MAINE REPORTS

98

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1904

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1904

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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.

STATE OF MAINE *vs.* ALEXANDER TERRIO.

Somerset. Opinion July 1, 1903.

Murder. New Trial. Newly-Discovered Evidence. Expert Testimony.

The defendant was convicted before the jury of murder in the first degree. He filed a general motion for a new trial before the presiding justice who upon hearing overruled the motion and an appeal was taken to the law court. Subsequently the defendant filed a further motion for a new trial based on the ground of newly-discovered evidence.

If it be conceded, after a review of the testimony reported upon the general motion for a new trial, that the circumstances and coincidences considered in combination and with relation to the conduct and declarations of the accused, with all the inferences which a jury might justifiably draw from them, would induce an affirmative belief of a strong probability of the defendant's guilt, *held;* that the evidence must still be considered with reference to its negative or exclusive tendency by which it finally establishes the presumption raised by negativing or excluding every other.

Such is the familiar test of the accuracy of a conclusion reached in which the peculiar efficacy of circumstantial evidence consists.

It is not sufficient that the circumstances proved are consistent with and render probable the hypothesis sought to be established, but they must exclude beyond a reasonable doubt every other hypothesis except that one.

Held; that under an application of this test, it is not entirely clear that a jury would be required to return a verdict of guilty, without the aid of the expert testimony given at the trial in relation to the marks found upon the primer of the crushed shell and those made by the respondent's rifle.

Held; that if the theory presented at the trial by the State's report was correct, that the characteristic marks made on the primer by the firing-pin of every rifle may be seen under the microscope corresponding with those on the firing-pin, it afforded circumstantial evidence of the certain kind where the fact in dispute is a necessary consequence of the fact attested and could not have been caused by any other.

Held; that under all the circumstances the respondent ought not to be deprived of the privilege of having the jury pass upon the newly-discovered evidence tending to modify the force of the expert testimony given at the trial, although it may seem to the court only probable that the new evidence would change the result, or that injustice would be done if a new trial was not granted.

Appeal. Motion for new trial based on newly-discovered evidence. Motion sustained. New trial granted.

The defendant was found guilty of the murder of Mathias Pare March 11, 1901, at or near Misery Stream between Brassua Lake and the Canadian Pacific Railroad, by the jury at the following September term of this court in Somerset County. He filed a motion for a new trial at the same term, which having been heard by the presiding justice was overruled, and he thereupon appealed to the next term of the law court in 1902, where the case was entered and continued until the December term. In the meantime, at the September term of that county, the defendant filed a further motion to have the verdict set aside on the ground of newly-discovered evidence. The evidence introduced in pursuance of this motion was taken out before the justice presiding at that term and is now considered together with the evidence introduced at the trial before the jury.

The facts are stated in the opinion.

Geo. M. Seiders, Attorney General and Geo. W. Gower, County Attorney, for State.

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

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

WHITEHOUSE, J. At an adjourned session of the September term of the Supreme Judicial Court in Somerset County, in the year 1901, a verdict of guilty was rendered by the jury against the defendant, Alexander Terrio, upon an indictment against him for the murder of

Mathias Pare on the eleventh day of March of that year. Thereupon at the same term of court, the defendant filed a motion to have the verdict set aside as against the evidence, accompanied by a certificate of his counsel that the motion was made in good faith and that the same was necessary for the protection of his rights. This motion was overruled by the court and the defendant appealed from the decision of the presiding justice to the next law court. The case was entered at the next term of the law court in 1902, and continued until the next December term. In the meantime, at the next term of the Supreme Judicial Court for the County of Somerset, in September, 1902, the defendant filed a further motion to have the verdict set aside on the ground of newly-discovered evidence. The evidence introduced in pursuance of this motion was taken out before the justice presiding at that term. The evidence alleged to have been newly-discovered, as well as that introduced at the trial, is now before the court.

On the eleventh day of April, 1901, the dead body of Mathias Pare, a young French Canadian who had for several years been accustomed to work as a woodsman in the forests of Maine during the winter season, was found by the side of a tote road on the banks of Misery Stream between Brassua Lake and the Canadian Pacific Railway, about a mile and a half from Asquith station. The body was fully clothed and nearly covered with brush and snow, but the partial melting of the snow had exposed a portion of the coat and the fingers of one hand. About a rod distant a hat and a woodsman's pack were found. The left pocket of the trousers was torn and turned inside out, and within two or three inches from the end of this pocket a cartridge shell of a 30-30 Winchester rifle was found lying on the snow. It was picked up and placed on the breast of the body where it remained until the body was removed on the fourteenth of April. This cartridge shell exactly fitted the chamber of the respondent's 30-30 Winchester rifle, and by reason of the distinctive marks alleged to have been made by the firing-pin of the rifle upon the primer or cap of the shell at the time the cartridge was exploded, as will be hereafter more fully shown, became evidence of vital importance tending to connect the respondent with the commission of the crime. On

the twelfth day of May following another cartridge shell was found by George I. Peary about fifty feet from the place where the body lay; but it was shown by actual experiment, as the defense confidently asserts, that this cartridge did not fit the Terrio rifle, and hence became of possible significance in behalf of the respondent.

From the subsequent examination of the body made at the autopsy, it appeared that Pare had received a rifle bullet through the chest and another through the right arm. A fragment of a leaden bullet, with a small piece of a steel jacket, was also discovered in a wound in the left arm. The State claimed that all of these wounds might have been made by bullets and steel jackets from a 30-30 rifle. The respondent claimed that the hole through the right arm was larger than the other, and suggested that more than one rifle may have been used. All the bones of the skull were broken and crushed as if by a blow from some heavy instrument like the back of an axe or the butt of a rifle stock. There was also an incised wound on the neck which might have been made with the narrow blade of a pocket knife. At the time the clothing was removed from the body, a metalic case of a bullet from an exploded cartridge and apparently a 30-30 rifle cartridge, dropped out of the clothing.

From the time of these discoveries, it was never in question between the State and the respondent that Mathias Pare came to his death by violence and criminal agency. At the trial the corpus delicti was not in controversy. There was equal moral certainty that he was murdered on the eleventh day of March between the hours of ten and twelve in the forenoon, one month prior to the discovery of the body.

On the banks of Moose River between Brassua and Moosehead Lakes is a primitive settlement known as Rockwood, comprising sixteen houses within the limits of a little more than two miles from Rockwood post office on the shore of Moosehead Lake, including those of George Ritchie, Willie Butler, Felix Butler, Vede Gilblair, the respondent Alexander Terrio, John Raspberry, Fred Parent, Joseph Murray and Sylvere Gaudet. During the winter preceding the murder, Pare had been at work for Gaudet in the woods north of Moose River, and on Saturday morning March 9, he received

from his employer $1.50 in cash and a due-bill for $106.58 in full settlement for his winter's wages. The same day both Gaudet and Pare left the camp in the woods and returned to Gaudet's home at the Rockwood settlement, which was left in charge of George Vigue during the absence of Gaudet and his wife in the woods. Here Pare remained Saturday night. Sunday morning March 10, he went to Kineo, a little more than two miles from Gaudet's and got his due-bill cashed, receiving therefor $100.50 in money, a leather wallet and a quart bottle of whiskey. Returning he arrived at Gaudet's house about half past ten o'clock in the forenoon; and there and at the house of Joseph Murray, with another bottle of whiskey furnished by Murray, he passed the afternoon and evening in drinking and convivial merriment in the company of Joseph Murray, Fred Pooler, George Vigue and Joseph McDonald, Gaudet himself being present at the "early feast" but not at the "late carouse." Several times during both afternoon and evening Pare exhibited his wallet and to some extent exposed his money in the presence of Murray and others. Terrio was not present in this company either in the afternoon or evening, but he was acquainted with Pare, for he worked with him for Gaudet the previous winter of 1900, and he knew that he had just come out of the woods in the Spring of 1901, for he met him in company with George Vigue Sunday afternoon March 10, and exchanged a few words of friendly greeting with him. There is no evidence that Pare in that brief interview made any reference to his wallet, or his money, or his intended departure for Canada the following day. This appears to have been the only time that Terrio saw Pare while he was at Rockwood settlement on Moose River during Saturday, Sunday and Monday before his departure.

Pare spent the remainder of that Sunday night at Gaudet's house in company with George Vigue, and at half past seven o'clock the next morning, March 11, he set out on foot for Asquith station, about seven miles away, carrying a canvas grip or valise and a woodsman's pack, intending to take the train there on his homeward journey to Canada. Between eight and half past eight o'clock he called at the house of Fred Parent and obtained from Mrs. Parent an old envelope in which he placed a portion of his money, leaving the bal-

ance of it in the wallet. The envelope, with the money in it, he placed inside of his sweater, and the wallet with the rest of the money, he returned to his trousers pocket. He next called at the house of Willie Butler, another resident on the road to Asquith, and remained there "between half an hour or an hour" until Fred Parent, who was hauling rocks to the Lake, came along with his team and gave him a ride to the "piers." There he left the team at half past ten or a quarter before eleven o'clock, and continued his journey towards Asquith on foot, taking the shorter road known as the "cookee's path" according to the directions given him by Parent. As far as disclosed by the evidence this was the last that was ever seen of Pare alive. Nothing further was known or heard in regard to his movements or his fate until his body was discovered on the tote road a mile and a half from his destination at Asquith, except by the person or persons who committed the murder or who were in some way cognizant of it. It has been noticed that the woodsman's pack was found near the body April 11, but the canvas grip appears to have been picked up near the scene of the crime on the first day of April by Fred Pooler and placed on the team of Wm. Butler, who was moving his goods from Rockwood settlement to Asquith station. It was carried by Butler to the home of George Ritchie of Rockwood, about two and one-half miles from the place of the murder, where Fred Pooler then boarded, the clothing removed from it, and the grip deposited under the bed in Pooler's sleeping room. After the discovery of the body, Butler notified the sheriff of the finding of the grip. No money was found in any of the clothing on the body of Pare. The wallet with its contents had been taken from the trousers pocket and the envelope containing the rest of the money had been abstracted from its hiding place under the sweater. The murder was obviously committed by some one who had knowledge of Pare's intended journey to Asquith that Monday morning, who knew that he had money on his person, and knew that the amount found in the wallet was not all that he possessed. The motive for the crime was manifestly robbery.

It is not within the scope and purpose of this opinion to retrace the steps of the government officers throughout the field of investiga-

tion traversed by them in their prompt and active efforts to discover the perpetrator of this crime, or to give a complete statement and critical analysis of all the details of the evidence presented at the trial upon the indictment against the respondent. In the view here taken, the question whether justice to the respondent and due regard for the proper administration of the criminal law require that a new trial be granted in this case must be determined principally by a consideration of the materiality and weight of the newly-discovered evidence relating to the characteristic marks made by the firing-pin of the Terrio rifle upon the primer or cap of the cartridge shell found by the side of Pare's body and afterwards designated the "crushed" shell. The relevancy and importance of this newly-discovered evidence may be fully understood and appreciated by a simple statement of the respective theories and contentions of the State and the respondent, an explanation of the expert testimony of Prof. Whittier introduced at the trial in regard to the imprint upon the primer of the crushed shell, the material portions of the newly-discovered evidence of Prof. Knight, and a brief summary of the less conclusive circumstantial evidence presented by the State, with the leading exculpatory facts adduced in behalf of the respondent.

Recognizing the obvious motive of the crime and the fact that it was unquestionably committed by some one having knowledge of the victim's money and intended journey, the government officers sought by the process of exclusion to narrow the field of inquiry and to ascertain, in the first place, whether all of Pare's merry companions of Sunday afternoon and evening March 10, who saw his wallet and knew it contained substantially his winter's wages, could satisfactorily explain their whereabouts and movements on Monday forenoon March 11. One of them who became prominent in the investigation, acting as guide for the sheriff, was Joseph Murray, a young woodsman 28 years of age, who had a camp on the west shore of Brassua Lake, six miles from his home at Rockwood. He was interviewed by the sheriff on the fifteenth of April, two days before the arrest of the respondent, and testified at the preliminary hearing and at the trial before the jury.

Proximity to the Scene of the Murder. According to his testimony, Murray himself left his home Monday morning March 11, between seven and eight o'clock, to visit his camp across the Lake, and as he was walking on his trail through the woods, he discovered fresh snow-shoe tracks coming from the north, and entering and following his trail westward to the Lake. On reaching the Lake these tracks diverged southerly from Murray's trail with a general trend in the direction of the place where the body of Pare was found. Murray claims, that although it was snowing that forenoon, he noticed at the time that one of these tracks was smaller than the other; "one shorter than the other and one some wider than the other," as he "had seen them before quite a few times." He had seen Terrio's snow-shoes a dozen times, and knew that one of them was shorter than the other. He had walked with Terrio and noticed that he "walked with a short step and rather wide at that." The following Wednesday he went out over his trail again and recognized the same tracks at another point returning in a northerly direction, although five inches of snow had fallen then. When Terrio's snow-shoes, one of which was in fact about two inches longer and a little narrower than the other, were exhibited to him at the trial, he asserts without qualification that they were the snow-shoes that made the tracks seen by him at both places. On cross-examination, however, he admits that he cannot be positive that the returning tracks he saw on Wednesday were the same as those seen on Monday, "because they were filled with snow." He states that the purpose of his visit to his camp that day was to obtain some fish, previously caught, for his brother-in-law, Joseph McDonald, who was visiting him and in fact remained with him until the following Wednesday. He had with him that day a 22 Flobert rifle.

It is contended in behalf of the respondent that this story of Murray's movements that Monday forenoon is wholly uncorroborated by any witness, and that nearly every feature of it is so extraordinary that Murray himself has even been subjected to suspicion of complicity in the crime. It is deemed to be unreasonable that he should make a journey of twelve miles on a stormy day to obtain a few fish for his brother-in-law, and that although he claims to have left home

about the same time that Pare left, and must have passed ten of the houses in the Rockwood settlement, there is no evidence that any one saw him until he and Simeon Newton appeared at the house of Felix Butler on his return between 12.30 and one o'clock. He was in the habit of making frequent visits to his camp across the Lake, and as the use of snow-shoes was common in that region, it is claimed to be wholly improbable that, upon such casual observation as he would be likely to give to snow-shoe tracks, on that Monday forenoon, he would have noticed that one was a little longer than the other, and be able to identify them as the tracks made by Terrio's snow-shoes; or that after the lapse of thirty-one days, he could remember the precise day on which he saw these particular tracks. There is a plain intimation in his testimony that it occurred to him at the time that those were tracks made by Terrio's shoes, and yet it is not in evidence that he ever mentioned that fact at Felix Butler's that day or to any one else at any time prior to the discovery of Pare's body. There was evidence in behalf of the defense that Murray had shown a feeling of ill-will against Terrio and made some threats against him. It also appeared that although Murray and Simeon Newton unquestionably met at Felix Butler's that Monday, Murray afterward claimed that he never saw Newton until the following September.

But Murray further states that on the seventeenth of April, the respondent Terrio, after his arrest, was left in his charge by the officers at Moosehead Lake for a few minutes, and after some conversation Terrio stopped talking a minute or two and then said: "Joe, the way the sheriffs are talking, you must have saw me that day," Murray's reply was: "No sir, I didn't." It appears that Murray never disclosed this statement imputed to Terrio in any of the interviews with the officers prior to the preliminary hearing; and made no mention of it in his testimony at that hearing; and it is insisted in behalf of the defense that a statement of such marked significance, practically tantamount to a confession of guilt, must have made such an impression upon the mind of Murray that he could not have failed to recall it and inform the offcers of it before the preliminary hearing, if it was in fact uttered as he now claims.

It is not in controversy that Murray called at the house of Felix Butler at Rockwood about one o'clock on that Monday, March 11, and there met Simeon Newton, who gave testimony of still more striking importance to the State tending to show the respondent's proximity, in point of time and space to the scene of the murder. It is claimed in bahalf of the defense, however, that the testimony of this witness invites the careful scrutiny of the court, not only because he admits that after the arrest of Terrio, he left the State and wandered about in New Hampshire and Massachusetts in order to avoid being called as a witness, but also because of the inherent improbabilities in the testimony itself.

Simeon F. Newton was another woodsman, thirty-eight years of age, residing at Jackman, but having business and social relations with the residents of Rockwood on the lower Moose River. Saturday night and Sunday, March 9 and 10, he was at Martin Munster's near Asquith station "sporting and having a good time." He left Munster's Monday forenoon about half past ten o'clock, after an early dinner, and taking the Misery tote road, started for John Holden's at Moosehead Lake. When he reached the thick woods near the burnt land, where he afterwards learned Pare's body was found, he says he noticed that the tote road was "all tracked up with snow-shoes," and about ten or twelve rods below he saw the same tracks crossing the tote road again. He noticed that the track made by one of the snow-shoes was larger than the other. He further states that he saw blood in the road at that point. On the left hand side of the road, about ten or twelve feet from the road, he discovered a valise or grip, and ten or twelve rods distant, he saw a man on snow-shoes with a rifle on his shoulder, going into the woods out of sight "as fast as he could travel." The man was back towards him and going in the direction of Brassua Lake. At that time he had never seen Terrio to know him, but on the 13th of April following, when Newton was employed as cook in Holden's camp on the Sockattin drive, Terrio, who was also employed by Holden, was sent from the farm to the camp with the mail to be delivered to Newton for the crew. Newton says he recognized him at once as the man he saw hastening into the woods from the scene

of the murder, on the eleventh day of March preceding. Although Terrio was then on snow-shoes and he only saw his back 10 or 12 rods distant in a snow storm, and he was not on snow-shoes when he came into camp April 13, Newton testifies that he recognized him by his "gait, his walk and his form."

On Monday the eleventh, as already noticed, Newton reached Felix Butler's about one o'clock and there met Joseph Murray, but neither appears to have mentioned to the other or to Butler what he had seen that day. Early in September following, however, Newton did say to Felix Butler, according to the latter's testimony, that he saw nothing on the tote road that Monday forenoon the eleventh of March, except a grip and some blood. He made no mention then of the fact that he saw a man disappearing in the woods, whom he afterwards recognized as Terrio. Two witnesses for the defense state that they rode from Rockwood to Asquith that day on a sled with one horse and as the horse was walking slowly along the tote road, where Pare's body was afterwards found, they saw blood in the road, and something outside of the road covered with boughs and received the impression that some one had killed a deer and attempted to conceal it. They saw moccasin tracks near there, but say that there were no snow-shoe tracks whatever in that vicinity. Again, if Newton was at the scene of the murder so early as to detect the criminal in the act of escaping, he must have been so near when the fatal shots were fired that he would have heard the reports of the rifle. But there is no evidence that any such reports were heard by him.

It is insisted in behalf of the defense that the testimony of Simeon Newton is wholly unworthy of credence. Though his sense of duty to the public was so obtuse that at first he fled from the State rather than disclose potent facts within his knowledge which might bring to justice the perpetrator of an atrocious crime, his testimony at the trial affords no indication of unwillingness on his part to aid in the conviction of Terrio by means of an identification that is manifestly uncertain and unreliable. It is claimed that his conduct was so strange and his testimony so remarkable that he too has subjected himself to the suspicion of having more information than he has

disclosed in relation to this crime. For it is undoubtedly a general rule often confirmed by observation of merely culpable as well as criminal conduct in life, that it is a sense of delinquency and guilt and not conscious innocence that shuns investigation and seeks concealment.

Conduct and Declaration of the Accused. Alibi. On the other hand several important declarations made by the accused after his arrest are so completely overborne by other testimony, or are so highly improbable in themselves, that they have strong criminative significance against him.

In his written statement to the sheriff Terrio says he remembers that on that Monday morning after he saw Pare Sunday night, he went into the woods to cut wood about half-past seven or eight o'clock, worked until noon and then came out to the house to eat his dinner. It stormed so hard in the afternoon that he stayed in the house and laid a chamber floor.

But John Calder called at Terrio's house about one o'clock that day to warm a dish of tea on the stove and saw Mrs. Terrio and the children at the dinner table, but did not see Terrio himself there. Fred Dube met him at the water-hole on the ice in front of his house between four and half-past four that afternoon, and Terrio then said that he had been gone all day and just come home. In her testimony, Mrs. Terrio had stated that her husband went into the woods to cut wood that forenoon without taking his rifle with him, and returned at one o'clock. In the afternoon he laid a chamber floor. But her testimony was impeached by her statement to officer Haskell that her husband did not come home to dinner that day, but returned about five o'clock, and her further remark to Angie Parent that her husband took his dinner with him that day because it was stormy. There was also evidence that the chamber floor was laid at another time. An alibi is the instinctive and favorite resort of conscious guilt as well as the natural defense of innocence; but an unsuccessful attempt to establish it is necessarily highly prejudicial to the accused, for the obvious reason that such a defense implies an admission of the truth of the facts alleged against him,

and the correctness of the inference drawn from them, if they remain uncontradicted.

