exception is allowed for the locality of the land whether within or without any particular subdivisions of the State's territory. The Legislature can no more discriminate in the rate of taxation between incorporated and unincorporated territory, than it can between different sections of incorporated territory. The apportionment and assessment each must be equal throughout the whole State. The criterion established, and hence the only criterion to be applied, is the "just value" of the land wherever situated. The only permissible variation of the amount of the tax is that resulting from the difference in value. The rate must be the same everywhere. Locality can be considered only so far as it affects value.

Judicial authority for this interpretation of the Constitution is not wanting. The Constitution of Massachusetts provided that taxes should be levied proportionately upon all "estates lying within the

Commonwealth." A statute imposed a tax upon corporation dividends due non-residents but not on those due residents. The statute was held to be in conflict with the Constitution. *Oliver* v. *Washington Mills Co.*, 11 Allen, 268. The Constitution of Michigan commanded the legislature to "provide a uniform rule of taxation." The Supreme Court of the United States in considering this provision said: "All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a state tax, it must be uniform throughout the State. If a County or City tax it must be uniform throughout such County or City." *Pine Grove Township* v. *Talcott*, 19 Wall. 666, 675. The Constitution of Wisconsin contained this clause: "The rule of taxation shall be uniform." A statute authorized a city to tax lands within the city limits, laid out into city lots, at different rates from those not so laid out. Held unconstitutional. *Knowlton* v. *Supervisors of Rock County*, 9 Wis. 410. The Constitution of Ohio commanded the legislature to pass "laws taxing by a uniform rule . . . . all real and personal property according to its true value in money." The Supreme Court of Ohio said of this clause: "The general assembly is no longer invested with the discretion to apportion the tax and to determine upon what property and in what proportion the burden shall be laid. A uniform rate per cent must be levied upon all property subject to taxation according to its true valuation in money, so that all may bear an equal burden." *Zanesville* v. *Richards*, 5 Ohio St. 589. In New York was a statute authorizing a tax payer to deduct his debts from the valuation of his personal property except that of his shares in National Banks. This was held to be in conflict with the United States statute requiring such shares to be taxed equally with other monied capital. *People* v. *Weaver*, 100 U. S. 539. The Constitution of Oregon commanded the legislature to "provide by law for a uniform and equal rate of assessment and taxation" and to "prescribe such regulations as shall secure a just valuation for taxation of all property both real and personal." A statute levied a tax of $1.25 on each bicycle without regard to value. Held unconstitutional. *Ellis* v. *Frazier*, 38 Oregon, 462, 53 L. R. A. 454.

It follows that the proposed legislation would be contrary to the Constitution.

Although these questions submitted by the House of Representatives were not received by the Justices until after the adjournment of the regular session of the Legislature, the question discussed in the answers of the Justices, 95 Maine, 564, as to the propriety and duty of answering questions propounded under somewhat similiar circumstances does not here arise, because of the fact that the present Legislature is to reconvene in September of this year, when it may consider the subject matter of the questions.

Portland, July 1, 1903.

ANDREW P. WISWELL.
LUCILIUS A. EMERY.
WM. P. WHITEHOUSE.
SEWALL C. STROUT.
ALBERT R. SAVAGE.
FREDERICK A. POWERS.
HENRY C. PEABODY.
ALBERT M. SPEAR.

RULE OF COURT.

STATE OF MAINE.

Supreme Judicial Court, December Law Term, 1902.

Augusta, December 20, 1902.

Ordered, by the Court all the Justices thereof concurring, that the following rule be established and promulgated as a Rule of Court, viz:—

RULE.

Oral arguments before the Law Court, including the reading of briefs and arguments in reply, are limited to one hour for each side unless for cause shown the court shall fix a longer time before the arguments are begun.

ANDREW P. WISWELL,
Chief Justice Presiding.

NATURALIZATION.

STATE OF MAINE.

Supreme Judicial Court. At June Law Term, A. D. 1903.

Portland, June 29, 1903.