In the same written statement to the sheriff Terrio says that about three o'clock that afternoon he loaned his snow-shoes to a "light-complected" young man wearing a red frock, whom he never saw before and has never seen since. The young man said he wanted them to go to Kineo and promised to return them the next morning, but failed to do so. A week later, however, he found them sticking in a snow bank about twenty rods above his house. Two witnesses for the defense testify that they saw the snow-shoes there on the snow bank about that time. This labored suggestion in regard to the loan of the snow-shoes to a stranger would seem to have been inspired by the hope of accounting for the snow-shoe tracks seen by Murray and Newton, without Terrio's personal presence; but inasmuch as he states in his testimony that he is not sure whether the loan was made on the 11th or 12th of March, and in any event it did not occur until three o'clock in the afternoon, it obviously fails of its purpose and whatever importance it does possess is prejudicial to the accused.

Fruits of the Crime. The Money. The recent possession of the fruits of crime involving larceny and robbery, in the absence of a satisfactory explanation, raises a natural presumption of fact that the person in whose possession they are found is the perpetrator of the crime. But the strength of this presumption obviously depends in a great degree upon the nature of the property in question, the time within which the possession is shown and various other conditions which give occasion for the application of the rule. In the case of bank bills which readily pass as currency from hand to hand, and which are not specially identified as the fruits of the crime, the presumption may be very weak or there may be none at all. But even in such a case, a sudden change in the life and circumstances of the accused immediately after the crime, followed by inconsistent and improbable explanations of the change, may equally justify an inference of guilt.

In the case at bar the State attaches great importance to the evidence tending to show that while for several months before the murder Terrio's earnings had been small and his money insufficient

to pay debts then due, immediately afterwards, he paid out considerable sums, which with the amount found in his house by the officer, after deducting the cash known to have been received by him in the meantime, made an amount substantially equal to that which Pare had when he left the settlement March 11. It is not in controversy that on the fifth day of April, Terrio paid $47.50 to Octave Clair to take up one of the notes given for one-half of the Raspberry farm, and that his wife delivered to officer Haskell $45.00 at the house, taking $43.00 of it in bills out of the sewing-machine drawer, including a torn bill which Terrio said he obtained at Kineo. Terrio had previously told the officer, however, that he had this money in the house. About the same time he paid to other parties sums amounting to $14.50. In November preceding he borrowed the money to pay the $25.00 note given for the Raspberry farm, and made an effort before that time to hire a larger sum. In March, 1900, he contracted to pay $170.00 for one-half of the Raspberry farm, and paid $50.00 down.

In accounting for his recent expenditures Terrio claims that he had $400.00 in money and a $200.00 note when he left Madison two years and a half before, and that after he settled in Rockwood, he buried $250.00 in his cellar enclosed in a salt box for safe keeping. He never received but five dollars as interest on the $200.00 note and lost the principal. He stated first that the $43.00 of bills which his wife took from the sewing-machine and gave to the officer were a part of the money buried there, and that he took out $100.00 that Spring to pay his bills. At his request his former counsel went to his house at Rockwood and made diligent search for the money alleged to be buried in the cellar, by digging according to his directions, but no money or traces of a hiding place could be found. In explanation of the fact that he paid only $50.00 down for the Raspberry place, when he had money enough to pay the entire $170.00, he says that Raspberry did not want the money, but preferred notes without interest for all above $50.00. When officer Haskell informed him that they were well satisfied that the five and ten dollar bills, which made the $43.00, taken from the sewing-machine drawer, came from Kineo, he became excited, threw up one of his hands and

exclaimed "My God, I was afraid—I thought—" and then broke down and wept. A few minutes later he said he had no doubt about it and explained that a stranger came along and exchanged the five and tens for a fifty dollar bill which he had. Terrio afterward claimed that this stranger was Joseph Murray. This is denied by Murray. It appeared from the statement of Mrs. Terrio in rebuttal that her husband told her he received the $43.00 in the sewing-machine drawer from the $200.00 note. But it is unnecessary to bring under discussion the great mass of details introduced in evidence in regard to all of Terrio's business affairs before and after the murder of Pare. It is insisted in his behalf that the evidence discloses sufficient funds in his possession to account for all his expenditures without the use of Pare's money; but with reasonable charity for the primitive habits of life and simple methods in business peculiar to the unlettered woodsman, it must be admitted that his explanations are so contradictory, extraordinary and improbable as to justify an inference unfavorable to the theory of his innocence.

One other declaration the State deems significant. In a conversation at Kineo, officer Haskell said: "Aleck, where is that envelope?" He says, "What envelope?" I said, "The envelope that had the money in it." He thought a minute and he says, "I think I stuck it up in the crack by the window in the house." At that time no envelope had been mentioned in connection with the case except that in which Pare concealed a part of his money under his sweater. But as Terrio had shown no disposition to confess his guilt, it seems a forced suggestion that having "thought a minute" he made such an answer, understanding that the question had reference to the Pare envelope. It seems but just to suppose that he was thinking of some other envelope.

The antecedent threats alleged to have been made by Terrio against Pare do not seem entitled to weighty consideration.

If it be conceded that the foregoing circumstances and coincidences, considered in combination, and with relation to the conduct and declarations of the accused, with all the inferences which a jury might justifiably draw from them, would induce an affirmative belief of a strong probability of guilt, the evidence must still be considered with

reference to its negative or exclusive tendency, by which it finally establishes the presumption raised by negativing or excluding every other. This is the familiar test of the accuracy of a conclusion reached in which the peculiar efficacy of circumstantial evidence is believed to consist. It is not sufficient that the circumstances proved are consistent with and render probable the hypothesis sought to be established, but they must exclude beyond a reasonable doubt every other hypothesis except that one. Under an application of this test to the evidence above noticed, it is not entirely clear that a jury would be required to return a verdict of guilty upon it. The importance, therefore, of the expert testimony relating to the marks upon the primer of the cartridge made by Terrio's rifle can now be fully realized.

Characteristic marks on the primer. Expert testimony. After it had been demonstrated by actual experiments made successively by the County Attorney, and two officers, that the shell of the 30-30 rifle cartridge found by the side of Pare's body exactly fitted the Terrio rifle, the shell was accidently crushed in a letter press by the County Attorney, and was thereafterward known in the case as the crushed shell. Observing the indentation made by the firing-pin, on the primer of this shell, it occurred to the mind of County Attorney Gower, that the firing-pin of every rifle might be found under the microscope to possess such an individuality that its characteristic marks would be impressed on every primer exploded by it, and that the marks on the primer might also be seen under the microscope corresponding with those on the firing-pin. If so, it would afford circumstantial evidence of the certain kind where the fact in dispute is a necessary consequence of the fact attested and could not have been caused by any other. The crushed shell, the Peary shell, the Terrio rifle and six other 30-30 rifles were accordingly sent to Dr. Frank N. Whittier, professor of bacteriology in Bowdoin College, and an expert in the use of the microscope, who made a critical examination of the primer of the crushed shell, the Peary shell, and of several other shells, and of the firing-pin of the Terrio rifle and of six other 30-30 rifles, by the test of the microscope, and photographs of microscopical views, magnified 25 diameters or 625 times. Called

as an expert in microscopy, he testified in regard to the crushed shell and the firing-pin of the Terrio rifle as follows:

"The first thing that I noticed in examining this shell under the microscope was a very prominent circle or ring, at the very center of this depression. That cannot be seen at all with the naked eye. Inside this ring I saw an L-shaped figure, a figure that, viewed under the microscope, seemed very plain. Then, at one end of the L-shaped figure, I saw a figure that somewhat resembled a claw, and that, in speaking of it, I would like to call a claw-shaped figure. Both of these figures, the L-shaped figure and the claw-shaped figure were inside the ring that I spoke of a moment ago. All these things were microscopic. They were so small that they could not be seen with the naked eye. Just outside the ring was a star-shaped figure, a figure that resembled somewhat a star. That also was so small that one could not see it at all with the naked eye. Outside this comparatively large and prominent ring—of course it is really very small indeed—but outside of this central ring I have been speaking of was a number of other rings. I could make out, in places at least, nine other rings, one outside of the other. I could also make out certain lines, ridges and grooves, amounting to at least twenty, little ridges, depressions or rings, that were on the surface of this little depression; but the most prominent things that I could see were the four things that I have mentioned, the central ring, the L-shaped figure, the claw-shaped figure and the star-shaped figure."

"I examined the firing-pin on the same day that I examined the shell, that is, under the microscope, and I found appearances which corresponded exactly to the appearances on the shell, with the exception that everything was reverse as regards right and left. . . . . I found an L-shaped figure with the angle turning in the opposite direction from the L-shaped figure on the primer. . . . The L-shaped figure was a ridge on the primer, and a depression on the firing-pin. I found there two things: The L-shaped figure and the claw-shaped figure inside of a central circle which corresponded to the central circle of the primer. The central circle containing these in the firing-pin corresponded to the central circle of the primer, except that the circle was a ridge on the firing-pin; it was a depression on

the primer. I found the star-shaped figure outside this central circle."

Dr. Whittier discharged a cartridge in the Terrio rifle, and made a photograph of the primer of that shell. It shows the same prominent markings that are shown by the photographs of the crushed shell. He examined under the microscope the firing-pins of other 30-30 rifles, but found no marks upon them corresponding with the marks found upon the firing-pin of the Terrio rifle. He also discharged cartridges from the other rifles, and examined the primers of those shells under the microscope, but found no marks upon them corresponding with the marks upon the primer of the Terrio shells; but in every case the mark on the primer of the shell corresponded with the mark on the firing-pin of the rifle that discharged that shell, with the difference that the right was left; and prominences were represented by depressions. In no instance did the markings upon the primer of a shell discharged in one rifle correspond with the markings on the primer of the shell discharged in any other rifle; and no two firing-pins could be found that were identical.

In regard to the Peary shell, found on the eleventh of May, about fifty feet from the place where Pare's body lay, Dr. Whittier says he was unable to determine whether it was fired in the Terrio rifle or not, by reason of the erosion or rusting that had taken place. The photograph of the microscopic view of the primer of that shell discloses no marks similar to those on the primer of the crushed shell. Dr. Whittier also explained the use of the micrometer, or measuring scale used by him, which makes actual measurements of any microscopic object in thousandths of an inch. By means of this instrument he measured the ridges and depressions constituting the markings on the primer of the crushed shell and found that they corresponded exactly with the measurements made upon the firing-pin of the Terrio rifle.

The respondent was unprepared to meet this novel and interesting phase of the State's evidence, and could only present the negative results of other hasty and imperfect examinations which failed to disclose these characteristic marks on primer and firing-pin. The evidence thus went to the jury with substantially the full effect claimed

for it by the State; and in view of the fact that Terrio's rifle was admitted to have been in his own possession on that eleventh of March, the testimony of Dr. Whittier, corroborated by the photographs exhibited in evidence, unquestionably exerted great probative force on the minds of the jury; and when this was combined with all the other facts and coincidences in the case, it may be conceded that the State's evidence warranted the verdict of guilty rendered by the jury.

But upon the motion for a new trial on the ground of newly-discovered evidence Prof. O. W. Knight, State assayer and expert microscopist, was authorized by the court to make a careful and exhaustive study of the question for the purpose of testing the accuracy of Prof. Whittier's conclusions. Prof. Knight thereupon made a thorough examination, under the microscope, of the crushed shell and of the end of the firing-pin of the Terrio rifle; and finally by the aid of photographs, he was able to find all of the markings on the primer of the shell and on the firing-pin, as described by Dr. Whittier. He thus verified the conclusions of Dr. Whittier, that there were characteristic marks on the end of the firing-pin of the Terrio rifle which made a corresponding imprint upon the primer of every cartridge discharged in it and that the marks on the primer of the crushed shell corresponded with the marks on the Terrio firing-pin.

But it will be remembered that Dr. Whittier testified, in effect, that he was unable to distinguish any characteristic marks on the primer of the Peary shell on account of the corrosion that had taken place. Prof. Knight thereupon undertook a series of experiments, which Prof. Whittier had not attempted, for the purpose of determining to what extent this corrosion would take place under given conditions, and whether such inconceivably fine and delicate marks as those in question, which could be seen only by the aid of a powerful microscope, might not under some conditions, disappear altogether in a short space of time under the effect of corrosion. In relation to these experiments Prof. Knight testified inter alia as follows: "On the 2nd day of March, 1902, I fired a number of shells in a rifle hired for the occasion. One of these shells I sealed in a glass tube so that it would show its original condition and would

not be acted upon by the atmosphere in any way. I then exposed a number of shells in various localities where they would be exposed to the rain and snow and the inclemencies of the weather. On the 9th of the same month, I took three of these shells home and after drying them thoroughly put them in this sealed tube. After this exposure of one week, I found that considerable corrosion had taken place on the external surface of those shells, so much so as to be visible to the naked eye. March 16, I took home and dried three more of these shells, and found they were still more corroded, and the condition is noticeable to the eye unaided by the microscope. My next step was to fire a number of shells in the Terrio rifle March 29, 1902, in the presence of Dr. Whittier. After sealing one in a glass tube so that it should remain unaltered and untarnished, April 3, I exposed six of these shells in a snow bank in a shady locality, about a mile from the city of Bangor, selecting a locality as nearly as I could like that in which the body was found. The same day I exposed six other shells in a sunny place in a snow bank. I took photographs of the microscopic views of those placed in a snow bank in a sunny locality and three of those in a shady locality. I took the photographs April 1, April 20, and again on May 3. I would like to add that I took pains to select for this entire experiment shells which showed most distinctly the characteristic marks of the Terrio firing-pin. I took measurements of the markings of these six shells, and also of the crushed shell. From the lowest depression of the bottom loop of the L to the tip of the highest ridge, the measurements of the six shells were respectively .0013125 of an inch, .0013125, .0015000, .0013125, .0015000, and .0018750 of an inch. The measurement of the markings on the crushed shell was only .0010382."

"I will now state the different stages of the corrosion of the face of the primer of the six shells exposed in the snow from April 3 to May 3. Examined under the microscope April 13, the markings upon the primer had begun to disappear somewhat and were much less sharp at the edges than they were April 3. April 20, the markings were very faint, far fainter than the markings of the crushed shell, and the photographs taken there are included in the exhibits.

On May 3, after being exposed one month, by examination with a microscope and by taking the photographs, I was unable to find on any of these shells markings which would lead one to conclude that they could possibly have been fired in the Terrio rifle. In the course of the work, I have examined the firing-pin of the Terrio rifle and many other rifle pins of similar make and as a result of my experiments, I am forced to conclude that it would be impossible for a shell to be exposed for thirty days and retain the characteristic markings made on the primer by the firing-pin of any rifle which I have examined in the course of my work. If the crushed shell in this case was used in committing this murder on the 11th day of March, 1901, and had remained in the conditions which the evidence in this case which I have read shows it to have been near Pare's body, and remained there until the 11th day of April, following, in my opinion, it would not have borne the marks of any firing-pin of any rifle in which it was fired on the 11th day of March."

After explaining the several causes which might tend to induce corrosion, Prof. Knight further testified that he should expect to find a deeper impression on a shell that was fired in a rifle and exploded than he would if the empty shell was afterward put into the same rifle barrel and hit with the firing-pin under the blow of the rifle hammer. "When the shell was loaded, and put into the rifle, the firing-pin coming down on it would exert a force tending to depress the primer; almost at the same instant the explosion of the material within the shell would exert a force in the opposite direction, and between these two forces the soft metal composing the primer would be forced into the pores of the firing-pin. In the second case a shell, when it had already been exploded, when it were put into a rifle and the firing-pin dropped on it, there would be only the one force, the force of the spring of the firing-pin acting and the impression would not be so deep, because there would be nothing to force this soft metal into the pores of the firing-pin."

In this connection the figures of the measurements showing smaller "depressions and ridges" in the marks on the primer of the crushed shell than on the primer of the other shells have possible significance. It is asserted with confidence, in behalf of the defense, that these

facts in connection with the evidence relating to the effect of corrosion satisfactorily prove that the characteristic marks on the primer of the crushed shell were not made when the loaded cartridge was exploded on the 11th of March, but accidentally made on the empty shell at a much later date, when this shell and Terrio's rifle were freely manipulated for the sole purpose of ascertaining whether the shell fitted the chamber of the rifle. This was before the shell was crushed and before the theory of characteristic marks had been suggested. It is pertinent to remember, however, that if the crushed shell was not exploded in the Terrio rifle on March 11, it was undoubtedly exploded in some other rifle on that day and received a characteristic imprint from the firing-pin of that other rifle. Unless obliterated by corrosion there was therefore already the impression of one firing-pin on the primer of the crushed shell, before it could accidentally have received a second impression after it was empty. Whether this is a factor of sufficient materiality to complicate the problem is a question which does not appear to have been considered by the experts. Dr. Whittier's testimony, however, only goes to the extent of asserting that the four prominent markings described by him were the same on the primer of the crushed shell as on the primers of the other shells exploded in the Terrio rifle. It is possible that these four characteristic marks might be impressed on the primer of the crushed shell after the first imprint, made by another rifle, had disappeared under the influence of corrosion, while the other infinitesimal shadings on the crushed shell alluded to by Dr. Whittier, might have a different appearance from those on the other shells.

Prof. Whittier was not called to rebut or controvert this evidence of Prof. Knight, and if it had been presented at the trial in connection with the evidence of Dr. Whittier, it is not improbable that it would have raised in the minds of the jury a reasonable doubt whether the characteristic marks on the primer of the crushed shell were made by the Terrio rifle at the time the cartridge was exploded on the 11th of March, or accidentally made on the empty shell at a subsequent date; and if they had a reasonable doubt respecting that proposition, it is not improbable that they would have had a reasonable doubt in relation to the guilt of the accused and returned a differ-

ent verdict. Under all the circumstances it seems but just that the respondent should not be "deprived of the privilege of having his new evidence passed upon by a jury whose peculiar province it is to decide controverted issues of fact, even though it appears to the court only probable that the new evidence would change the result, or that injustice would be done if a new trial was not granted." *Parsons* v. *Lewiston, etc., Street Railway*, 96 Maine, 508. The respondent is an unknown woodsman whose personal destiny may attract little attention and awaken little interest; but equally with all others he is entitled to the protection of the courts. The discovery of truth is the single aim of all judicial inquiry, and justice should always move to its end with deliberation and with the strength and dignity of impartial law.

With respect to the motion for a new trial based on newly-discovered evidence the entry must accordingly be,

Appeal sustained; Motion sustained; Verdict set aside. New trial granted.

CALVIN W. BROWN, Judge of Probate,

vs.

ARTHUR A. CRAFTS, and others.

Piscataquis. Opinion July 1, 1903.

Gift, Imperfect, In presenti, Power of attorney back to donor. *Delivery*, Formal requisites, Colorable. *Trust*, Intention, Statute of Wills.

While the courts of this State have given liberal construction to language and attending circumstances to uphold a trust, where the essential element of declaration can be fairly inferred, nevertheless, an intended but imperfect gift cannot be enforced as a trust.

If the essential intention exists on the part of the donor to create a gift, a simple delivery of stocks, bonds or notes, without formal assignment or indorsement, is sufficient to at once pass the title.

Where the delivery of property, which is the subject of a claimed gift, is accompanied by all the formal requisites, it becomes necessary to determine the intention of the donor in observing the forms and also to apply the restrictions imposed by the law of wills.

A delivery is rendered colorable, incomplete and unreal by a manifest mental reservation by a donor, embodied in a power of attorney prepared at the same time as the deed of gift, and executed immediately by the donee, giving the donor control over the property during his life.

The nature of the original transaction in such a case is not changed by an attempt at delivery made subsequent to the date of the deed of gift, in pursuance of legal advice received by the donor, by allowing the donee to temporarily take into her possession the key to the safe in which the property is deposited.

On report. Judgment for plaintiff. Remanded to nisi prius.

Debt on bond to the judge of probate of Piscataquis County, on the application of Hattie Eveleth widow of John H. Eveleth late of Greenville in said county, deceased. The suit was in common form in such cases against the executor and the American Surety Company of New York which furnished the bond.

The plea was the general issue with a brief statement of full per-

formance. The plaintiff filed a counter brief statement setting out, in substance, the failure of the executor to return a true and perfect inventory of the testator's estate.

The testator in his lifetime had, in form, made a gift to his daughter of certain stocks, bonds and mortgages of the market value of about $60,000. The executor had failed to include these securities in his inventory. His failure to do so was the basis of this suit prosecuted in the name of the judge of probate by the testator's widow.

The case appears in the opinion.

C. F. Johnson, C. W. Hayes and W. H. Powell, for plaintiff.

W. E. Parsons, Henry Hudson and F. E. Guernsey, for defendant.

Counsel contended that after the certificates of stock and notes were in fact delivered to the donee and she had them, they then and there became her absolute property. She had complete dominion over them. The fact that the certificates were delivered back by her to her father, the donee, does not and did not divest her of her title thereto.

"After the gift is made complete by delivery it is not necessary that the donee shall retain possession of the property. The subsequent possession by the donor, while it may throw suspicion on the transaction as being in fraud of creditors, if satisfactorily explained, will not divest the donee of the title to the property when it has once been lawfully acquired by him." 8 Am. Encl. of Law, p. 1317. In *Grover* v. *Grover*, 24 Pick. 261, a note and mortgage were given by the donor to the donee. After the donee had received delivery of the papers he gave them to the donor saying, "You may keep the papers until I call for them, or collect them for me." The point was made that the donor could not by law act as agent of the donee to keep the papers or collect the money. The court say: "Another objection is that if the gift was valid and complete by the delivery of the note it was annulled by the redelivery to the donor. We think this objection is also unfounded."

Plaintiff claims that the husband had no legal right to make this gift as against the rights of the wife. Defendant claims that the

personal property is the property of the husband; that he has the right to dispose of the same as he sees fit; that the rights of the wife in the personal property take effect only upon the death of the husband. Up to the date of his death the husband has the right to dispose of his personal property. In *Sanborn* v. *Goodhew*, 28 N. H. 48, the husband gave notes aggregating $3000 just before his death to his children. These notes were delivered to one N. W. Westgate for said children. Upon the death of the father the wife claimed that the notes should form a part of his estate; and in her behalf the point was made that the husband could not make and execute such a gift and thereby deprive the wife of her share of the notes. The court held that the notes were the property of the husband and he had the right to make the gift. In *Lines* v. *Lines*, 142 Penn. 149, 24 Am. St. Rep. 487, the father gave to his children certain securities mentioned in deeds of trust. The wife claimed that these deeds were in fraud of her rights as widow; that they were testamentary in their character, and asked to have the deeds declared void. The court: "The first proposition cannot be sustained. It is settled law of this State that a man may do as he pleases with his personal estate during his life. He may even beggar himself and his family, if he chooses to commit such an act of folly. When he dies, and then only, do the rights of his wife attach to his personal estate."

But plaintiff claims that this whole transaction was merely colorable. That it was done for the express purpose of defrauding the wife. Mr. Eveleth may have looked at this matter differently from others. He had married his wife late in life, as the record shows. She did not help him accumulate any part of his property. He received about $50,000 from his father. And upon examination of some of the certificates of stock it will be seen that they were owned by the father in his lifetime and passed under the will to Mr. Eveleth, the donor, who was his father's executor. These facts together with the fact that his final account as such executor was really settled as a part of the same transaction with the gift, all go to show that the donee intended to give to his daughter substantially the property which he had received from his father.

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

PEABODY, J. This is an action of debt on a probate bond commenced in the name of Calvin W. Brown, Judge of Probate for the County of Piscataquis, State of Maine, against Arthur A. Crafts, executor of the will of John H. Eveleth, late of Greenville, in said county, deceased, testate, and American Surety Company, surety on his official bond, by Hattie Eveleth, widow of the testator. It is before the law court on report.

The testator died on the seventh day of November, 1899, leaving a widow, Hattie Eveleth, and Rebecca W. Crafts, a daughter by a former wife. The will was admitted to probate on the eighth day of January, 1900, and within six months thereafter the widow waived the provision made for her and claimed her right and interest by descent in her husband's estate. The defendant, Arthur A. Crafts, husband of Rebecca W. Crafts, was appointed executor of the will and gave bond to the judge of probate, the predecessor of the nominal plaintiff. He returned an inventory of the estate to the Probate Court within the time required by law, which included improved real estate, $34,120; wild land, $40,960.50; goods and chattels, $9,879.93; and rights and credits, $34,798.24.

The basis of the suit is the breach of the condition of the executor's bond by his failure to include in his inventory certain stocks, bonds and mortgages specified in the plaintiff's replication, amounting at their face value in the aggregate to $65,673.33, and of the market value of about $60,000. This property belonged to the deceased prior to June 12, 1898, and constituted part of his estate at his death unless the title thereto passed to his daughter by gift. It was in his possession at the time of his death and was afterwards delivered by his executor to his daughter, who claimed it under deed of gift from the deceased, dated June 11, 1898, signed on the following day.

It appears that the testator, four days after the execution of his will, without the knowledge of his wife or daughter caused to be prepared two written instruments, one a bill of sale or assignment, by which he sought to transfer the property in controversy to

his daughter; the other, a power of attorney under which he was to receive the property and during his life to manage, control and have the use and income of the same and the right to pledge it for his personal debts, or to sell it as he might deem necessary to pay any indebtedness he might have, using the same as though it were his own property.

His daughter, Rebecca W. Crafts, was then called and his intention to give her this property disclosed to her; and the papers were executed consecutively by himself and his daughter with all the formalities required in the transfer of personal property. Upon signing the bill of sale he delivered the stocks, bonds and mortgages described therein to the donee, who received them and at his request compared them, item by item, with the schedule; and she in turn signed the power of attorney and redelivered the property to the donor to be by him retained and used in accordance with its terms.

So far as appears by the report, there is but one rational explanation for the execution of these papers. Eveleth was forty years older than his wife, and while nothing appears to indicate that the marriage relation was not usually harmonious, his wife had in their discussions in reference to the disposition of his property made threats that she meant to get all she could out of the estate when he got through with it. He communicated this fact to his attorney when seeking his advice in regard to the validity of the disposition of this property by gift to his daughter under the bill of sale and the conditions by which he was to retain the control and enjoyment of it during his life under the power of attorney.

The validity of the transaction is called in question by the plaintiff in interest upon two grounds:

1. That it was not a completed gift.

2. That it was a disposition of personal property intended to deprive his wife of her distributive share, and was consequently, as to her, by law fraudulent and void.

Gifts to children are favored by the policy of the law. *Love* v. *Francis*, 63 Mich. 181, 6 Am. St. Rep. 290; *Betts* v. *Francis*, 30 N. Y. 152; *Nichols* v. *Edwards*, 16 Pick. 62. The delivery of this

property was not incomplete by reason of lack of formal indorsement or assignment of the certificates of stock, bonds or notes. The gift of these choses in action could have been completely executed by simple delivery with the intent at once to pass the title. *Reed* v. *Copeland,* 50 Conn. 472; *Wing* v. *Merchant,* 57 Maine, 385; *Grover* v. *Grover,* 34 Pick. 261, 35 Am. Dec. 319; *Com.* v. *Crompton,* 137 Pa. 138; *Watson* v. *Watson,* 69 Vt. 243; *Larrabee* v. *Hascall,* 88 Maine, 511, 518, 51 Am. St. Rep. 440.

The debatable ground is the intent with which the formalities were observed and the limitation defined by the law of wills. Under the instrument signed by the donor there lacked no element of perfect execution of the gift, but there was a manifest mental reservation by him, which had already been embodied in an instrument prepared at the same time as the deed of gift, and at his virtual request it was immediately executed by the donee. It is a significant fact that the husband of the donee, who was also the confidential clerk of the donor, knew of the preparation of both papers and was present as a witness when they were executed.

It may well be doubted whether it was legally in the power of the donee under the circumstances to have accepted the gift made to her under the formalities which attended it without executing the power of attorney which gave to the donor the control of the property during his life. If not actually advised as to the intention of the donor when she received the property, she was not left in doubt for any determinate time. What was done by the donor and donee was one and the same transaction. We think the delivery of the property was incomplete. It was colorable, not real. This attempted transfer, having the semblance of a gift but the substance of a will, was nugatory. The dominion which the donor retained over the property during his life was as full as if the disposition had been by will; and the rights and enjoyment of the donee were postponed until his death. It appears that subsequently to the date of the bill of sale, in pursuance of legal advice received by John H. Eveleth on the subject of the gift to his daughter, she received the key to the safe in which the property was deposited and temporarily took it into her possession; but this does not in our view change the nature of the original trans-

action. It tended rather to disclose its character as not being bona fide. The letter of the donor to the donee, advising this course and reiterating the fact that the property was hers, was simply artificial evidence created for the purpose of proving the execution of the original gift.

In *Buswell* v. *Fuller*, 156 Mass. 309, the payee of a note undertook to give the maker, his daughter in law, the principal and retain the interest. He passed the note to her which she took, but the payee said he would like to have it to indorse payments of interest. It was returned to the payee who retained it. The court say that "a mere oral gift, without a complete transfer of the thing given, such that the giver no longer retains control of it, is ineffectual to pass a title." . . . "If the plaintiff's testator undertook to give the defendant the principal of the note and to retain the interest during his life and kept possession of the note for the purpose of having a claim for his interest, his attempted gift was a nullity." In *Shurtleff* v. *Francis*, 118 Mass. 154, certain assignments of mortgages were delivered by a father to his son at the dates of their acknowledgments, with instructions to put them on record in case he died before the son. They were deposited in a safe to which both had access. The court say that "it was not the intention of the parties to transfer the property to the plaintiff during the life of his father, but that the purpose of the transactions was that the transfer of the property should not take effect until after his death, a purpose which could not be carried into effect because of the statute of wills." In *Young* v. *Young*, 80 N. Y. 422, 36 Am. Rep. 634, a father attempted to give bonds to each of his two sons. They were placed in separate envelopes with an indorsement that "the interest to become due thereon is owned and reserved by me so long as I shall live; at my death it belongs absolutely and entirely to them and their heirs." It was held that there might be a valid gift in presenti by an instrument securing payment of money, reserving to the donor the accruing interest, but if the donor retained the instrument for the purpose of collecting the interest himself, there is an absence of complete delivery.

The courts in this State have given liberal construction to language

and attendant circumstances in upholding a trust where the essential element of declaration could be fairly inferred. *Northrop* v. *Hale*, 73 Maine, 66. But an intended gift cannot be enforced as a trust. *Norway Savings Bank* v. *Merriam*, 88 Maine, 146; *Bath Savings Institution* v. *Hathorn*, 88 Maine, 122, 51 Am. St. Rep. 382, 32 L. R. A. 377.

Having reached this conclusion sustaining the first point raised against the validity of the gift, it is not necessary to decide the second point.

The title to the property remained in the deceased and it should have been included in the inventory of the executor. The avails of this suit belong to the estate, and the executor should charge himself with the same in his account.

Defendants defaulted. Case to be retained at nisi prius for further proceeding in Probate Court, in accordance with this opinion. If the executor shall charge himself in his account with the value of the property claimed to have been given to Rebecca W. Crafts, within such time as may be fixed by the judge of probate, no execution to issue except for costs; otherwise such further order to be made at nisi prius as the case may require.

Inhabitants of Eliot *vs.* Oliver Prime, Exor.

York. Opinion July 1, 1903.

Tax. Assessment, Supplementary, Erroneous Description. *Amendment. Pleading. Demand. Costs. R. S., c. 6, § 14, par. 8; §§ 24, 35, 92.*

A liberal construction will be given to the statute for the collection of taxes by an action at law when no forfeiture is involved.

Personal property of deceased persons, in the hands of their executors or administrators not distributed, should be assessed to the executors or administrators. R. S., c. 6, § 14, par. 8.

In an action of debt against an executor for the collection of a supplementary tax assessed upon personal property of the deceased in his hands, the assessment was: "Heirs of A. B. or C. D., Executor." *Held;* that there is no statute authorizing the assessment of a tax upon personal property to the "heirs of" the deceased; therefore the phrase "heirs of A. B., or" is surplusage and the executor is liable for the tax.

When an original assessment of a supplementary tax is correct, it is the duty of assessors to correct any erroneous transcription to the collector's book.

The plaintiffs declared upon the regular assessment in which the defendants name did not appear; but under the statute, as held by the decisions of this court, the regular and supplemental assessments for legal purposes become one; and a declaration which intelligibly sets out that a tax is due under either, is sufficient.

Costs are not allowed when no demand for payment of a tax has been made before action brought.

On report. Judgment for plaintiffs.

Action of debt under the statute to recover a tax on personal property in the hands of the defendant as executor of the will of Benjamin Kennard, late of Eliot, deceased. The plaintiffs' declaration was the same as in *York* v. *Goodwin*, 67 Maine, 260, and *Wellington* v. *Small*, 89 Maine, 154.

The case is stated in the opinion.

J. B. Donovan and F. A. Hobbs, for plaintiffs.

H. Fairfield and L. R. Moore, for defendant.

The action is brought against the property of the deceased in the

hands of the executor. It should have been brought against the defendant personally. R. S., c. 6, § 14, par. 8; *Dresden* v. *Bridge*, 90 Maine, 493. It is to recover a supplemental tax made Oct. 1, 1900, while the declaration is for the recovery of the regular tax as of April 1, 1900. Plaintiffs introduced the books showing the regular assessment made on June 11, 1900, and is the assessment declared on. The name of the defendant does not appear therein. This fact is fatal to the action. Evidence of the supplemental tax is not admissible under the declaration. To recover a supplemental tax, the fact of its being supplemental, the omission by mistake and certificate to that effect should be shown and alleged as traversable facts, *Topsham* v. *Purinton*, 94 Maine, 357; *Dresden* v. *Bridge*, supra, and are put in issue under the plea of the general issue. The supplemental tax is not an amendment of the regular tax. It is rather a second assessment, or may be a third or fourth. The statute requires a new invoice, a new valuation, a new listing and a new commitment. R. S., c. 6, § 35. An assessment in the alternative does not comply with the statute. *Burke* v. *Burke*, 170 Mass. 500; *Alvord* v. *Collins*, 20 Pick. 418–21.

It is the duty of the assessors to ascertain whether the deceased died testate or intestate, before assessing the tax, and then act according to the fact. It is not sufficient for them to fail to investigate and then assess the tax to both, in the alternative. *Eliot* v. *Spinney*, 69 Maine, 31.

Under another statute provision real estate may be assessed to the owner or tenant, but the assessors cannot assess to both in the alternative. Their decision as to which one to assess should be made before and not after the assessment. In this case the assessors should have first ascertained whether there was an administrator or executor. This they did. They ascertained there was an executor and that his name was Oliver Prime. Their plain statute duty was then to assess against him alone. Whereas they assessed against him and the heirs in the alternative. By so doing they lost the right to recover of either.

Stafford v. *Twitchell*, 33 La. An. 520, *Grotefend* v. *Ultz*, 53 Cal. 666; *Hearst* v. *Eggleston*, 55 Cal. 365; *Greenwood* v. *Adams*, 80

Cal. 74; *Grim* v. *O'Connell*, 54 Cal. 522; *Daly* v. *Ah Goon*, 64 Cal. 512; *Pierson* v. *Creed*, 78 Cal. 144; *Jatum* v. *O'Brien*, 89 Cal. 57; *Dubois* v. *Webster*, 7 Hun, N. Y. 371.

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

SPEAR, J. This is an action of debt for the collection of a supplementary tax of $240, assessed upon $12,000 of personal property of Benjamin Kennard, late of Eliot in the County of York, deceased, in the year 1900, and in the possession of Oliver Prime of said Eliot, the executor of the last will and testament of the said Benjamin Kennard.

It is admitted that the said Benjamin Kennard, deceased, last dwelt in Eliot, and that Oliver Prime was, on April 1st, 1900, an inhabitant of Eliot, and that he then was and now is the executor of the last will of Benjamin Kennard; that the town clerk, assessors, selectmen, town treasurer and tax collector were legally chosen and duly qualified for the year 1900; that the assessors in 1900 gave notice in writing to the inhabitants to bring in their tax lists according to R. S., c. 6, § 92, and that the defendant brought in no lists; that the selectmen of Eliot instructed this suit to be brought; that in the supplementary tax list for the year 1900, other persons were also taxed but for poll-taxes only; that the defendant was not taxed at all in April, 1900, in any capacity as representative of the estate of Benjamin Kennard; that after the supplementary assessment of taxes was made the assessors under the hands of two of them, and with the consent of the third, made the following certificate: "We hereby certify that the above were omitted by mistake" which certificate was made before taxes were committed to the collector of taxes; that when the assessment was made, it was entered upon the book of valuation for the year 1900, as follows: Name, heirs Benjamin Kennard, or Oliver Prime, Executor; valuation $12,000; rate $20; total tax $240. The testimony shows that these taxes were committed October 1, 1900, and a certificate thereof given to the tax collector; that in copying from the tax lists to the collector's book the

words "or Oliver Prime, Executor" were not entered at the date of the commitment.

The evidence further shows that in the first week of October the tax collector presented to Oliver Prime, the executor, a tax bill in which the tax appeared to be assessed only to the heirs of Benjamin Kennard; that after this the assessors discovered that the phrase "or Oliver Prime, Executor," was not entered upon the collector's book, as it appeared upon the tax lists of the assessors, and that thereupon Mr. Goodwin, one of the assessors, the others being present and consenting, added the phrase "or Oliver Prime, Executor" to the entry in the collector's book. The collector says that he presented to Mr. Prime, the executor, a corrected tax bill corresponding with the amended entry upon his book. The defendant claims that the assessment of this supplemental tax in the alternative as above shown is illegal on the ground that such an assessment is against neither party named, and that the statute expressly requires that it shall be made against the executor. If a tax upon personal property could be legally assessed against the "heirs of" a deceased person, there would be great force in the defendant's position. Revised Statutes, c. 6, § 14, par. 8, provides "that the personal property of deceased persons in the hands of their executors or administrators, not distributed, shall be assessed to the executors or administrators" just as the tax in question was assessed, had the words "heirs Benjamin Kennard or" been omitted. Section 24 of the same chapter provides "that undivided real estate of a deceased person may be assessed to his heirs or devisees without designating any of them by name."

Under the last section, our court have held "that such estate may be taxed to the heirs without naming them when, and only when, it descends to them by operation of law; and that it may be taxed to devisees without naming them when, and only when, it comes to them by will." *Eliot* v. *Spinney*, 69 Maine, 31. Under this construction of this section of the statute, it is apparent that an assessment "to the heirs of" or "devisees of," in the alternative could not be sustained, as each phrase designates a party against whom a tax can be legally assessed; but this section applies solely to the taxation of real estate, and we find no similar provision in the statute relating to the

assessment of taxes upon personal property. On the other hand, it has been held that personal property in the hands of the executor can be taxed only to the executor personally, and that such assessment makes the executor personally liable. "To sustain the action it must be shown that the tax was so assessed as to make the defendant personally liable for its payment." *Fairfield* v. *Woodman*, 76 Maine, 549; *Dresden* v. *Bridge*, 90 Maine, p. 493. Taxes can be legally assessed only by authority of the statute. There is no statute authorizing the assessment of a tax in this case to the "heirs of" the deceased; therefore the phrase "heirs Benjamin Kennard or" being unauthorized by law, as parties upon whom a tax upon personal property can be assessed, is surplusage; and, under the liberal construction given the statute for the collection of taxes by our court, where a forfeiture is not involved, should have no effect upon the assessment. *Cressey* v. *Parks*, 76 Maine, p. 534; *Topsham* v. *Blondell*, 82 Maine, p. 156. The original assessment of the supplementary taxes being correct, it was not only proper, but the duty of the assessors, to correct any erroneous transcription to the collector's book. The assessment being in conformity with the statute, it is unnecessary to discuss the question as to whom the assessors intended to assess the tax. Yet, if the question of intention was in any degree involved, all the assessors testified that it was their intention to assess the tax to Oliver Prime, Executor. The evidence was clearly admissible. *Bath* v. *Reed*, 78 Maine, 284.

The defendant further objects to the right of the plaintiffs to maintain their action on the ground that the declaration in their writ was not sustained by the proof offered. The plaintiffs declare upon the regular assessment which was made June 11, 1900, as of April 1st, but the name of the defendant does not appear at all on this assessment. The plaintiffs admit "that this list shows no assessment against the defendant." The supplemental tax was assessed October 1st, 1900. On the same collector's tax list, on a blank page following the list of June 11, but preceding the last page, on which is the assessors' certificate of June 11, 1900, appear, under the heading "supplementary tax for 1900 omitted through mistake" in the columns properly marked, the names, valuation and amount of taxes assessed,

and among them the name of the defendant. The supplemental assessment was also entered upon the book of valuation for the year of 1900, as above stated. Thus we find the assessment of this tax entered both upon the book of original assessment, and in the comitment to the collector, under a proper certificate in each case and under signature of the assessors in the latter case, although the entry was actually made after the signatures were placed upon the collector's book.

The statute authorizing the assessment of a supplementary tax is found in R. S., c. 6, § 35. "When any assessors, after completing the assessment of a tax, discover that they have by mistake omitted any polls or estate liable to be assessed, they may, during their term of office, by a supplement to the invoice and valuation, and the list of assessments, assess such polls and estate their proportion of such tax according to the principles on which the assessment was made, certifying that they were omitted by mistake. Such supplemental assessments shall be committed to the collector with a certificate under the hands of the assessors, stating that they were omitted by mistake, and that the powers in their previous warrant, naming the date of it, are extended thereto; and the collector has the same power, and is under the same obligations to collect them, as if they had been contained in the original list." It seems to us that under this statute the supplementary tax becomes a part of the original assessment. In the language of the statute it is "a supplement to the invoice and valuation and the list of assessment." The polls and estate are "omitted by mistake" from the original, and by the supplementary assessment they are simply added to it. The powers in their previous warrant are extended to the assessments and "the collector has the same power and he is under the same obligation to collect them as if they had been contained in the original list." Every attribute of the supplementary relates back to, and becomes a part of, the original assessment. Without it there could be no supplement. The earlier decisions of this State which have never been questioned seem to go even further than this and hold that the supplementary assessment may relate back and cure a fatal omission in the original assessment. "It appears that on the twentieth of July, 1837, a tax list

accompanied by a warrant duly authenticated was committed to the collector, but the tax list was not under the hands of the assessors, as the statute requires. On the fourth of October following a supplementary or additional tax list, correcting certain errors or omissions in the first list, and expressly referring to it as containing the assessment for that year, was signed by a majority of the assessors and committed to the collector. These two lists contained the assessment on the polls and estates of the inhabitants of the city for that year.