All the Justices being present,

Ordered, that the following rule be established relative to Naturalization Cases, to wit:

Every applicant for naturalization shall file with the Clerk of the Court his application in writing, according to the Statutes of the United States, thirty days before the term of the Court in that County at which his application is to be heard. The Clerk shall enter such application upon a special docket in the order of filing and shall, at the expense of the applicant, cause notice thereof to be published in some public newspaper published in the county of the applicant's residence fourteen days at least before such term.

ANDREW P. WISWELL,
Chief Justice.

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Nuisance may be restrained by, *Sterling* v. *Littlefield*, 479.
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Vol. conveyance held void in, *Spear* v. *Spear*, 498.
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A bill in, to construe a will, *Burgess* v. *Shepherd*, 522.
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Case of collusive marriage, *Hudson* v. *Charleston*, 17.
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Physicians employed by board of health, *Clement* v. *Lewiston*, 95.
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Void decree has no probative force, *Winslow* v. *Troy*, 130.

Admissible to show receipt is a duplicate, *Truworthy* v. *French*, 143.
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Time of recording foreclosure of mortgage must appear of record, *Stafford* v. *Morse*, 222.
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Written statements of third parties not admissible in, *Rich* v. *Hayes*, 293.
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(EXECUTORS AND ADMINISTRATORS concluded.)

Suit on probate bond defeated, *Burgess* v. *Young*, 386.
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EXEMPTIONS.

See BANKRUPTCY.

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Fish weirs regulated by R. S., c. 3, § 63, *Sawyer* v. *Beal*, 356.
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FRAUDULENT CONVEYANCE.

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Void appointment of a, *Winslow* v. *Troy*, 130.
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Statements as to bodily health in life, *Jeffrey v. Golden Cross*, 176.
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Policies of life, exempted by State and U. S. laws, *Pulsifer* v. *Hussey*, 434.
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Loss under void fire policy, *Melcher* v. *Ins. Co.*, 512.
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Assignment of life policy held invalid, *Tremblay* v. *Ins. Co.*, 547.
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Illegal sales of, prohibited, *State* v. *Eaton*, 289.
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Presence and consent give not, to appointment of guardian of person of unsound mind, *Winslow* v. *Troy*, 130.
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Of the, of probate courts, *May* v. *Boyd*, 398.
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The, of Sanford Mun. Court, *State* v. *Bass*, 484.
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LANDLORD AND TENANT.

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Lease forfeited by tenant's nuisance, *Small* v. *Clark*, 304.
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LANDS RESERVED FOR PUBLIC USE.

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Imperfect foreclosure of, by publication, *Stafford* v. *Morse*, 222.
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A, held to subsist after payment, *Look* v. *Horn*, 283.
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Death caused by want of fire-escape, *Carrigan v. Stillwell*, 247.
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Case of contributory, at highway grade crossing, *Blumenthal* v. *R. R.*, 255.
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Question of contributory, for the jury, *Coombs* v. *Mason*, 270.
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Physician held liable for, *Ramsdell* v. *Grady*, 319.
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Master to provide suitable appliances, *Amburg* v. *Paper Co.*, 327.
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Collision at R. R. crossing, *Lewis* v. *R. R. Co.*, 340.
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Case of defective machinery, *McGraw* v. *Paper Co.*, 343.
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Collapse of wharf staging, *Caven* v. *Granite Co.*, 381.
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Verdict for deft. in action for, set aside, *York* v. *Cleaves*, 413.

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Overseers removed a pauper, *Merrill* v. *Bassett*, 501.
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(NEGLIGENCE concluded.)

Case of defect in highway, *Whitman* v. *Lewiston*, 519.
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Plff.'s, barred his right to recover, *Day* v. *R. R.*, 528.
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Road commissioner is a public officer, *Bowden* v. *Derby*, 536.
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Master to provide reasonably safe machinery, *Cowett* v. *Woolen Co.*, 543.
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so held in this case, *Ib.*
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A, granted. Illegal evidence admitted, *Rich* v. *Hayes*, 293.
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it was on same paper with admissible evidence, *Ib.*
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No, when evidence is conflicting, *Lewis* v. *R. R. Co.*, 340.