"It was decided in the case of *Johnson* v. *Goodridge*, 3 Shepl. 29, to be a sufficient compliance with the requirements of the statute, 'that the lists should bear upon them the official sanction of a majority of the assessors, evidenced by their signatures.' By signing the supplementary list and therein referring to the former list the assessors made a distinct declaration in their official character and under their hands, that both lists constituted the list of assessments for that year." *Bangor* v. *Lancey*, 21 Maine, p. 472.

Under the statute as interpreted by this decision, the two assessments for legal purposes become one, and a declaration which intelligibly sets out that a tax is due under either is sufficient. As the defendant's name, in this case, did not appear in the original assessment at all, the plaintiffs' declaration necessarily set out, not only the original, but so much of the supplemental as related to the tax against the defendant. This was all that was required. We think the declaration was sufficient to admit the evidence of the supplementary assessment.

There is no evidence of a demand which warrants a judgment for costs. In accordance with the stipulation in the report,

Judgment is to be entered for the plaintiffs for $240 and interest from the date of the writ, without costs.

ALICE D. TILTON, IN EQUITY, *vs.* EDITH B. DAVIDSON.

Hancock. Opinion July 2, 1903.

Will. Trust. Termination. Pleading.

Although a trust may not have ceased by expiration of time, and although all its purposes may not have been accomplished, yet if all the parties who are or may be interested in the trust property are in existence, and sui juris, and if they all consent and agree thereto, a court in equity may decree the determination of a trust and the distribution of the trust fund among those entitled.

When the purposes named in the trust which are inconsistent with the full beneficial ownership and control of the cestui are fulfilled, so that the trustee holds the property on a simple trust, the cestui having the absolute ownership of the fund, he is entitled to have the trust terminated.

A testator devised all his estate to his two daughters who were his only heirs and by a codicil appointed them as trustees under the will with powers of investment and to pay over to themselves in equal portions all the income of the principal, and to dispose, by will or otherwise, their portion of the principal after their death. Upon a bill of interpleader to obtain a construction of the will, *held;* that it did not create a spendthrift trust; and upon amendment to the prayer of the bill the alleged trust may be terminated.

Such bill should distinctly allege that the two daughters are the only heirs of the testator.

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

Bill to obtain the construction of the will of Herman Elvas Davidson, late of Bar Harbor, deceased. The defendant, one of the two only heirs, answered and joined with the plaintiff in requesting its construction.

H. E. Hamlin, for plaintiff.

J. A. Peters, Jr., for defendant.

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

WHITEHOUSE, J. This is a bill in equity brought to obtain a judicial construction of the will of Herman Elvas Davidson, late of Bar Harbor in the State of Maine.

On the eleventh day of June, 1890, the testator made his last will and testament, the disposing items of which were of the following tenor, viz: "I bequeath and devise as follows: 1. To my two daughters, Alice Bowker Davidson, and Edith Bowker Davidson, share and share alike, all the property real and personal of which I may die possessed, or which may be paid to my estate after my decease. And in case either of my said daughters should die before me, leaving no issue, then I give and bequeath all the property named in this article of my will to the other of my daughters surviving me; but if she is also deceased then to her issue surviving me. 2. I hereby designate and appoint my two daughters aforesaid Executors and Administrators of this my last Will and Testament; and I desire that they be not required to give bonds."

On the fourth day of August of the same year, he executed the following codicil to his will: "By this codicil to my last Will and Testament, dated in June 1890, made this fourth day of August, eighteen hundred and ninety, I hereby appoint my two daughters, Alice Bowker Davidson and Edith Bowker Davidson, trustees of my estate, which I bequeath to them. I hereby bequeath all my estate both real and personal to my aforesaid Trustees, the same to remain in their care during their lifetime, with power to keep or change any of the investments as they may deem fit and to pay over to themselves in equal portions, all the income of said principal, and to dispose, by will or otherwise, their portion of said principal after their death.

"And I hereby order that the above named Trustees shall not be required to give any bonds for their fulfillment of the within trust."

The testator died on the tenth day of the same month, and the foregoing will and codicil were duly admitted to probate in the County of Hancock. The plaintiff and defendant are the testator's daughters named in the will and codicil, and it is alleged in the plaintiff's bill and admitted in the answer that they "are the only living persons interested, or who by possibility may be interested in the subject matter of this bill." The plaintiff asks the court to determine what interest in the testator's estate the plaintiff and the defendant each respectively acquired by virtue of this will and codicil, and whether or not each is entitled to one-half of the estate, "absolutely

in her own right and free from any trust." The defendant admits the allegations in the bill and joins in the prayer for the construction of the will according to the prayer of the bill. The case is thereupon reported to this court on bill and answer, the defendant submitting without argument.

It is a familiar rule of law that where the legal and equitable estate in the same land becomes vested in the same person, the equitable will merge in the legal estate, if the latter is equally extensive with the former; "for a man cannot be a trustee for himself nor hold the fee, which embraces the whole estate and at the same time hold the several parts separated from the whole." "No person can be both trustee and cestui que trust at the same time, for no person can sue a subpoena against himself." 1 Perry on Trusts, §§ 13 & 347. See also 2 Pom. Eq. § 988; *Wills* v. *Cooper*, 1 Dutcher, 25 N. J. 137; *Bolles* v. *State Trust Co.*, 27 N. J. Eq. 308; *Mason* v. *Mason's Ex'rs*, 2 Sandf. Ch. 433. But in equity this is not an inflexible or universal rule, and it will not be applied contrary to justice or the intention of the parties, but the two estates may be kept separate and a trust allowed to subsist, if necessary to protect the equitable interest of the owner.

In the case at bar it has been seen from the terms of the codicil that the testator resorted to this legal solecism of constituting his daughters trustees for themselves, for the apparent purpose of limiting their enjoyment of the estate to the use of the income during their lifetime, and of preventing any alienation of the principal except by "will or otherwise" to take effect at their decease. He evidently attempted to establish a trust to insure the preservation of the corpus of the estate unimpaired during their lives, but at the same time desired to give them substantially the same dominion and control over the property that they would have had if no attempt had been made to create a trust. The plaintiff's bill, as well as the testator's codicil, is silent respecting the nature and value of the estate, the situation and circumstances of the parties, what had transpired in the conduct or social relations of the legatees during the two months which intervened between the will and the codicil, and the particular consideration which in fact induced the testator to attempt to modify

the terms of the original will which in plain terms gave the daughters an absolute title to the property. There is nothing in the will or codicil indicating any other thought or feeling than an affectionate regard for the welfare and happiness of his children, and a desire to secure to them a permanent support which should not be exposed to the risks of their own possible improvidence and the consequent demands of creditors or the importunities of others. It is not improbable that the testator had in mind the idea of giving them only a qualified estate which they could not alienate and which creditors could not reach. It would have been competent for him to create a trust which would have accomplished that purpose. The doctrine of "spendthrift trusts" has been distinctly approved by this court in *Roberts* v. *Stevens*, 84 Maine, 325. But an intention to create a "spendthrift trust" has not been unequivocally expressed by the testator, nor is it necessarily or clearly to be inferred from the language of the will and codicil construed together. There is no explicit provision that either the income or the estate shall not be alienable by the voluntary act of the daughters or be subject to attachment by their creditors. If the testator intended to create a spendthrift trust, he did not succeed in framing a will to carry out that intention. The property is "bequeathed" to his daughters as trustees, with power to change the investments and to pay over to themselves all of the income of the property. True, the gift of the income of real or personal property for life is a gift of a life estate in that property. So the codicil in this case purports to give the daughters an estate for life in the entire property, followed by a general power of appointment or right to make a disposition of the estate, if they see fit to exercise it, by will or other instrument which shall take effect at their decease. But no other beneficiaries except the daughters are named or suggested. After providing for this life estate to the daughters, the will contains no reference whatever to any limitation over of the estate in any contingency to any other person. True, the entire estate is "bequeathed" to the trustees to "remain in their care during their lifetime" for the purpose and with the power above stated, but the testator makes no disposition of the remainder after the termination of this life estate.

The daughters thus hold the property upon a simple trust for their own benefit. Under these circumstances, even if the trust had been confided to strangers for their benefit, the daughters would thereby have become the absolute equitable owners, not only of the income but of the principal of the trust estate. In *Sears* v. *Choate*, 146 Mass. 395, the testator left the residue of his estate to trustees "to hold, invest, manage and take care of the same according to their best knowledge and discretion" and made the following provision for his son Joshua, his only child and sole heir: "I give to my son Joshua M. Sears the sum of $3000 to be paid to him at the age of twenty-one years. All such parts of the income of my estate which may be necessary for the support and education of my son, I order to be used for that purpose, and when he shall be twenty-one years old, I direct that $4000 be paid to him annually; when he shall be twenty-five years old $6000 per year, and $10,000 per year when he shall be thirty years old." The son brought a bill in equity alleging that he had the entire beneficial interest both in the income of the property held by the trustees for his benefit, and in the property itself, and praying that the trust might be terminated and the property conveyed to him. In the opinion the court say: "The trustees now hold the trust estate upon the simple trust, as defined in the will, to pay the plaintiff $10.000 per year. There is in the will no limitation over of the estate in any contingency to any other person . . . . and there is no provision that the income of the estate shall not be alienable by the plaintiff, or attachable by his creditors. It cannot be doubted that under this will the plaintiff took an equitable estate which he might alienate, and which equity would apply to the payment of his debts. . . . Taking this will as it is, we should not be justified in holding that the plaintiff took anything else than an absolute equitable estate both in the income and the corpus of the trust."

"There is no doubt of the power and duty of the court to decree the termination of a trust, where all the objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination. Where property is given to certain persons for their benefit and in such a

manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." See also *Dodson* v. *Ball*, 60 Pa. St. 492, (S. C. 100 Am. Dec. 586); *Burleigh* v. *Clough*, 52 N. H. 267; *Irwin* v. *Farrer*, 19 Ves. 86; *Barford* v. *Street*, 16 Ves. 135; *Holloway* v. *Clarkson*, 2 Hare, 521; *Conrad* v. *Reynolds*, N. J. Er. & Ap. 1901, 49 Atl. Rep. 541.

In *Dodson* v. *Ball*, 60 Pa. St. supra, the purpose of the trust was substantially the same as that in the case at bar, and apart from the identity of trustees and beneficiaries, the facts were also analogous to those in the principal case. In the opinion the court say: "The only useful purpose visible in the deed (of trust) was the preservation of her property to her sole use . . . and its transmission by will or descent. . . . . The trust is purely passive requiring no active duty except conversion for her benefit and advantage; and if the trust as expressed does not in fact break the course of descent, there seems to be no good reason to interpret it so as to divest her of her control of her own property, and the trust should fall."

In regard to the utility and necessity of merely passive trusts where the trustee is a simple depositary of title, this court has said in *Sawyer* v. *Skowhegan*, 57 Maine, 500: "They tend to obscure titles, mislead the public and facilitate fraud, and it was the object of the statute of uses to abolish them. Hence, we find the courts discouraging them. . . . They are not useful."

It is accordingly the opinion of the court that upon an amendment to the prayer of the present bill asking that the alleged trust in this case be declared terminated, no sufficient cause is shown why the plaintiff will not be entitled to a decree of the court to that effect. The bill should also be further amended by adding a distinct allegation that these parties are the only heirs of the testator.

Cause remanded for further proceedings, in accordance with this opinion.

MILFORD WITHEE

vs.

THE SOMERSET TRACTION COMPANY.

Somerset. Opinion July 7, 1903.

Negligence, Risk not assumed. *Electric Railway. Poles,* Placed too near the track.

During a crowded condition of a trolley-car, by custom and under verbal instructions to the conductor, passengers were received and permitted to ride on the platform and running boards.

In collecting the fares the conductor was obliged to pass along the running board and step around the passengers, relying on the handle bars for support.

While thus engaged in taking fares, the plaintiff, a conductor in the employ of the defendant corporation operating the road, was struck by an inclining trolley-supporting pole which, at the height of plaintiff's head, was nineteen inches from a point vertically above the outer edge of the running board on the easterly side of the track.

The accident pole was twenty-two inches nearer the rail than the average distance of the three hundred and eighty-one poles on the entire line and inclined toward the track six and a quarter inches in a height of six feet.

The plaintiff had been in the employ of the road for four years on its cars and had been previously engaged in setting trolley poles. But he had not noticed the proximity or inclination of the accident pole.

Held; that the defendant company was negligent in making an improper location of the pole.

Held; also, that there was no such want of preponderance of evidence as would justify setting aside the verdict in plaintiff's favor rendered by a jury who heard the testimony and viewed the place of the accident, either on the ground of contributory negligence or assumption of risk.

Motion by defendant. Overruled.

Case for personal injuries. Plaintiff was a conductor on one of defendant's electric cars. The car, which was open, was crowded and the conductor was collecting fares on the running board when he was struck by a pole at the side of the track supporting the trolley.

The verdict was for plaintiff for $1472.08.

Defendant filed a general motion for a new trial alleging the usual grounds.

The facts are stated in the opinion.

Forrest Goodwin, for plaintiff.

Geo. W. Gower, for defendant.

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

PEABODY, J. The plaintiff was a conductor on an electric car used by the defendant corporation on its street railway between Madison Village and Skowhegan, in Somerset County, Maine. On the fourth day of July, 1900, when performing the duties of his employment, he was struck by one of the poles erected and maintained by the company for supporting the trolley wires.

The action is brought to recover damages for injuries he sustained, and which he alleges were caused by the negligence of his employer, the defendant corporation. The verdict was for the plaintiff for the sum of $1,472.08; and the defendant brings the case to this court on motion for a new trial.

The jury must have found, first, that the defendant was guilty of negligence in reference to the plaintiff in the relation of master and servant; second, that the plaintiff did not assume as a risk incident to his employment the special danger of being hit by this particular pole as it was then located; third, that the plaintiff did not contribute to the accident by failure to use due care.

The facts upon which the question of the alleged negligence of the defendant depends relate to two elements of the proposition.

First, as to the location and other conditions of the trolley pole relative to the track and the car on which the plaintiff was serving the defendant as a conductor.

The distance from the inside of the pole to the outside of the rail was forty-four and one-fourth inches, and to the outer edge of the running board on the side of the car nineteen inches less. The pole inclined toward the track six and one-fourth inches at the height of the plaintiff's head as he stood upon the running board, so that at

that height the handle bars on the posts of the car were twenty-four inches from the pole. The average distance from the rail of three hundred eighty-one trolley poles along the line of the road for twelve miles was about fifty-nine and one-half inches. There were six (or possibly nine) poles, a fence and trees, making eighteen objects in all which were slightly nearer to the rail than the accident pole; but they were either vertical or inclined from the track, so that at the height of the conductor's head, with the exception of one pole set in the line of trees, this one was nearest and was about twenty-two inches nearer than the average. An object at this height at a point vertically above the outer edge of the running board would be within nineteen inches of this pole.

Second. The other facts relate to the nature of the plaintiff's service and bear upon the duty which the Somerset Traction Company assumed toward its servant, the plaintiff.

The seating capacity of the open car running at the time of the accident was sufficient for about fifty passengers, but on this day there were from ninety-five to a hundred. They were received on the car in accordance with the usual custom and verbal instructions, as appears from the testimony of the plaintiff, the motor-man, and a former superintendent of the company. In consequence of the crowded condition of the car passengers stood upon the platforms at each end and on the running boards on each side.

The trolley poles were placed in different portions of the road on alternate sides, but the greater part on the easterly side of the track, among which was the accident pole. In taking the fares, which was one of the important duties of the conductor, it was impossible or impracticable when the car was crowded, as on this occasion, for him to collect them while standing on the side opposite the passenger. In passing along the running board for that purpose it was necessary to step around passengers standing upon it and to rely upon the handle bars for support.

The nearness of this inclining pole to the head of the conductor as he was performing this duty was the direct cause of the injury, and whether the location and maintenance of the pole in its position constituted a failure of the master to provide the plaintiff with a reason-

ably safe place while performing the service required of him was an important question in issue.

There seemed to be reasons why some of the poles were placed nearer than the average distance; for example, those within the line of trees at the Clough place were naturally located at the same distance as the trees; those near the bridge at the same distance as the trestle; and those at the curves might properly be somewhat nearer than the ordinary distance, because the car inclined away from them. But no reason or explanation is given why the trolley pole in question and those immediately north and south were set nearer than was usual along the electric road.

It is claimed in behalf of the plaintiff that the company by locating this pole and allowing it to remain with a decided inclination toward its cars, fitted with running boards on which passengers were not only permitted but invited to stand when the sitting room was occupied, made it unsafe for the conductor as he passed between the pole and passengers in collecting the fares, and that it was consequently guilty of negligence in reference to him while engaged in the line of his duty. This was properly submitted to the jury for their determination.

In *Nugent* v. *The Boston, Concord & Montreal Railroad*, 80 Maine, 62, a brakeman in pursuance of the signal for setting brakes was rapidly ascending an iron ladder on the side of a box car, and was brought in contact with the end of the depot awning and suffered injuries.

In his action against the company he recovered a verdict, and upon motion for a new trial, it was held that the presiding justice properly submitted to the jury the question of the defendant's negligence and that of the plaintiff's exercise of ordinary care, and the law court declined to interpose and set the verdict aside.

Illustrations were given by reference to similar cases showing that fair-minded men may reasonably arrive at different conclusions upon admitted facts. *Gibson* v. *Erie Railway Company*, 63 N. Y. 449, 20 Am. Rep. 552; *Illinois Central Railroad Company* v. *Welch*, 52 Ill. 183, 4 Am. Rep. 593.

These cases are not unlike the case at bar. That last cited was

an action against a railroad company by a brakeman for injuries by collision with a projecting awning on one of its station-houses. And it was held that the danger was such as might well escape the observation of a person who had been in the employ of the defendant for a long period of time, and that the company was liable for the damages sustained.

The next proposition to be considered is one of equal importance.

While, by the well established rules of the law of master and servant, the master is under an implied obligation to furnish and maintain for the servant a reasonably safe place for the performance of the duties required and reasonably safe appliances connected with the business, the servant is under like obligation to use due care and to assume all obvious and usual risks incident to his employment.

If the defect was an obvious one, or if the plaintiff knew, or by the exercise of ordinary care ought to have known, that this pole was unusually near or inclined toward the track so as liable to hit a person passing another on the running board of the car, the danger was a risk which he assumed and he could not recover for injuries sustained through the negligence of the defendant in reference to its location and continuance.

In *Hall* v. *Wakefield and Stoneham Street Railway Company,* 178 Mass. 98, a conductor stepping around a person standing on the running board of the car came in collision with a tree. It was held that the tree near the track was a permanent condition of the plaintiff's employment, and that having been employed for some time he took the risk.

In *Goldthwait* v. *Haverhill, etc., Railway,* 160 Mass. 554, the plaintiff while employed in its car-house by the defendant was injured by having his leg caught between the running boards of two open cars, Barker, J., says: "It (the danger) was not only incident to his employment, but so obviously incident that he must be presumed to have known and appreciated it, and must be held to have accepted as one of the risks of his employment the danger of injury to himself by being caught between cars swinging towards each other on the tracks at the entrance of the car-house." *Lovejoy* v. *Boston & Lowell Railroad,* 125 Mass. 79.

In *Ryan* v. *New York, etc., Railroad,* 169 Mass. 267, the plaintiff descending from a moving freight car in the discharge of his duties as brakeman was injured by coming in contact with a fence three feet and nine and one-half inches from the nearest rail of the track, Holmes, J., says: "The fence which the plaintiff struck was a permanent visible structure, and under our decisions (Mass.) did not constitute one of those unusual dangers to which an employee who has not taken the risk of them with actual knowledge of their existence has a right to assume that he will not be exposed by entering an employment."

In *Ladd* v. *Brockton Street Railway Company,* 180 Mass. 454, in some particulars closely resembling the case under consideration, the plaintiff while engaged in learning the duties of a street car conductor in the defendant's employment and having had experience on other roads and being familiar with the general duties, was struck while standing on the running board of a moving car by a trolley post and injured. The post by which he was struck was one of several along the same side of the track and about equally distant therefrom, but there was no evidence that they were unusually near the track. It was held that the plaintiff assumed the risk, and upon entering the employment of the defendant he must be held to have contracted with reference to the existing arrangement of the track and trolley posts.

The plaintiff in this case had been employed for four years by the company either as motor-man or conductor and had previously been engaged in setting trolley poles, some of them being the identical ones which are located at no greater distance from the track than the pole in question.

He testifies that the rule for locating the poles was that the distance from the center of the poles to the center of the track should be eight feet, and that he did not know that there was any deviation except in a few instances where he had observed that the track was moved toward one side of the true location so that the center stakes were not equi-distant from the rails. The poles within the line of trees at the Clough place were known to him to be nearer the track than the usual distance; but these were always kept in mind by his

observance of the requirement of the superintendent that passengers should be warned to avoid being struck by them; no instruction had been given him in reference to this pole; no notice that it was dangerously near the track, and he did not know the fact before the accident.

There is in the case the testimony of one witness which tends to show that the plaintiff did know this, because, as he states, the conductor cautioned the passengers to look out for the pole immediately before he was himself struck by it. And two other witnesses testify to the warning given by him, but not so definitely as to the words, time or place as necessarily to conflict with the plaintiff's testimony that he gave no warning as to poles but that he did so as to the trees.

It is contended by the defendant that while the plaintiff may not have appreciated or actually known the danger, his obliviousness to so obvious an object of peril to himself which he had passed thousands of times, several times daily, was more than want of ordinary care which he was bound to use, it was gross carelessness.

But his explanation is that its proximity to the track was not apparent by reason of any marked contrast with the position of other poles north and south of it, as it was in alignment with them; that he had occasion to collect fares usually at points at some distance from it, and had not necessarily passed it while standing on the running board so as to be made conscious of its unusual nearness to the car; and that when not occupied with taking fares his place was in the center of the rear platform; and while he had been employed as motor-man he stood in the center of the front platform, places not favorable for detecting or noticing such a defect. Also, in this connection, it is a relevant fact that the motor-man and former superintendent, men presumably observant and watchful, having the same opportunity and owing the same duty to the company, failed to observe this particular pole before the accident.

Affirmative proof that the plaintiff did not fail to exercise the legal standard of care is required.

In his testimony, in addition to the facts and circumstances already referred to, he states that two passengers were taken on to the east side of the car and stood upon the running board. He had previously

collected all the other fares, and for the purpose of collecting the fares of these passengers, he was in the act of passing around one or two persons holding on to the handle bars with both hands in the same manner as he had been accustomed to do, when he was brought in contact with the trolley pole. If his testimony is true, it was the usual course in collecting fares when the car was crowded, and he would have been as free from danger as when collecting fares on the opposite side of the car but for the improper location and maintenance of this trolley pole. But the testimony of a passenger on the car at the time tends to show that the plaintiff was negligent. He states that in passing the witness on the running board, the conductor instead of holding to the handle bars, held to the arm of the witness. This the plaintiff denies. Their testimony is apparently in conflict but is not so necessarily. The plaintiff's left hand must have been released from the handle bar in passing the witness and may have involuntarily pressed against or grasped his arm.

We think the principle of *Nugent* v. *The Boston, Concord & Montreal Railroad*, supra, applies to this case and that it was for the jury to determine the question of negligence and due care; and although we might upon the evidence as reported have reached a different conclusion on some or all of the propositions involved, it is to be considered that the jury had the opportunity, which we have not had, to view the place of the accident, to observe the poles and other objects called to their attention, and to see the witnesses when testifying.

And a careful review of the case does not show such obvious want of a preponderance of the evidence in favor of the plaintiff as indicates that the jury were improperly influenced or failed to observe the rules given them by the court, nor that the damages are excessive.

Motion overruled.

CHARLOTTE A. NEAL *vs.* DANIEL H. RENDALL.

Androscoggin. Opinion August 18, 1903.

Way, Law of the road, Travelers to seasonably turn to the right. *Negligence and Causation*, Questions of fact. *Collision on Highway. Imputable Negligence*, Facts insufficient for decision. *R. S., c. 19, § 2.*

When no person is passing, or about to pass in an opposite direction, one may travel upon any part of the traveled road which suits his pleasure or convenience, but when teams are approaching to meet, the law requires them to seasonably turn to the right of the middle of the traveled part of the road, so far that they can pass each other without interference.

"Seasonably turn" means that travelers shall turn to the right in such season that neither shall be retarded in his progress by reason of the other occupying his half of the way, which the law has assigned to his use when he may have occasion to use it in passing.

Failure to comply with this requirement is not negligence per se. Negligence and causal connection are ordinarily questions of fact.

Upon the question of causation an important consideration is whether the injury suffered was one which it was the purpose of the law to prevent when it imposed upon the defendant the duty which he is charged with having violated.

In this case the defendant was on the wrong side of the road, in violation of a law enacted for the safety and convenience of travelers and to prevent collisions. A collision occurred and the plaintiff, a traveler, was injured. The evidence tends to show that the defendant saw the plaintiff approaching, that there was ample time for him to turn to the right of the middle of the traveled part of the road, that there was nothing to prevent his so doing, and that had he done so there would have been no collision and no injury.

Held; that under these circumstances it should be submitted to a jury to say whether the defendant was in fact negligent, and if so, whether such negligence was the proximate cause of the plaintiff's injury.

Imputable negligence is based upon agency. The court declines to express an opinion on this question, the facts reported being insufficient.

On report. Remanded to nisi prius for trial.

Case for personal injuries.

The terms of the report, amounting practically to an agreed statement of facts, were as follows:

This was an action on the case for negligence. The case was opened to a jury. The testimony showed that the plaintiff, sixty-eight years of age, was riding in a carriage with her husband. The husband, who was seventy-two years of age, was driving. At the time of the collision which resulted in the injuries complained of, they were traveling south on Turner Street in Auburn, at a reasonable rate of speed, and on the right of the middle of the traveled part of the road, as they traveled. The traveled part of Turner Street at that point was from 46 to 50 feet in width.

The defendant, in a proper team, was traveling north on the same street, at a walk. But he was on the left of the traveled part of the road, as he traveled.

Both teams were thus on the west of the middle of the traveled part of the way, and the team of the defendant was nearer the middle.

The testimony tended to show that there was apparently sufficient room on the west of the middle of the traveled part of the way so that the teams could have passed without interference, had they both continued as they were traveling just before the collision described in plaintiff's writ; but that just as the teams were about to meet and pass each other, the horse attached to the wagon in which the plaintiff was riding, became suddenly frightened, and while still going forward, shied towards the center of the traveled part of the road and towards defendant's team. The front left wheel of the plaintiff's carriage passed the front wheel of the defendant's team without touching it, but did come into collision with the hind wheel of the defendant's vehicle, whereby the plaintiff was thrown from her carriage and suffered the injuries for which she claims damages in this suit.

The testimony tended to show that the two teams would have passed each other safely and without collision had it not been for the horse's fright and shying, also that there would have been no collision had the defendant's team been on the right of middle of the traveled part of the road.

The testimony further tended to show that the defendant had opportunity, after the plaintiff's team came into his sight, to turn to the right of the middle of the traveled part of the road, and there was nothing to prevent his doing so; but there was no other evidence of any negligence on the part of the defendant except the mere fact of the position of his team on the left of the middle of the traveled part of the road.

The plaintiff put in evidence the following ordinance of the City of Auburn:

"The owner, driver, or person in charge of any heavily loaded vehicle, or any other team, while passing through any public street at a speed not greater than a walk, shall drive such vehicle, or other team as near as possible to the curbing on the right hand of the street so as to allow the free passage of other teams and vehicles passing along said street at a greater rate of speed." Ordinances of the City of Auburn, chapter 43, § 21.

There was also evidence in the case from which the defendant might properly claim and argue that the negligence of the plaintiff's husband in driving contributed to the collision and injury. The plaintiff, on the other hand, denies that there was any such negligence.

At the conclusion of the plaintiff's testimony, the parties agreed that the case should be reported to the law court upon the foregoing statement of facts, which it was agreed is a correct resume of the testimony introduced by the plaintiff. If the law court were of opinion that the case discloses any evidence of negligence on the part of the defendant requiring the submission of the case to the jury, the court shall order the action to stand for trial; otherwise the plaintiff is to become nonsuit.

And if the action is ordered to stand for trial, the law court was asked to say whether, as matter of law, any proven negligence of the plaintiff's husband as driver which contributed to the injury of the wife, is imputable to her, as this question will be an important and material one in the trial of the case.

W. H. Judkins and B. L. Pettigrew, for plaintiff.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for defendant.

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

POWERS, J. Action on the case for negligence. As the plaintiff was traveling south on Turner Street, Auburn, in a carriage driven by her husband, at a reasonable rate of speed, and on the right of the middle of the traveled part of the road, they met the defendant, who, in a proper team, was traveling north on the same street at a walk. The traveled part of the street at this point was from 46 to 50 feet in width. Both teams were on the west of the middle part of the traveled way, and the team of the defendant was nearer the middle. Just as the teams were about to meet and pass each other, the horse attached to the wagon in which the plaintiff was riding became suddenly frightened, and while still going forward shied toward the center of the traveled part of the road, and toward the defendant's team. The front wheel of the plaintiff's carriage collided with the hind wheel of the defendant's, and the plaintiff was thrown out, and suffered the injuries for which this suit is brought.

The evidence tended to show that the defendant had opportunity, after the plaintiff's team came in sight, to turn to the right of the middle of the traveled part of the road; that there was nothing to prevent his doing so; and that there was apparently sufficient room west of the middle of the traveled part of the way so that the teams could have passed without interference, had they both continued as they were traveling just before the collision. The evidence further tended to show that the two teams would have passed each other safely, and without collision, had it not been for the horse's fright and shying; also that there would have been no collision had the defendant's team been on the right of the middle of the traveled part of the way. There was no evidence of any negligence on the part of the defendant other than the position of his team on the left of the middle of the traveled part of the road. The court is to determine whether this is sufficient to require the submission of the case to a jury.

"When persons traveling with a team are approaching to meet on a way, they shall seasonably turn to the right of the middle of the

traveled part of it, so far that they can pass each other without interference." R. S., c. 19, § 2. This is a salutary statute, enacted for the safety and convenience of all travelers. When no person is passing, or about to pass in an opposite direction, one may travel upon any part of the traveled road which suits his pleasure or convenience, but when teams are approaching to meet, the law requires them seasonably to turn to the right of the middle of the traveled part of the road. "Seasonably turn" means "that travelers shall turn to the right in such season that neither shall be retarded in his progress, by reason of the other occupying his half of the way, which the law has assigned to his use, when he may have occasion to use it in passing. In short, each has an undoubted right to one-half of the way whenever he wishes to pass on it, and it is the duty of each, without delay, to yield such half to the other." *Brooks* v. *Hart*, 14 N. H. 310. This is a regulation to avoid collisions, and if one neglects it, and an accident follow, an explanation of the occurrence must begin with some presumption against him. Cooley on Torts, p. 666. This court has held the fact that a party was at the left of the road at the time of the collision "strong evidence of carelessness," and has said that, unexplained and uncontrolled, it would not only be strong but conclusive evidence of carelessness. *Larrabee* v. *Sewall*, 66 Maine, 381. It is competent evidence of negligence to be submitted to a jury. *Smith* v. *Gardner*, 11 Gray, 418; *Damon* v. *Scituate*, 119 Mass. 66, 20 Am. Rep. 315; *Randolph* v. *O'Riordon*, 155 Mass. 331.

It is not conclusive. The law of the road is not an inflexible criterion by which to determine the question of negligence. There may be cases in the crowded streets of cities, or even upon our country roads, where a deviation from it would be both justifiable and necessary in order to avoid accident and injury. Notwithstanding the statutory duty to turn to the right of the middle of the traveled way the defendant had the right to be upon any part of the road, and his negligence must arise out of his failure to exercise ordinary care under all the circumstances. There was ample room for the plaintiff and her husband to pass on the defendant's left, and they would have passed in safety had they kept upon the same course. On the other

hand, the defendant was on the wrong side of the road, he saw the plaintiff approaching in ample time to turn to the right of the middle of the traveled road. There was nothing to prevent his doing so, and the evidence tended to show that had he done so there would have been no collision. It is said that the defendant could not anticipate the sudden shying of the horse, and the collision which followed. That is for the jury to determine upon the question of ordinary care. Everyone is presumed to know that all animals are controlled more or less strongly by various appetites, impulses, instincts, feelings and emotions, each of which, if worked upon in a certain manner, will be likely to induce a certain kind of conduct. Note to *Gilson* v. *Delaware and Hudson Canal Co.*, 65 Vt. 213, 36 Am. St. Rep. 812. Even safe and well broken horses do sometimes shy as the result of sudden fright. The thing which happened, the collision, was the very thing which the statute was designed to prevent, and we think that the evidence of negligence was sufficient to warrant its submission to a jury.

In order to require the submission of the case to a jury it must further appear that the defendant's negligence was the proximate cause of the injury sustained. In the first place it is to be observed that the question of causal connection is ordinarily for the jury. *Lake* v. *Milliken*, 62 Maine, 240, 16 Am. Rep. 456; *Hayes* v. *Michigan Cent. R. R. Co.*, 111 U. S. 228. It is claimed that the fright and uncontrollable conduct of the horse was the proximate cause of the injury. It has been repeatedly held however in this State, in cases against towns for failure to keep their ways in repair, that, while the uncontrollable conduct of a frightened horse, which his driver cannot stop or control, may be the proximate cause of the injury, a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by the driver. In the latter event the horse's conduct is the remote and not the proximate cause of the accident. The principles upon which this conclusion rests have been fully set forth in recent cases in this State, and it would be unprofitable to discuss them further. *Spaulding* v. *Winslow*, 74 Maine, 528; *Aldrich* v. *Gorham*, 77 Maine, 287; *Cleveland* v. *Bangor*, 87 Maine, 259, 47 Am. St. Rep. 326; *Morsman* v. *Rock-*

land, 91 Maine, 264. The evidence in the present case tends to show that the loss of control of the horse by the plaintiff's husband was but momentary. According to the agreed statement of fact, "Just as the teams were about to meet and pass each other, the horse attached to the wagon in which the plaintiff was riding became suddenly frightened, and while still going forward, shied toward the center of the traveled part of the road and towards the defendant's team." The collision and the injury must have followed instantly. Whether the loss of control was momentary is a question of fact for the jury, and has an important bearing upon the question of causation.

It is difficult to distinguish the facts of this case from those in the cases just cited. In *Cleveland* v. *Bangor* the alleged defect was one of the poles of the street railway located just within the limits of the wrought part of the street. The plaintiff's horse became suddenly frightened at an electric car, shied, sprang forward, and brought the carriage in contact with the pole, throwing the plaintiff out, and causing the injuries complained of. The jury found that the defect was the sole cause, and that the fright of the horse was not one of the proximate causes of the accident, and the court refused to disturb the verdict. The liability of a town is statutory and limited, and the defect must be the sole proximate cause of the accident or injury. In an action of negligence, however, where the injury is the result of two concurring causes, the defendant's negligence may be regarded as the proximate cause of an injury of which it is not the sole and immediate cause. *Lake* v. *Milliken*, supra. If the defendant's negligent, inconsiderate, and wrongful, though not malicious act, concurred with any other thing, person or event, other than the plaintiff's own fault, to produce the injury, so that it clearly appears that but for such negligent act the injury would not have happened, and both circumstances are clearly connected with the injury in the order of events, the defendant is responsible, even though his negligent, wrongful act may not have been the nearest cause in the chain of events or the order of time. *Ricker* v. *Freeman*, 50 N. H. 420, 9 Am. Rep. 267. Sherman & Redfield on Neg. § 10.

There must be a necessary connection between the defendant's act

and the plaintiff's injury. It is not necessary that the negligent act should be the efficient cause, causa causans; it is sufficient if it is a cause, which, if it had not existed, the injury would not have taken place. *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228. In that case judgment was reversed and a new trial ordered because the question was not submitted to the jury. In the present case it is agreed that "the evidence tended to show that there would have been no collision had the defendant's team been on the right of the middle of the traveled part of the road." Upon the question of causation another important consideration is, whether the injury suffered was one which it was the purpose of the law to prevent when it imposed upon the defendant the duty which he is charged with having violated. See note to *Gilson* v. *Delaware and Hudson Canal Co.*, supra.

Negligence is not the proximate cause of an accident, unless, under all the circumstances, it might have been foreseen by a man of ordinary intelligence and prudence. The accident must be the natural and probable consequence of the negligence. *Wood* v. *Penn. R. R. Co.*, 177 Pa. St. 306, 55 Am. St. Rep. 728, 35 L. R. A. 199. To hold the defendant, however, it is not necessary that he should be able in the exercise of ordinary prudence to foresee the precise form in which the injury in fact resulted. *Hill* v. *Winsor*, 118 Mass. 251. "The injury must be the direct result of the misconduct charged, but it is not to be considered too remote if, according to the usual experience of mankind, the result ought to have been reasonably apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." Colt, J., in *Lane* v. *Atlantic Works*, 111 Mass. 136. In that case the negligence charged consisted in the defendant leaving a truck, with a bar of iron unfastened upon it, standing in one of the streets of Boston for twenty minutes, in violation of a city ordinance enacted for the purpose of rendering the streets more safe and convenient for travelers. A boy

by moving the tongue of the truck, or by the application of force directly to the bar of iron, rolled it upon the plaintiff. It was held that the violation of the city ordinance was competent evidence of negligence; that whether the act charged was negligent, and whether the injury suffered was within the relation of cause and effect, legally attributable to it, were questions for the jury, and a verdict for the plaintiff was allowed to stand.

In the case before us the defendant was on the wrong side of the road. He was there in violation of a law enacted for the safety and convenience of travelers, and to prevent collisions between them. A collision occurred, and the plaintiff, a traveler, was injured. The evidence tends to show that but for the wrongful act of the defendant there would have been no collision, and no injury. The court cannot say that such a consequence could not reasonably be anticipated. The questions of negligence and causal connection should be submitted to a jury to determine, under all the circumstances of the case. *Hayes* v. *Michigan Central R. R. Co.*, supra.

The court is asked to determine whether any proven negligence of the plaintiff's husband as driver, which contributed to the injury of the wife, is imputable to her. It is not to be imputed from the fact alone of the relation of husband and wife. It depends upon the circumstances, the extent to which she controlled, co-operated with, and directed her husband in the management of the team. The doctrine of imputable negligence is based upon agency. The only fact before us is that she was sixty-eight and he was seventy-two years of age. We think this too slight a basis of fact upon which to decide a question which at the trial must depend upon so many other attendant circumstances, and that any opinion in advance, based upon so narrow a foundation of fact, would be more likely to prejudice than assist in settling the rights of the parties.

In short, we do not hold that it is negligence per se for a traveler with a team not to seasonably turn to the right of the middle of the traveled part of the way when another team is approaching, so far that they can pass each other without interference. We do hold, however, that it is evidence of negligence, and that, under the circumstances of this case, it should be submitted to a jury, to deter-

mine whether the defendant was in fact negligent, and if so, whether such negligence was the proximate cause of the injury sustained.

Case to stand for trial.

BOSTON AND MAINE RAILROAD, Appellant,

vs.

SACO VALLEY ELECTRIC RAILROAD.

York. Opinion August 18, 1903.

Railroad Commissioners, Appeal. *Decree*, Temporary, showing indecision—Void. *Railroad Crossings*, Electric Railroad. *Stat. 1901, c. 191; 1895, c. 72, §§ 1, 2, 3.*

Under our statutes the whole question of how railroad crossings shall be constructed and maintained is left, in the first instance, to the sound judgment and discretion of the railroad commissioners for determination; and their decision when made is final, unless an appeal is taken.

They have no authority to modify or change such a decree once made, except upon a new application, notice and hearing; nor can they, before appeal, make a temporary decree which does not purport to represent their sound judgment and discretion in the premises. Such temporary decree is void.

On report. Remanded to board of railroad commissioners.

Appeal from a decree of the board of railroad commissioners.

This was an application to the railroad commissioners under stat. of 1895, c. 72, § 2, by the Saco Valley Electric Railroad asking a determination of the manner and condition under which its tracks should cross the Portland and Rochester division of the Boston & Maine Railroad in Buxton; also the eastern division of the Boston & Maine in Saco.

The facts appear in the opinion.

J. W. Symonds, D. W. Snow, C. S. Cook and C. L. Hutchinson, for appellant.

J. O. Bradbury, for petitioners.

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

POWERS, J. This is an appeal from a decree of the railroad commissioners allowing the Saco Valley Electric Railroad to cross at grade the Boston and Maine Railroad at Saco and at Buxton.

The decree appealed from is void. It appears upon its face that it does not represent the sound judgment and discretion of the railroad commissioners, but is intended as a temporary expedient until they can make up their minds what ought to be done in the premises. In making the decree they say:—

"The Boston and Maine Railroad desires to avoid grade crossings. The petitioning company claims that grade crossings are reasonable, and that neither overhead nor undergrade crossings are feasible. We have given the matter considerable attention, several continuances having been made for that purpose. We are yet undecided in the matter.

"The statute, chapter 191 P. L. 1901, provides that if an appeal is taken to the decision of the railroad commissioners in such case, the commissioners may still determine the manner and conditions of construction and maintenance of such crossing during the pendency of the appeal, and issue the necessary temporary decree therefor.

"Long before this statute, this board in the matter of the petition of the Bangor, Old Town & Orono Railroad for a crossing of the Maine Central Railroad at Veazie, made a decree authorizing a temporary crossing at grade. This decision will be found in the report of the commissioners for the year 1895, page 92. That decree was afterwards changed by the board upon petition of the Maine Central Railroad, and the court sustained the commission in its action. (*Maine Central R. R. Co.* v. *B. O. & O. Railway Co.*, 89 Maine, 555.)

"It is too early now to make a decree under P. L. 1901, chap. 191; we deem it best however to make a temporary decree as we did in the Veazie case."