Verdict for defts. set aside, *York* v. *Cleaves*, 413.
plff.'s corn factory alleged to be burnt by fire from deft.'s saw-mill, *Ib.*
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A, granted when jury erred by confusing deft.'s legal duty towards plff., *Merrill* v. *Bassett*, 501.
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A, granted when obvious that verdict not sustained by facts proved, *Brown* v. *Edwards*, 564.
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Jury did not weigh the evidence, *Furber* v. *Fogler*, 585.
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Indictment for a liquor, held good, *State* v. *Wiseman*, 90.
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Lease forfeited by, of tenant, *Small* v. *Clark*, 304.

May be restrained by equity, *Sterling* v. *Littlefield*, 479.
pltf.'s rights in this case not clear and bill dismissed, *Ib.*
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A, by overflowing highway, *State* v. *Improvement Co.*, 559.
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OFFICER.

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PAUPER.

Case of collusive marriage, *Hudson* v. *Charleston*, 17.
agency of municipal officers in procuring such marriage not proved by admissions of past events, *Ib.*
contra of declarations during official acts, *Ib.*
such declarations are verbal acts, *Ib.*

Private charities are not, supplies, *Orland* v. *Penobscot*, 29.
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supplies to, defined, *Ib.*
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Wife takes, settlement of husband, *Winslow* v. *Troy*, 130.
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Relief of, by non-resident, *Conley* v. *Woodville*, 240.
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Of emancipated child, *Carthage* v. *Canton*, 473.
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Overseers removed a, *Merrill* v. *Bassett*, 501.
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PHYSICIAN.

Was employed by board of health, *Clement* v. *Lewiston*, 95.
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A, held guilty of negligence, *Ramsdell* v. *Grady*, 319.
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PLEADING.

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Indictment for a liquor nuisance held good, *State* v. *Wiseman*, 90.
"a certain shop in a building" is sufficient, *Ib.*

Declaration for libel held defective, *Hanna* v. *Singer*, 128.
did not identify plff. with the article complained of, *Ib.*
did not refer to him in his official capacity, *Ib.*

Death caused by want of fire-escape, *Carrigan* v. *Stillwell*, 247.
demurrer to declaration overruled, *Ib.*

Nuisance stat. R. S., c. 17, § 3, requires strict pleading, *Eveleth* v. *Gill*, 315.
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Indictment for polygamy held good, *State* v. *Damon*, 323.
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statutory exceptions correctly negatived, *Ib.*

Case of defective machinery, *McGraw* v. *Paper Co.*, 343.
declaration held indefinite on demurrer, *Ib.*
attachment to a barker fell, *Ib.*

Negative averments in indictments, *State* v. *Improvement Co.*, 559.
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POLICE AND MUNICIPAL COURTS.

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PRACTICE.

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Action on lost note, *Matthews* v. *Matthews*, 40.
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Verdict will be sustained when no other can be rendered on facts admitted or undisputed, *Winslow* v. *Troy*, 130.

Objections to charge were waived, *Libby* v. *Deake*, 377.
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When court may order verdict, *Day* v. *R. R.*, 528.
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PROBATE.

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What property vests in admr. de bonis non, *Meservey* v. *Kalloch*, 91.
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suit on predecessor's bond not sustained, *Ib.*

Void appointment of guardian, *Winslow* v. *Troy*, 130.
14 days' statute notice not given and no inquisition had, *Ib.*
presence and consent give not jurisdiction, *Ib.*
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(PROBATE concluded.)

Suit on, bond defeated, *Burgess* v. *Young*, 386.
estate not represented insolvent but admr. pleaded R. S., c. 66, § 1 and 2, in bar showing estate could pay no more, *Ib.*
sureties may set up same defense, *Ib.*
admr. had paid expenses of adm. funeral, and first four classes of debts in R. S., c. 66, § 1, *Ib.*
Decrees in, when conclusive, *May* v. *Boyd*, 398.
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PUBLIC OFFICER.

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Road commissioner is a, *Bowden* v. *Derby*, 536.
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Location held good, *Nicholson* v. *R. R. Co.*, 43.
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