They then granted crossings at grade "until otherwise ordered by this board." It is evident that these words do not mean simply until otherwise ordered by the board upon a new application. That would

be true of every decree. Taken in connection with the words "temporary decree" the language used shows an intent to reserve and assert the power of the railroad commissioners to hereafter modify or completely set aside this decree in this same proceeding, should they at any time hereafter come to a decision as to whether "grade crossings are reasonable or overhead and under grade crossings feasible." We find no such authority granted by statute. In the case of a railroad company of any kind, whose tracks are to be constructed across the tracks of any railroad already built, upon application, notice and hearing, such crossing shall be made, constructed, and maintained in such manner, and under such conditions as shall be ordered by the board of railroad commissioners. Laws 1895, c. 72, § 2. When the crossings already exist upon application, notice and hearing the board are to determine what changes, if any, are necessary, and how such crossings shall be constructed and maintained. Laws 1895, c. 72, § 1.

By section three of the same act such decision is declared by the statute to be "final" unless appeal is taken. No power is reserved to the board suo motu to modify or change a decision once made.

In the case of the *Maine Central R. R. Co.* v. *B. O. & O. Ry. Co.*, 89 Maine, 555, referred to as authority for this temporary decree, the power of the railroad commissioners to make such a decree was not considered. There had been a temporary decree authorizing a grade crossing. Subsequently, upon a new petition, notice and hearing, the railroad commissioners made an order which provided for an overhead crossing and abolished the grade crossing provided for by the temporary decree. Upon appeal these last proceedings were upheld and approved. The validity of the so-called temporary decree was not before the court in that case.

This "temporary decree" differs from the one referred to in the Veazie case in this, that while both granted crossings at grade "until otherwise ordered" this decree contains in itself the statement that the commissioners have reached no decision as to whether grade crossings are reasonable. Grade crossings are not only places of recognized danger, but they are sources of danger to all who travel on either steam or electric roads. The time has not yet come when they can be everywhere abolished, but it was never the intention of

the legislature that they now should be established in cases where the railroad commissioners could not decide that they were reasonable. A decision which contains within itself such a statement of indecision is a felo de se and must fall.

In *Maine Central R. R. Co.* v. *Waterville and Fairfield and Light Street Ry. Co.*, 89 Maine, 328, Mr. Justice WALTON says: "It seems to us that the evident intention of the legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the railroad commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust."

Mr. Justice STROUT in the *Veazie case*, 89 Maine, 555, says: "The question whether public safety requires a highway to pass over or under a railroad at a crossing, is left by the statute in the first instance, to the judgment of the railroad commissioners, and their decision should not be reversed by this court unless it is manifestly erroneous." Such language as this was never intended to embrace decisions which do not purport to represent the sound judgment of the board rendering them. They are entitled to no weight, for they do not purport to flow from the judgment of any man or body of men. Neither can such irresponsible decrees, even though unappealed from, afford a basis and justification for action in matters which so clearly concern the public safety. The so-called temporary decree in this case was unauthorized and void.

Upon appeal this court has power to make such order or decree thereon as law and justice may require. Laws of 1895, c. 72, § 5. The question here presented has never been passed upon by that board to whom it was the intention of the legislature to refer it in the first instance. While its decision is not conclusive, yet the court should have the benefit of the commissioners' judgment in any subsequent proceedings.

The whole matter is recommitted to the board of railroad commissioners for further proceedings in accordance with this opinion.

So ordered.

JOHN K. FOY, and others, In Equity,

vs.

GARDINER WATER DISTRICT, and others.

Kennebec. Opinion August 26, 1903.

Election. Voters, Majority vote. *Gardiner Water District. Statutes,* Explanatory act and time of taking effect. *Municipal Corporations. Special Laws, 1903, c. 82, c. 194.*

The legislature by a special act of Feby. 26, 1903, provided that it should take effect when approved by a majority vote of the legal voters within the district, and by an explanatory act of March 18, 1903, declared that the former act should take effect if approved by a majority vote of the legal voters voting at the election held under the first act.

Held; that both acts became law at the date of their approval.

Also; that the act of March 18th, is a legislative declaration of what was meant in the original act by the term "majority vote of the legal voters," and defines it as "a majority vote of the legal voters voting" although the meeting of the inhabitants under the first act had been called on March 10th.

Semble; under the first act that if the explanatory act had not been passed, the better construction of the term "majority vote of the legal voters" is a majority of those actually voting.

It is a fair presumption that those not voting assent in advance to the action of those who do.

Appeal in equity. Decree below confirmed. Petition in equity by ten tax payers of the City of Gardiner asking an injunction against the Gardiner Water District, incorporated by an act approved Feby. 26, 1903, for the purpose of supplying that city and the towns of Randolph, Pittston and Farmingdale with pure water for domestic and municipal purposes.

The corporation was also empowered to acquire the property of the Maine Water Company, within the limits of the City of Gardiner and the towns named, by purchase or exercise of the right of eminent domain. By the terms of the act it was not to take effect until approved by a majority of the legal voters within said district. On March 10th, 1903, a special meeting of the voters was called to be

held on March 23d and the legislature by an act approved March 18th passed an explanatory act which provided that the act of Feby. 26, 1903, should take effect when approved by a majority vote of the legal voters voting at the election held under the provisions of the first act.

At the meeting held on March 23, 1903, there were 271 ballots given in the affirmative and 233 in the negative.

The petitioners claimed the number of voters in the district authorized to vote on the acceptance or rejection of the act was 1,232, and that the total vote cast, viz: 504, fell short of a majority; and that therefore the act of Feby. 26, 1903, has never been legally accepted or approved, but was null and void.

The trustees appointed by the municipal officers of the City of Gardiner under the act were made parties.

Will C. Atkins, for plaintiffs.

The one point involved in this case is contained in the first sentence of section 12 in the act approved Feby. 26th, 1903, viz: "This act shall take effect when approved by a majority vote of the legal voters within said district, etc." "Majority" means a majority of the voters or those entitled to vote, whether they actually do vote or not. Webster and Century Dict. "Words and phrases shall be construed according to the common meaning of the language. Technical words and phrases, and such as have a peculiar meaning, convey such technical or peculiar meaning." R. S., c. 1, § 6, par. 1. Webster defines a technical word as one that belongs properly or exclusively to an art. Most people would place the same construction upon the language which your plaintiffs did.

Counsel cited: *Harshman* v. *Bates County,* 92 U. S. 569.

In that case there appeared a constitutional provision that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto," adopted in 1865. In this case the court held that "two-thirds of the qualified voters," meant two-thirds of those entitled to vote, whether actually voting or not.

Counsel is aware that the same court in *Carroll County* v. *Smith*, 111 U. S. 556, decided the same point in the opposite way to *Harshman* v. *Bates County*, and the other later decisions have seemed to follow that. In view of the fact that our highest court has interpreted the same language in different ways, and our own courts have never passed upon the question, it seems proper that it should be decided.

L. C. Cornish and N. L. Bassett; Geo. W. Heselton, for defendants.

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

STROUT, J. The special act of February 26, 1903, provided in section 12, that it should take effect "when approved by a majority vote of the legal voters within said district" &c. The explanatory act of March 18, 1903, provided that the former act "shall take effect if approved by a majority vote of the legal voters voting at the election held under the provisions of said (first) act." Both acts became law at the date of their approval.

March 10, 1903, the municipal officers of Gardiner called a meeting of the inhabitants of the water district to be held on March 23, 1903, to vote upon the acceptance of the act of February 26. That meeting was duly held, and the total vote was 504, of which 271 voted in favor of acceptance. It is admitted that the number of names on the registration lists in the district was 1,232. It is also admitted that all the requirements of law as to the warrant, posting, publication, registration, returns and certificates as required by the act of February 26, 1903, were fully complied with.

The rights of the parties depend upon the question, whether the term "majority vote of the legal voters" in the first act, meant a majority of all the legal voters in the district, or a majority of those actually voting; and whether, if that act required a majority of all the voters, the explanatory act of March 18, 1903, applied and became effective upon the vote in the meeting of March 23, called before, but actually held after that act was in force.

Under the first act, if the explanatory act had not been passed, the

better construction of the term "majority vote of the legal voters" is a majority of those actually voting. Any other view would be attended with such great and almost insurmountable difficulties that it ought not to be adopted, unless expressed by the Legislature in clear and unmistakable language. How are the legal voters to be ascertained? If the registration list is to afford the evidence, that list may and usually does contain names of persons deceased, or who have removed from the locality, or become otherwise disqualified, and to require a majority of those contained in that list, would require more than a majority of qualified voters. If on the other hand, it is to be construed as meaning voters qualified in fact and in law, without reference to the registration, then the body of voters is as indefinite as though there were no registration, and the actual number must be ascertained in each case by witnesses, entailing a long and difficult hearing, before the vote can be declared and its result known. When and by whom can it be had? Such hearing is utterly impracticable. A construction leading to such result should not be adopted nor such intention imputed to the Legislature unless demanded by express, imperative and unmistakable language. The expression in the act is not of that character. It is a fair presumption that those not voting assent in advance to the action of those who do.

We are not aware that the question has before been raised or decided in this State. But it has been passed upon in several cases in the Supreme Court of the United States. In *Harshman* v. *Bates County*, 92 U. S. 569, it was held that the terms "two-thirds of the qualified voters" meant two-thirds of all those qualified to vote. But that court had held in *St. Joseph Township* v. *Rogers*, 16 Wal. 664, that the terms "majority of the legal voters" meant a majority of those voting. The same construction was adopted in *County of Cass* v. *Johnston*, 95 U. S. 360, where the language was "two-thirds of the qualified voters." To the same effect is *Carroll County* v. *Smith*, 111 U. S. 563. The weight of authority therefore, in that court, as well as its latest expression, is in accord with the view we have taken.

The act of March 18, 1903, is entitled "An act to remove a doubt in the act incorporating the Gardiner Water District." That doubt is the one presented in this case. The act was intended to resolve it.

It is a legislative declaration of what was meant in the original act, by the term "majority vote of the legal voters," and defines it as "a majority vote of the legal voters voting." It became a part of the original act before the vote was taken. There was no necessity for calling another meeting. It applied and was effective upon the action of the meeting held after its passage. A majority of the voters voting approved the original act. That was sufficient and effected a legal approval of the act in accordance with its provisions. The decision below was correct.

Decree below affirmed.

HENRY F. SMITH, Petitioner, *vs.* GEORGE B. RANDLETTE.

Sagadahoc. Opinion September 18, 1903.

Taxes. Collector's Bond, Sufficiency of form. *Officer,* Claimant in equity. *R. S., c. 4. § 53; c. 6, §§ 125, 128. Stat. 1893, c. 260.*

A collector of taxes, who contracts with the town to settle with the town on or before a certain date, cannot be required to give bond for the fulfillment of such contract.

The "requisite" bond named in R. S., c. 6, § 125, is not such a bond as the assessors may require, but is such a bond as is required by § 128 of that chapter.

A bond of a collector of taxes, conditioned for the faithful performance of all the duties of his said office, is sufficient in form; and, if the sum and sureties are satisfactory to the municipal officers, it is their duty to approve it.

On report. Bill in equity sustained.

Petition as in equity, heard on bill, answer and evidence reported to the law court, under R. S., c. 4, § 53, as amended by stat. 1893, c. 260. The petitioner claimed that he was elected to the municipal office of collector of taxes of the town of Richmond at the annual town meeting for 1903, and is now entitled to hold said office, and

that the defendant Randlette is now unlawfully claiming to hold said office.

In the evidence reported to the law court it was admitted that the petitioner refused to give a bond containing a clause requiring him to "settle in full for said taxes on or before Feb. 1st, 1904," unless the selectmen would give him a writing protecting him from costs and expense in case he as collector should bring suit against the American Ice Company for taxes. And it was further admitted that the municipal officers declined to approve the collector's bond unless it contained such a condition, besides the usual condition requiring him to well and faithfully perform all the duties of his said office.

The statute under which this proceeding was brought is as follows:

"Any person claiming to be elected to any county or municipal office, or to the office of county attorney, may proceed as in equity against the person holding or claiming to hold such office, or holding a certificate of election to such office, or who has been declared elected thereto by any returning board or officer, or who has been notified of such election, by petition returnable before any justice of the supreme judicial court, in term time or vacation, in the county where either party resides, or where the duties of such office are to be performed, and said court shall have jurisdiction thereof."

The prayer of the bill is as follows:—"Wherefore your petitioner prays that notice of the pendency of this suit and of the time and place of hearing thereof may be ordered by this Honorable Court, returnable before any Justice of the Supreme Judicial Court in term time or in vacation in the County of Sagadahoc where the petitioner and the defendant reside and where the duties of said office are to be performed, to the end that after notice and hearing this Honorable Court will issue an order to the said George B. Randlette, now unlawfully claiming and holding said office, commanding him to yield up to your petitioner, who is lawfully entitled thereto, said office, and all papers, records, moneys and property connected therewith or belonging thereto, as by statute in such cases made and provided. Dated this second day of June, A. D. 1903."

The case appears in the opinion.

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

The town by its vote did not say that if the collector entered into a contract to pay the full amount of his taxes on Feb. 1st, 1904, he should back up his contract with a bond. The petitioner in his proposition made no such offer. The petitioner and the town were content to allow the matter of settlement on Feb. 1st, 1904, to be a plain and simple contract. Just what it means and just what the rights of the town would be after breach are not material here. Ordinarily such propositions and votes contain a clause that if settlement is not made upon the day agreed, the collector is to forfeit his commission. Here the parties seem to have been somewhat lax and to have made no provision for any penalty in case of breach. In all probability the rights of the town would follow the principles of contract. If Smith failed to settle on Feb. 1st, 1904, he would clearly have the right to go on and collect his taxes, and the town on its part could recover from him the actual damages sustained by his non-performance,—probably such interest money as the town would be compelled to pay in waiting for the full amount of the collection.

The suggestion of counsel in argument that under the contract to settle on Feb. 1st, the petitioner, to avoid any liability for damages, would have been compelled to have then advanced the full amount of the uncollected taxes is of itself fatal to his contention that the town would have a right to require bond containing the clause which the selectmen demanded should be inserted. It would be a hardship upon his sureties to give such indemnity.

If the town had desired to make its vote as to settlement on Feb. 1st, 1904, broad enough to require the collector not only to contract to settle, but also to give a bond to back up his contract it should have so said in the vote. Having omitted it, it is certainly an anomalous position in the face of the statute to contend that the selectmen had power to travel outside of the statute and to demand that a clause be inserted in the bond to secure the performance of a collateral contract which counsel for the defense argued with much earnestness was not an official duty. If an official duty, the bond he tendered covered it. If not an official duty, but simply a collateral

contract, he had a right to refuse to give bond for the performance of such collateral contract.

L. C. Cornish and N. L. Bassett; Chas. D. Newell, for defendant.

The bond as tendered covered the duties of the collector's office and nothing more. They were the only obligations that would be assumed under it and they were the only ones for which the sureties could be held liable in case of default. *Ford* v. *Clough*, 8 Maine, 334; *White* v. *Fox*, 22 Maine, 341; *Deering* v. *Moore*, 86 Maine, 181.

In the case at bar, however, there was a contract obligation entered into between the plaintiff and the town independent of and wholly apart from the ordinary duties of the office or the duties as prescribed by statute and that contract obligation would not be covered by the bond as tendered. The town stated its position by vote that whoever should collect the taxes must make final settlement before Feb. 1st, 1904. This vote was passed but no action on the collectorship had been taken, so that all bidders might take it into consideration before making their bids. It was likely that a higher per cent would be demanded if such a speedy settlement must be made, for it would not be probable that all the taxes would actually be paid by that early date and if not, the collector must advance them. This then was a condition upon which every bid was made. The plaintiff must have so understood it for he inserted the condition in his written bid. That became a part of the offer which he made. The town accepted his offer by electing him to the office and the express contract was then and there completed. *Bethel* v. *Mason*, 55 Maine, 501.

This contract obligation put different duties upon the plaintiff than the statute. The latter puts the same upon all. The former were assumed by the plaintiff as an individual for the sake of getting the higher rate. Under the contract, he must make final settlement with the town at a date earlier than some of his remedies for collection could be put in motion. Still, if he saw fit to make this independent contract, he must abide by it.

If the plaintiff's contention is correct, it would haye done defendant no harm to insert the contract provision in his bond, and no

illegal requirement was thrust upon it. An enumeration of statutory and contract duties in a bond cannot injure the plaintiff.

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

POWERS, J. Bill in equity under R. S., c. 4, § 53, as amended by ch. 260, of the laws of 1893.

At the annual town meeting in Richmond for 1903, it was voted that the tax collector pay in to the town treasurer, on or before February 1, 1904, the full amount of the commitment. Bids were then received from various parties, and read in town meeting, and among others, the following signed by the plaintiff.

"To the inhabitants of Richmond: I will collect the taxes for the year 1903, and settle with the town on or before February 1, 1904, at the rate of one and seventy-two and a half hundredths per cent."

Thereupon the plaintiff was duly elected and sworn as tax collector. On May 26, he tendered to the assessors a bond with sureties, conditioned that he would well and faithfully perform all the duties of his said office. The penal sum and sureties in said bond were satisfactory to the municipal officers, but they declined to approve it unless it contained the further condition, "and setttle in full for said taxes on or before February 1, 1904." The plaintiff declined to give a bond containing this clause, and thereupon the assessors, claiming that the plaintiff had refused to give the requisite bond, appointed the defendant to act as constable and collector for the collection of taxes for 1903, and he is now holding and exercising the duties of said office.

The statute provides that the assessors "shall require the constable or collector to give bond, for the faithful discharge of his duty, to the inhabitants of the town, with such sum and with such sureties as the municipal officers approve," R. S., c. 6, § 128, and that when the collector chosen refuses to give the requisite bond, the assessors may appoint a suitable person to act as constable and collector for the collection of taxes. R. S., c. 6, § 125.

Was the bond which the plaintiff tendered the requisite bond

within the meaning of the statute? It is claimed in behalf of the defendant, that, inasmuch as section 128 provides that the assessors shall require the collector to give bond, the requisite bond contemplated by the statute is such a bond as the assessors shall require. We do not think such is the proper construction of the language used. The statute states that the bond required of the collector shall be for the faithful discharge of his duty. Section 128. The word "requisite" used in section 125, has reference to such a bond as is required by section 128, and such only as the assessors have a right to require. The form of the bond is fixed by the statute and not by the widely varying ideas of each board of assessors as to what may be required in the premises. The bond tendered by plaintiff contained the condition that he would well and faithfully perform all the duties of his said office, and was a bond "for the faithful discharge of his duty," within the meaning of these words as used in the statute under consideration.

The defendant further contends that by virtue of plaintiff's contract with the town, it became his duty to make full settlement by February 1, 1904, and that therefore the assessors had a right to require a bond, which in terms called for the performance of this duty. If it be admitted that to make such a settlement was the "duty" of the plaintiff within the meaning of that word as used in section 128, then the bond which he tendered for the faithful performance of all the duties of the said office, covered that duty. All the duties must include every duty. If to make a settlement at that date was not such a duty, then the statute did not require a bond for its performance; neither did the contract into which the plaintiff entered call for any. He agreed to make full settlement by a certain date,—he did not agree to give bond that he would do so. A party who enters into a contract cannot be required to give bond for its performance, unless the giving of such bond is a part of the contract.

It follows that the plaintiff, never having refused to give the requisite bond, is the lawful collector of taxes of the town of Richmond, that it was the duty of the municipal officers to approve the bond tendered, and that the defendant is unlawfully claiming and holding the office.

Bill sustained. Decree accordingly.

HARRY L. SMITH *vs.* EDWARD M. LAWRENCE, and another.

Washington. Opinion October 10, 1903.

Broker. Holder of Option. Commissions, Action for Compensation. *Sales. Contracts. Evidence,* Hearsay.

1. A real estate broker undertaking to sell the real estate of another earns nothing until he produces to the owner a customer, willing and prepared to purchase and pay for the property at the price and on the terms given by the owner to the broker. All his expenditure of time, labor and money are at his own risk to be recouped only in case of success. The same rule applies to the holder of an option.
2. Upon the issue whether the owner of real estate during the continuance of an option given upon it offered to sell it to another party at less than the option price, a statement made by such party to the witness that such an offer had been made to him is not admissible evidence against the owner. It is mere hearsay.
3. The fact that during the continuance of an option the owner bargains the property to a third party, but contingently upon the failure of the option holder to comply with the terms of his option, does not alone constitute a breach of the option by the owner.
4. Upon the issue whether the owner, during the continuance of an option, dissuaded a probable customer of the option holder from purchasing from him, evidence that the owner and the customer had several interviews and, after the termination of the option, entered into a contract relative to the land, does not alone prove dissuasion by the owner. The customer may nevertheless have first of his own motion abandoned the option holder, and then have sought and persuaded the reluctant owner.
5. The affirmative of such an issue is not sustained so long as the evidence merely justifies suspicion or surmises, or so long as the negative may, after all, be consistent with the evidential facts.
6. A proposition is not proved until the evidence becomes inconsistent with the negative.
7. *Held;* that the evidence in this case does not amount to proof of the propositions advanced by the plaintiff.

On motion and exceptions by defendants. Motion sustained.

Assumpsit to recover $6,250 for services alleged by the plaintiff to have been rendered by him for the defendants in procuring a pur-

chaser of real estate. Plea, general issue. Verdict for plaintiff for $2,750.

The disposition of the case upon the motion for a new trial made by the law court renders a report of the bill of exceptions immaterial.

The case is stated in the opinion.

H. H. Gray; W. R. Pattangall and H. L. Smith, for plaintiff.

J. H. Gray; G. M. Hanson and A. St. Clair, for defendants.

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

EMERY, J. From the uncontradicted evidence and the evidence for the plaintiff, laying aside for the present the disputed evidence for the defendant, we think the following facts appear:—

Prior to February 1, 1902, Daniel W. Smith, the plaintiff's father, was a copartner with Edward M. Lawrence and Elias P. Lawrence, the defendants, in a partnership owning and operating timberlands, lumber mills, &c., in Jonesboro, Washington County. Smith's interest was small, only about $1250, while the interest of the Lawrences was about $34,000. On the date above named, February 1, 1902, the partnership being somewhat in debt and the parties being desirous of closing up the partnership affairs, the Lawrences agreed with Smith in writing to convey to him or his assigns all their interest in the property and partnership for $34,000 and the payment of all the partnership debts, if so purchased before February 20, 1902. This agreement was subsequently extended to March 20, 1902.

Mr. Daniel W. Smith under the above agreement expended much labor and money in efforts to find a purchaser for the property. His son Harry L. Smith, the plaintiff, also expended much labor and money in his father's behalf in the same effort. Among others whom they sought to interest in the matter, was a Mr. Grimes, an experienced lumberman. Mr. Grimes tried to organize a syndicate including some Rockland parties to purchase the property, but never got them to the point of actually agreeing to purchase. Finally, on March 18, 1902, Mr. Daniel W. Smith abandoned all further efforts to find a purchaser and so notified the Lawrences. It was then

orally agreed that Daniel W. Smith should convey and assign his interest in the partnership to the Lawrences for $1250 and a deed by him and a note by the Lawrences to that effect were executed and deposited in escrow, and afterwards delivered. The Lawrences then orally agreed with Harry L. Smith, the plaintiff and the son of Daniel, that he might have till May 1, 1902, to find a purchaser for the property at $34,000, plus the $1,250 to be paid his father and plus the debts of the partnership, $7,500, or $42,750, in all. Under this agreement Mr. Harry L. Smith and Mr. Grimes continued their efforts to find a purchaser. The price they were endeavoring to obtain for the property was $49,000, which would give the plaintiff a margin or profit of $6,250.

Mr. Grimes finally induced several men to consider the proposition to purchase with him at $49,000, among whom were Mr. Taylor, Mr. Oak and Mr. Wing, the latter a Rhode Island capitalist of experience in timber lands and mills. He arranged for these men to go to Jonesboro with him to examine the property with reference to purchasing it. They arrived there, Mr. Wing with them, on April 4. Mr. Wing made some examination of the property, but finally on April 7, 1902, declined to purchase. This dissolved the syndicate, none of the other men being willing to purchase without Mr. Wing, and Mr. Grimes withdrew from the scheme and so notified the plaintiff. No further efforts were made by the plaintiff to find a purchaser and he allowed his option to lapse without further action.

Up to this point it is clear, and indeed conceded, that the plaintiff had not earned any commissions and is not entitled to recover for any expenditure of time, labor or money in his efforts to find a purchaser. A real estate broker undertaking to sell the real estate of another earns nothing until he produces to the owner a customer, willing and prepared to purchase and pay for the property at the price and on the terms given by the owner to the broker. All his expenditure of labor and money are at his own risk to be recouped only in case of success. *Garcelon* v. *Tibbetts*, 84 Maine, 148, and cases cited.

But the plaintiff claims that his failure to bring the proposed customer to the point of actual purchase at his price of $49,000 was

caused by the interference of the defendants in offering to sell to his customers at a much less price viz, $34,000, or in persuading Mr. Grimes to abandon the plaintiff and become a purchaser of part of the property on his own account at a less rate. The first question raised by this claim is whether there is sufficient evidence to sustain it in fact, if good in law. The following circumstances are testified to and relied upon as sufficient for that purpose:—While Mr. Wing and others of the proposed syndicate were examining the property and consulting about it at Machias and Jonesboro April 5, 6 and 7, Mr. Grimes and one or the other of the Lawrences were together several times. After the dissolution of the prospective syndicate by the withdrawal of Mr. Wing and he and the others had left on April 7, Mr. Grimes remained at Machias, the headquarters of the conferences, and the next day went to Jonesboro in the Lawrences' team and remained about Jonesboro and Machias till Saturday, April 12, when he went with the Lawrences to Lubec, their home and where they carried on a large business in packing fish, &c. While there he entered into an arrangement with them to become the manager of their lumber business in Jonesboro, with the right to acquire an interest in the business on given terms. In pursuance of this arrangement he and the Lawrences on April 19, 1902, at Lubec, organized a corporation by the name of the Lawrence Lumber Company, to be located at Jonesboro, for the purpose, among others, of taking over and operating the property in question. There is no evidence that anything more was done in the matter until May 10 or 12th, several days after the plaintiff's option had expired by limitation, when the Lawrences conveyed to the corporation the property in question at a valuation of $50,000 and stock therefor was issued to them, and they transferred one-half of the stock to Mr. Grimes.

It may be that the conduct of Mr. Grimes and the Lawrences justifies a suspicion that the Lawrences did actively interfere to prevent a sale by the plaintiff. It does not amount to proof however. There is no intimation, so far, that the Lawrences offered the property to Grimes or any one else for $34,000 during the life of the plaintiff's option. It does not appear either, that the Lawrences took the initiative, which is the essential thing for the plaintiff to prove. That can

only be surmised. For all that appears, Grimes was the active persuader and the Lawrences the passively persuaded. Their conduct as above detailed is logically consistent with the testimony of Grimes and the Lawrences that the arrangement between them was not made, nor suggested, nor thought of even, until after the prospective purchasers had declined to purchase and had so notified the plaintiff; and with their further testimony that no offer or suggestion of sale at less than $49,000 was made at any time before the plaintiff's option expired; and also with their testimony that neither Grimes nor either of the Lawrences in any way discouraged the prospective purchasers from completing the purchase at any time during the plaintiff's option. It is also logically consistent with the theory that Grimes, himself, while looking over the property and the chances of business connected with it, conceived in his own mind the idea, without any suggestion from the Lawrences, that he could do better for himself by withdrawing from all connection with the plaintiff and effecting some arrangement with the Lawrences, and acted accordingly without any inducement from the defendants. This might have been the case, although perhaps not probable, notwithstanding all the suspicious circumstances shown, and if so, they gave the plaintiff no cause of action against the Lawrences.

No arrangement or understanding between Grimes and the Lawrences was carried into effect until May 10 or 12, several days after the plaintiff allowed his option to lapse. The Lawrences in no way put it out of their power to convey the property to the plaintiff or his assigns in full compliance with the terms of the option. They were able to convey at any time during the option, and there is no evidence they or either of them ever declared they would not convey for the agreed price. So far as appears, they would have conveyed to the plaintiff or his assigns at that price, notwithstanding their negotiations with Grimes, had the plaintiff during his option found them a customer willing and prepared to purchase. All their negotiations, plans and preparations might reasonably have been contingent, not to be carried into effect unless and until the plaintiff let his option lapse. It does not appear that any person who might have been induced to become a customer had any knowledge of the dealings between Grimes and the Lawrences, nor that the plaintiff could, even probably, have found a customer but for those dealings.

But the plaintiff called a witness who testified that on April 16, nearly a week after the Wing syndicate failed to purchase and the plaintiff ceased his efforts to sell, Edward M. Lawrence told him, that they, the Lawrences, had made a sale of the property in question, that the purchaser had taken possession that morning, and that the purchaser was Mr. Grimes. It is not claimed, however, that the Lawrences had in fact conveyed the property at that time, or had in any way effectually barred themselves from conveying a good title to the plaintiff or his assigns. The undisputed fact was they had not. In view of this fact the most this evidence shows, is that on April 16, the Lawrences and Mr. Grimes had concluded a bargain or arrangement for a sale to Mr. Grimes to be carried into effect afterward. It does not show the fact essential for the plaintiff to show, viz:—that the Lawrences had barred themselves from conveying to him, or had induced Grimes to abandon the plaintiff and deal with them on his own account. It still falls short of showing, or tending to show, that the Lawrences took the initiative.

The plaintiff also called a witness who testified that during the time the property was being examined by the Wing syndicate early in April, Mr. Grimes said the Lawrences had offered the property to him for $34,000, half down. This, however, is not evidence against the Lawrences, the defendants.

No other material evidence is called to our attention as tending to show that the Lawrences interfered with the plaintiff's rights under and during his option, either by offering the property at less than $49,000, the price fixed by the plaintiff, or by inducing Mr. Grimes to withdraw from his connection with the plaintiff. In our own research we have found no other evidence of that tendency.

Granting all the competent testimony adduced by the plaintiff to be true, and drawing all permissible inferences in his favor, yet the evidence gives ground for surmise only. It falls short of proving that the Lawrences actively brought about the failure of the plaintiff, during his option, to find a customer willing and prepared to buy the property on his terms.

Motion sustained. Verdict set aside.

EDWARD H. WOOD *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion October 22, 1903.

Common Carriers. Railroads. Personal Baggage, Liability and loss of.

The relation of passenger and public carrier between the parties entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight. No separate contract is required for the carriage of mere personal baggage which is accompanied by the passenger in its transportation. With respect to such baggage, the carrier of passengers incurs the responsibility of common carriers of merchandise, and becomes liable as an insurer of the baggage except in cases of "vis major" or the public enemy.

But in the absence of any special agreement therefor the carrier does not incur this liability as an insurer of the baggage, unless the passenger accompanies it in its transportation or is prevented from so doing by the fault of the carrier. If therefore that which would have been properly baggage had it been accompanied by the owner as a passenger, should by accident or mistake be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in the character of baggage, and would not be responsible for it as such.

Although the measure of the liability of the carrier of the baggage is the same as that of the common carrier of goods as freight, the risk incurred by the carrier in the two cases is not always the same. Where the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and when his journey has been safely made, the carrier may at once deliver to him his baggage.

Where the owner did not intend to accompany his baggage the entire distance of his route and it is admitted that he did not in fact accompany it over any part of the defendant's railroad, *held;* that the defendant did not incur the full responsibility of a common carrier of goods; and that at the time the trunk was rifled of its contents, the defendant was only liable as a gratuitous bailee.

Held; that there was no want of ordinary care on the part of the defendant respecting the custody of the trunk.

The trunk was deposited in an ordinarily well-constructed baggage room with the doors and windows secured in the ordinary manner on the night in question, and the felonious entrance was effected by breaking out a pane

of glass in one of its windows. The plaintiff's conduct indicated that he regarded this baggage room as a reasonably safe place for the storage of baggage. He must have been familiar with the condition of the baggage room of the defendant company at that station. When he stopped in Boston, he knew that in the ordinary course of transportation his trunk would reach its destination at Wiscasset in this State in advance of his arrival, and be stored in this baggage room over night. After his arrival he made no haste to call for it and showed no anxiety in regard to its safety.

On report. Judgment for defendant.

Action for loss of plaintiff's baggage by theft from the defendant's station at Wiscasset.

It was admitted that the owner did not accompany it while it was being transported from Boston to Wiscasset, its place of destination.

The case appears in the opinion.

W. M. Hilton, for plaintiff.

N. and H. B. Cleaves; S. C. Perry and H. W. Swasey, for defendant.

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

WHITEHOUSE, J. In this case the first count in the writ sets out an express contract on the part of the defendant as a common carrier, to transport the plaintiff's trunk with its contents safely from Portland to Wiscasset and there to deliver it to the plaintiff. The second is on an alleged contract by the defendant as a warehouseman to receive from the plaintiff and safely keep, and deliver to him his trunk and its contents upon demand. The defendant pleads to the first count that it was not liable to plaintiff as a common carrier for the loss of his property, and to the second count that as a warehouseman it used reasonable and ordinary care and diligence in keeping the property; and that the defendant's baggage room in Wiscasset was broken open and entered by thieves and the contents of the trunk stolen without the fault of the defendant.

On the 16th of June, 1902, the plaintiff bought a passenger ticket from Asbury Park, N. J., to Boston, and had his trunk checked through to Wiscasset, Maine. The plaintiff testified that he paid

"an additional price," or "extra charge" over and above the price of his ticket to have the trunk checked through to Wiscasset, but he was unable to remember whether this "extra charge" was 75 cents or $1.25. The check found on the plaintiff's trunk was the ordinary paper check usually attached to trunks of passengers on the roads over which this trunk was carried. The plaintiff came to Boston as a passenger on the same train with the trunk, arriving there on the morning of June 17. He remained in Boston the entire day and in the evening continued his journey by boat from Boston to Bath. There, on the morning of June 18, he bought a ticket on which he traveled over the defendant's railroad from Bath to Wiscasset, arriving there about 9.30 in the forenoon of that day. In due course of transportation upon the check, the plaintiff's trunk had reached Wiscasset over the defendant's railroad from Portland at 2.55 in the afternoon of the day preceding, but no one appearing there to receive it on its arrival, it was duly deposited in the baggage room with other baggage. The plaintiff did not call for it until the afternoon of the 18th about 24 hours after its arrival.

It is contended that the facts thus disclosed are insufficient to establish the liability of the defendant as a common carrier and an insurer of the trunk, and that it can only be liable either as a gratuitous bailee or as a warehouseman.

It is settled and familiar law respecting public carriers of passengers, that the existence of the relation of passenger and carrier between the parties entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight. No separate contract is required for the carriage of mere personal baggage which is accompanied by the passenger in its transportation. The fare for the transportation of the passenger includes compensation for the carriage of the baggage; and with respect to such baggage, the carrier of passengers incurs the responsibility of common carriers of merchandise, and becomes liable as an insurer of the baggage, except in cases of "vis major" or the public enemy. But in the absence of any special agreement therefor the carrier does not incur this liability as an insurer of the baggage, unless the passenger accompanies it in its transportation or is prevented from so

doing by the fault of the carrier. *Wilson* v. *Grand Trunk Railway*, 56 Maine, 60; Id. 57 Maine, 138; *Graffam* v. *Boston & Maine Railroad*, 67 Maine, 234. "If therefore that which would have been properly baggage had it been accompanied by the owner as a passenger, should by accident or mistake be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in the character of baggage, and would not be responsible for it as such. . . . . For although the measure of the liability of the carrier of the baggage is the same as that of the common carrier of goods as freight, the risk incurred by the carrier in the two cases is not always the same. Where the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and where his journey has been safely made, the carrier may at once deliver to him his baggage." Hutchinson on Car. §§ 701 and 702; *Collins* v. *Boston & Maine Railroad*, 10 Cush. 506.

In *Beers* v. *Boston & Albany R. R. Co.*, 67 Conn. 417, 52 Am. St. Rep. 293, 32 L. R. A. 535, the defendant company received from another carrier and transported the plaintiff's trunks upon the erroneous assumption created by the checks on the trunks that they were the personal baggage of passengers who had purchased tickets over the defendant's road as a connecting carrier. In fact the owner of the trunks traveled by another route, but supposed that the trunks were properly checked. The court held that the defendant did not receive the trunks in the capacity of a common carrier of passengers for hire; and as there were no passengers accompanying the trunks or who had bought tickets entitling them to passage with their trunks over defendant's road, there was no liability of the defendant, except for wilful and intentional injury to the trunks in its possession. So in the recent case of *Marshall* v. *Pontiac, Oxford & Northern R. R. Co.*, 126 Mich. 45, the plaintiff purchased a passenger ticket over the defendant's railroad for the purpose of obtaining a check upon which his trunk was forwarded as baggage, without any intention of accompanying the baggage in its transportation. He made the journey to his destination by his own private conveyance, but in the meantime

the baggage had arrived and as the owner was not there to receive it, the trunk was deposited in the baggage room used for that purpose. The second night after the arrival of the trunk, the baggage room was feloniously entered and the trunk carried away by thieves. Some four months later the plaintiff used his ticket as a passenger on the defendant's railroad. The court held that the plaintiff was not a passenger at the time the trunk was transported over the road, and that at the time it was stolen from the baggage room the defendant was only a gratuitous bailee, and not being guilty of "gross negligence" it was not liable to the plaintiff. In this case, however, the court deemed it proper to close the opinion with this observation: "We must not be understood as holding that it is absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railroad company as a warehouseman. Where the passenger purchased his ticket with the bona fide intention to use it, but without fault upon his part, did not accompany it, but went upon a following train, a different case is presented."

In the case at bar it satisfactorily appears from all the evidence that the plaintiff's trunk was received by the carrier in New Jersey in the ordinary way as the personal baggage of a passenger, in the expectation that it would be accompanied by the owner. It is true that the plaintiff testifies that he paid an "extra amount" to have the trunk "checked through to Wiscasset," but he is unable to state the precise amount paid for that purpose, and he recalls no conversation between the checker and himself tending to show that the trunk was to be forwarded as freight without the passenger. He received only the ordinary passenger check for the trunk, and it seems probable from all the evidence that the "additional price" paid by him was only the ordinary charge for the transfer of the baggage of passengers across New York and Boston. The conclusion is irresistible that when the trunk was checked at Asbury Park both the parties understood that it was to go forward as the baggage of a passenger. It is equally clear that the plaintiff did not intend to accompany it beyond Boston, and it is admitted that he did not in fact accompany it over any part of the defendant's railroad.

It is accordingly the opinion of the court that the defendant did not incur the full responsibility of a common carrier of goods, and that at the time the trunk was rifled of its contents, the defendant was only liable as a gratuitous bailee.

But with respect to its manner of storing and keeping the trunk, the evidence fails to show that the defendant was guilty of any negligence which would render it liable, as a gratuitous bailee, to compensate the plaintiff for the loss of baggage taken from its custody by shop-breakers and thieves. The trunk was deposited in an ordinarily well constructed baggage room with the doors and windows secured in the ordinary manner on the night in question, and the felonious entrance was effected by breaking out a pane of glass in one of its windows. The plaintiff's conduct indicated that he regarded this baggage room as a reasonably safe place for the storage of baggage. Wiscasset was his old home. He must have been familiar with the condition of the baggage room of the defendant company at that station. When he stopped in Boston, he knew that in the ordinary course of transportation his trunk would reach its destination in advance of his arrival, and be stored in this baggage room over night. After his arrival he made no haste to call for it and showed no anxiety in regard to its safety.

There was no want of ordinary care on the part of the defendant respecting the custody of the trunk.

Judgment for the defendant.

DAVID D. STEWART *vs.* EDWIN E. SMITH, Executor.

Somerset. Opinion October 28, 1903.

Pleading, Capacity of Parties, Defendant not Executor. *General Issue* in assumpsit, What it admits, Brief Statement. *Abatement.*

The statute authorizing brief statements of special matter in defense does not supersede the use of pleas in abatement for setting up dilatory defenses.

In assumpsit the defense that defendant is not executor must be pleaded in abatement, otherwise it is waived.

The plea of the general issue admits the capacity in which the defendant is sued.

Preliminary objections like the denial of plaintiff's right to be heard in court, or the want of capacity in either of the parties, should be interposed and determined in limine. The rules of pleading demand that such defenses should be heard before the merits are reached so as to prevent unnecessary costs and delay.

Exceptions by defendant. Overruled.

Action of assumpsit on two promissory notes with a count on account annexed. Defendant was sued as executor of the last will and testament of Nancy A. Smith, deceased.

The plea was the general issue with the following brief statement:—

"And by way of brief statement under the general issue the said defendant says, that he is not nor ever has been executor of the last will and testament of said Nancy A. Smith, nor ever administered any of the goods and chattels, estate, rights or credits which were of the said Nancy A. Smith, deceased, at the time of her death as alleged."

The facts appear in the opinion.

D. D. Stewart, for plaintiff.

E. N. Merrill, J. S. Williams and Forrest Goodwin, for defendant.

Counsel conceded the necessity of pleading ne unques executor, but contended that the defense could be raised by brief statement under the general issue, since the act to abolish special pleading.

"That the plaintiff is not administrator, may be pleaded in bar and such plea may be joined with non-assumpsit." *Flynn* v. *Chase*, 4 Denio (N. Y.) 85, 86. Counsel also cited among other cases *Shepard* v. *Merrill*, 13 Johns. (N. Y.) 475.

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

WHITEHOUSE, J. This was an action of assumpsit on two promissory notes signed by Nancy A. Smith and Laura A. Davis, and on an account annexed running against the same parties. The suit is against the defendant as "executor of the last will and testament of Nancy A. Smith, deceased." It was entered at the September term of the court for Somerset County in 1901, and the defendant entered a general appearance at that term, but filed no pleadings. The action was continued from term to term until the September term, 1902, when by agreement of parties it was submitted to the presiding judge for hearing and decision with the right of exception. At the hearing before the presiding judge at the September term, 1902, the defendant presented a plea of the general issue and a brief statement "that he is not and never has been executor of the last will and testament of said Nancy A. Smith." The plaintiff moved the court to reject the plea or brief statement of ne unques executor, because it related to the capacity in which the defendant was sued and should have been pleaded in abatement at the return term of the writ; and because his capacity to be sued as executor of the will of Nancy A. Smith, deceased, was conclusively admitted by his previous plea of the general issue." The plaintiff offered no evidence and contended that he was not bound to introduce any evidence, of the appointment and qualification of the defendant as executor. He accordingly moved for judgment on the notes introduced in evidence. The presiding justice ruled as matter of law that under the pleadings it was unnecessary for the plaintiff to prove the appointment and qualification of the defendant as executor and rendered judgment for the plaintiff in the sum of $1605.62.

The case comes to this court on exceptions to this ruling.

The question of pleading thus presented for the determination of the court must be deemed res judicata in this State. The ruling of the presiding justice was correct. *Clark* v. *Pishon*, 31 Maine, 503; *Brown* v. *Nourse*, 55 Maine, 230, 92 Am. Dec. 583. In *Clark* v. *Pishon*, the suit was brought by the plaintiff as administrator, and the defendant pleaded in bar that the plaintiff was not administrator. The court rejected the plea. The defendant then pleaded the general issue with a protest that he did not waive the defense set up in the plea in bar but reserved the right to avail himself of it at any stage of the case. "By pleading in bar," said the court, "the defendant admitted the plaintiff's capacity, though in the very plea he denies it. There was an incongruity. The plea was rightfully rejected. So also was the plea containing the protest."

This rule of pleading was again brought in question in *Brown* v. *Nourse*, supra. That was also an action in which the plaintiff sued as administrator. At the return term the defendant filed a plea in abatement of ne unques administrator, which was adjudged bad on demurrer because not verified by affidavit. The defendant then pleaded the general issue with a brief statement alleging in bar that the plaintiff "was never duly appointed administrator in this state." It was again held that the question of the plaintiff's capacity to sue can be raised only by plea in abatement. In the opinion the court say: "This question seems to have been directly determined by this court in the case of *Clark* v. *Pishon*, 31 Maine, 503. It was there held that,—'by pleading the general issue the defendant admitted the plaintiff's capacity.' This case was decided after the decision in *Langdon* v. *Potter*, 11 Mass. 315, in which a different doctrine is indicated, although that case was cited by counsel in *Clark* v. *Pishon*. On examination of the authorities, we are satisfied that the decision by our own court is, to say the least, as well supported in every respect as the contrary doctrine. . . . . .

"The principle which lies at the bottom is, that where, independently of all merits, a party would deny the capacity of the plaintiff and his right to be heard in court in the case, the objection must be interposed in limine, so as to prevent unnecessary costs and delay. It is a safe and extremely convenient rule in practice, and not unrea-

sonable in its requirements. It only demands that what is preliminary in its nature shall be interposed and determined before the merits are reached. We do not see any sufficient reason for overruling *Clark* v. *Pishon*."

Each of the foregoing cases, it is true, relates to an action brought by the plaintiff as administrator, and not to one in which the defendant is sued in his capacity as executor or administrator. But a fortiori the same rule must apply in the latter case. When the defendant in the suit is made a party in his representative capacity, the reasonableness and practical convenience of the rule are still more apparent. It must of course be a matter more peculiarly within the knowledge of the defendant whether he is an executor or not, and if he would make the objection that he is not, it is only reasonable and just that the objection should be interposed by plea in abatement "so as to prevent unnecessary costs and delay." *Clements* v. *Swain*, 2 N. H. 475; *Kittredge* v. *Folsom*, 8 N. H. 98.

Under the pleadings in the case at bar, the defendant's representative capacity must be regarded as admitted, and it was not incumbent upon the plaintiff to prove the appointment and qualification of the defendant as executor.

Exceptions overruled.

INHABITANTS OF SOUTH BERWICK, Petitioners,

vs.

COUNTY COMMISSIONERS.

York. Opinion November 19, 1903.

Certiorari. County Commissioners. Jurisdiction. Record. Answer. Deed, Indivisible Grant. *Words. Way* "subject to a gate." *R. S., (1883) c. 18, § 53.*

The jurisdiction of the court of County Commissioners cannot be presumed when their proceedings are examined by this court on the hearing of a petition for writ of certiorari; the necessary jurisdictional facts must affirmatively appear by the record, or be properly supplied by the answer.

The answer in certiorari, in order to supply the omission in the record of findings of jurisdictional matter by the commissioners, must not only be under oath, but should set out facts conferring jurisdiction, which were actually adjudicated, but by inadvertence omitted from the record.

In order to give the County Commissioners jurisdiction to adjudge a way unsafe and inconvenient for travelers, on the petition mentioned in R. S. (1883) c. 18, § 53, it must appear that the way is one which the town is bound to maintain, and that the municipal officers have had the required five days' notice of the defective condition.

A qualification in a deed that the conveyance thereby made is "for the purpose of a way, etc., to be subject to a gate at said highway," charges the land granted with a perpetual servitude of a gate which cannot be released, except by the grantor or his successor in title.

The gate, by the language used, became part of the way; for stripped of all verbiage such a conveyance is "a way subject to a gate." The grant is indivisible, the gate and the way being created at the same time and by the same authority.

Neither the grantee in such a conveyance nor his successor in interest can give sufficient title to the way in question to authorize either of them, whatever their intention, to dedicate it to the public use as a highway.

On report. Writ of certiorari granted.

This was a hearing on a petition for a writ of certiorari to quash the proceedings of the County Commissioners of York County who had ordered the town of South Berwick to repair an alleged town way in that place.

The facts appear in the opinion.

Geo. C. Yeaton; C. D. Varney, for petitioners.

W. S. Mathews, for respondents.

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

SPEAR, J. Petition for writ of certiorari to quash the proceedings of the County Commissioners of York County in directing the town of South Berwick to repair an alleged town way in said town. While the parties raise no question as to the formalities of the record sent up, the record, itself, upon inspection, discloses defects fatal to the validity of the proceedings. Turning to the record, we find no adjudication that the town of South Berwick was liable to maintain the way described in the petition, or any adjudication of facts upon which such liability follows as a legal conclusion. Nor is there any adjudication that one of the municipal officers of said town had five days' notice or knowledge of the defective condition of such way. But R. S. (1883), c. 18, § 53, governing these proceedings, provides "when a town liable to maintain a way, unreasonably neglects to keep it in repair, as aforesaid, after one of the municipal officers has had five days' actual notice or knowledge of the defective condition, any three or more responsible persons may petition" etc. Both the liability of the town to maintain, and the five days' notice, under this statute, are necessary jurisdictional facts and should appear of record, as adjudicated. Their failure to so appear is fatal, as jurisdiction cannot be conferred, even by consent. *Powers* v. *Mitchell*, 75 Maine, 364.

Neither can the jurisdiction of the court of County Commissioners be presumed but must affirmatively appear of record. The answer does not supply the omission, first because it is not under oath, and second because it does not set out any facts conferring jurisdiction actually adjudged but inadvertently omitted from the record. It does set out that the way is a public town way. This, however, is a legal conclusion and the answer therein is not conclusive, as it would be if it recited the facts from which such a conclusion must follow.

Therefore the record, when supplemented by the answer, fails to show jurisdiction. It may be here observed that the petitioners do not specifically allege the errors upon which the decision in this opinion is based, but "the respondents appeared and answered and presented a copy of the record of the proceedings duly certified which is made a part of the case. We shall therefore consider the case as if the petition contained the proper allegations." *Emery* v. *Brann*, 67 Maine, p. 44. A writ of certiorari lies only to correct errors of law, and when such errors appear by an inspection of the record, and then only, will the writ issue. The principles of law governing this case have so recently been announced in *Stevens* v. *County Commissioners*, 97 Maine, 121, that it is unnecessary to again repeat them.

While the writ in this case is to issue for want of jurisdiction for the reasons above stated, it is apparent that the petitioners, in assigning want of jurisdiction as the error upon which they rely, had in mind entirely different reasons therefor, as the errors in the record are not alluded to at all as the ground upon which the petitioners proceed. The errors which authorize the writ are omissions which affect the present procedure but not the merits of the case. The error assigned in the petition, however, goes to the very life of the case, but it should have been raised by appeal and not by a petition for a writ. *Phillips* v. *County Commissioners*, 83 Maine, 541; *Stevens* v. *County Commissioners*, 97 Maine, 127.

The well defined rules of practice in this class of cases require a decision based upon the condition of the record as presented; yet, it may not be inadvisable to also consider the case upon the issue, treated by both parties as the only issue involved, and the only one discussed by them in their briefs, a determination of which will be decisive of any further controversy, namely, "that said court of County Commissioners had no jurisdiction of the petition, or of the way therein described, and its acts in making said order and decree are erroneous and the records thereof are erroneous and illegal for the following reasons, viz: "Because the said way described in said petition never was, and is not now, a town way, which said town of South Berwick was, or is, liable to keep in repair; but always was, and is now a private way, and not a public way of any kind." The

petitioners say in their brief that "the only question contested at the hearing was that of the jurisdiction of the County Commissioners." Being an inferior court their jurisdiction depended, entirely, upon the existence of a town way; the validity of their acts upon their jurisdiction; hence, if a town way, their acts were valid; if not, invalid. It was also unquestioned that if the bridge in controversy was a town way, it became such solely by the act of dedication. The case is reported and "upon so much of the evidence as is legally admissible, the law court is to enter such judgment as the rights of the parties may require."

This brings us to the immediate consideration of the question at issue: Had the road complained of become a town way by dedication? Dedication is an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by or on behalf of the public. A primary condition of every valid dedication is that it shall be made by the owner of the fee. Under the above rule of law, we do not think John G. Dorr, the original grantee of the way in question, or Charles H. Dorr, his successor in title, had such ownership of said way as to enable either of them to make it a town way by dedication. The title to the way in question was conveyed to John G. Dorr by Chadbourn Warren in 1857, by a warranty deed containing the following description: A certain tract or parcel of land situated in said South Berwick and bounded beginning at the south-east corner of the school house near the dwelling-house of said Warren at the highway leading from said South Berwick to said Warren's; thence easterly by said road two rods to a stake; thence northerly about seventeen rods to a hub on the banks of the Great Works River near the south-east corner of said Dorr's bridge; thence in the same course to the center of said river; thence westerly by said center of said river two rods; thence southerly on a line parallel with said second line about eighteen rods to the point commenced at containing thirty-six square rods more or less for the purpose of a way from said highway to said Dorr's land to be subject to a gate at said highway and said way not to be fenced by either party, and the said Dorr to build sufficient culverts across said way.

In *White* v. *Bradley*, 66 Maine, 261, the court say: "It is a well

settled doctrine of the law that the grantee, in a valid and operative deed poll under which he derives and enjoys a title by its acceptance, becomes bound by its restrictions, limitations, reservations and exceptions contained in it, and it does not lie in his mouth to impeach it, or reject the burden it imposes; and the deed may charge other lands with a servitude, besides those which are the subject of conveyance. *Winthrop* v. *Fairbanks*, 41 Maine, 307; *Vickerie* v. *Buswell*, 13 Maine, 289; *Newell* v. *Hill*, 2 Met. 180."

Newell v. *Hill*, supra, was a case very similar to the one at bar. "The plaintiff conveyed to the defendant, by deed and for valuable consideration, a tract of land described, bounding it on one line by the grantor's own land. In the body of the deed is the following stipulation: 'The said Josiah Hill, his heirs and assigns, to build and forever maintain a good and sufficient fence the whole extent of the line bounding on the grantor's land'. This, although it purports to be a stipulation on the part of the grantee. and although the deed is not signed by the grantee, is still a valid and binding contract on his part. A deed poll, when accepted by the grantee, becomes the mutual act of the parties, and a stipulation, on the part of the grantee, though it cannot be declared upon as his deed, yet by force of his acceptance, is a valid contract on his part, by which a right may be reserved or granted, or upon which a suit may be maintained."

In *Vickerie* v. *Buswell*, 13 Maine, 289, the qualification in the deed was: "Brook to remain for the use of the mills, as heretofore, forever." The court say, referring to the brook, "it was to remain as before." "The enjoyment of the property released to the complainant, is to that extent qualified."

The qualification in the deed to John G. Dorr, that the conveyance was "for the purpose of a way, etc., to be subject to a gate at said highway" was one which charged the land granted with the perpetual servitude of a gate, which could not be released, except by Chadbourn Warren or his successor in title.

The gate, by the language used, became a part of the way. The conveyance, stripped of all verbiage, was "a way subject to a gate," an indivisible grant, the gate and the way being created at the same time by the same act and by the same authority. The purpose

of the qualification clearly indicates that the gate was to run with the way. Not only did the grantor provide for a gate, but exemption from fencing along the sides of the way. This was evidently to prevent the grantee of the way from dividing the field through which it passed; and the gate to prevent the stock upon the farm from straying into the highway. These are servitudes of a permanent nature running with the occupancy and use of the farm, and affecting its market value.

We are of opinion that neither John G. Dorr nor Charles H. Dorr, his successor, had such title to the way in question as would authorize either of them, whatever their intention, to dedicate it to public use.

We have discussed the nature of the way involved, not as a ground upon which the writ is granted in this case, but as a possible aid to the parties in determining their future action in regard to the one issue raised by counsel upon both sides in their briefs.

Writ granted.

STATE OF MAINE ex rel. GEORGE M. SEIDERS, Attorney General,

vs.

CITY OF BANGOR AND CITY OF BREWER.

Penobscot. Opinion November 14, 1903.

Const. Law. Eminent Domain. Corporations. Charter, Extension. *Toll-Bridge. Condemnation Proceedings. Award. Confirmation,* by consent. *Waiver. Apportionment of Value,* between two cities. *Committee*—Personnel of. *County Commissioners,* Remote interest disregarded by legislature. *Vote. Collateral Attack. Mistake,* of voters. *Highway. The Public,* Protection of its interest. *Attorney General. Mandamus. Const. Maine Art. IV, § 14,* (Amend. of 1875). *Spec. Laws, 1828, c. 529; 1846, c. 325; 1895, c. 208; 1901, c. 360.*

The further extension of an old toll-bridge charter is not equivalent to the granting of a new charter.

Where a toll-bridge is converted into a highway, the two cities divided by the river spanned by the bridge, are bound under the law to maintain it.

There can be no impropriety in the legislature allowing these cities to declare their desire as a condition precedent to the taking or purchasing of such a toll-bridge for a highway.

Section 14 of Article IV Const. of Maine (the amendment of 1875), relating to the organization of corporations under general law, has been held to have no application to charters previously granted, even though amended subsequently.

The Bangor Bridge Company was chartered in 1828, and was then granted the right to take tolls for fifty years. In 1846 it was granted the right to rebuild its bridge, and its right to take tolls extended to fifty years from the time the bridge should be reopened to passengers. Nothing in either act provided for forfeiture of the bridge to the public after the right to take tolls had expired. *Held;* that, even if forfeiture would have resulted without legislative action (which is not here decided), it was certainly competent for the legislature to waive the forfeiture, that being the only power authorized to claim it for the State.

The act of 1895, extending the time for taking tolls by the Bridge Company, was within the legitimate authority of the legislature.

It is claimed that at the March Meeting in 1902, in Bangor, when by a majority vote it was determined to "buy and make free the toll-bridge," the voters acted under a misapprehension of the facts and of the value of the bridge. *Held;* that it is too late for Bangor to raise this objection, when, long after the vote was taken, it joined with Brewer in a petition to the Chief Justice, asking the appointment in accordance with the act, of a committee to find the value of the bridge property; which was done, and the appraisal accepted and confirmed, with the consent of all parties, including Bangor.

When each of the cities had duly voted to take or purchase the bridge as provided in the acts of 1895 and 1901, and the value of the bridge property had been determined, the rights of all parties became vested, and the statutes then became imperative upon both cities to pay the price awarded by the committee and to take the bridge by eminent domain as authorized by sec. 1 of the statute of 1901.

The Bridge Company had no option, and neither Bangor nor Brewer could, by any action at any meeting called subsequently to that in which the vote had been taken, rescind their former vote, or escape the duty imposed by the act of 1901.

Neither of the cities can complain that the assessment of value by the committee was erroneous or excessive, since that assessment was confirmed by the Chief Justice, with the consent of both.

One span of the bridge was carried away by a freshet March 22, 1902. The petition for appraisal of the value of the bridge was not filed until April 14, 1902. Beginning in the same spring, and working during the summer and fall of 1902, the Bridge Company replaced the span carried away, with one of steel, at a cost of about $26,000. Bangor and Brewer agreed that the appraisal should be had as the bridge was at the date of the petition, with the span out, and further agreed that if the two cities were finally compelled to pay the award of the committee, they should pay the Bridge Company, in addition, the cost of the new steel span; and this agreement was stated by counsel for both cities to the committee. *Held;* that, in view of these facts, a contention that an entire bridge was to be appraised is not well founded.

When it is clear that the legislature, in designating the County Commissioners to determine the proportion of value of a bridge to be paid by each of two cities, understood that one or more of the commissioners would likely be citizens or tax payers in one of the cities, *held;* that the legislature clearly intended to ignore the remote interest possessed by one of the commissioners by reason of being a resident and tax payer of one of such cities.

The determination by the County Commissioners of the proportions of the value to be paid respectively by Bangor and Brewer for the bridge property, and for its subsequent maintenance, is final and conclusive, and cannot be attacked, except for fraud or mistake.

Where two cities have consented to the taking of a toll-bridge for a highway by proper condemnation proceedings, the public are interested that the end sought shall be reached. It should not be suffered to fail by the inaction of the Bridge Company or either of the cities.

The duty of the cities to pay, and of the Bridge Company, upon payment, to surrender the bridge, are duties in the performance of which the public have an interest. That interest is and can only be represented by the Attorney General, acting for the State.

Mandamus is the appropriate and only process by which the State can compel the performance of the duties owed to the public in connection with this bridge by the cities of Bangor and Brewer, and thus secure a free bridge for public use.

On report. Peremptory writ of mandamus to issue as prayed for.

Petition for mandamus. It was agreed by the parties at the argument of the cause before this court in banc that the petition and answers should be regarded as the alternative writ and return.

The petition was as follows:—

To the Honorable William Penn Whitehouse,
Justice of the Supreme Judicial Court:

And now comes George M. Seiders, Attorney General for the State of Maine, in his proper person, and by virtue of his office and in behalf of said State, and respectfully represents:

First. That on the thirteenth day of March, A. D. 1901, and for a long time prior thereto, the Bangor Bridge Company, a corporation duly created and organized under the laws of the State of Maine, was and ever since has been and now is maintaining a toll-bridge with its approaches between the cities of Bangor and Brewer across the Penobscot River, and that during said time there has been and now is no highway between said cities.

Second. That by Chapter three hundred and sixty of the Private and Special Laws of Maine for the year nineteen hundred and one, approved March 13, 1901, and now in force, the following provision was made by the legislature, to the end that the said bridge and its approaches might be a public highway, to wit:

"Section 1. Chapter two hundred and eight of the private and special laws of one thousand eight hundred and ninety-five is hereby amended so that said chapter, as amended, shall read as follows:

'Section 1. The cities of Bangor and Brewer, or either of them, with the assistance of the County of Penobscot as hereinafter provided, are authorized to take and purchase the bridge, property and appurtenances of the Bangor Bridge Company, on the payment to said Company of such sum as may be agreed upon; or as may be found as the value of said bridge, property and appurtenances, by a committee of three disinterested men, to be appointed by the Chief Justice of the Supreme Judicial Court, the award of a majority of whom shall be reported to the Supreme Judicial Court, in Penobscot County, in term time or in vacation, and the said Chief Justice may confirm the same or recommit it for the correction of errors, if justice so requires. The award of the committee shall be conclusive as to the amount.

'Section 2. The said cities of Bangor and Brewer may at any time file a petition in the Clerk's office of the Supreme Judicial Court for said County of Penobscot, in term time or in vacation, addressed to the said Chief Justice of said court, who, after notice to said Bridge Company and said County Commissioners, shall after hearing and within twenty days after the filing of said petition, appoint said committee, who shall forthwith organize, and after due notice and hearing proceed under proper instruction from said court, to the determination of the value of said bridge, property and appurtenances. In assessing and determining the value, the committee shall not award anything for franchise.

'Section 3. Until this value shall be agreed upon, or determined as aforesaid, and the amount thereof shall be paid to said Bridge Company, the right to take tolls as established by chapter three hundred and twenty-five of the laws of eighteen hundred and forty-six, and not exceeding the rates now charged shall be continued subject, however, to legislative regulation, as provided in said chapter.

'Section 4. If the cities of Bangor and Brewer and the County Commissioners of Penobscot County shall jointly agree with said Bridge Company upon said value, or if said value be determined as aforesaid, the said County Commissioners are hereby directed and authorized to cause forthwith to be paid to said Bridge Company

from the treasury of the County of Penobscot and of the moneys of said County a sum equal to one-half of the value of said bridge ascertained in either of the above named ways; provided, however, that if said one-half of said value shall exceed the sum of twelve thousand dollars, said County of Penobscot shall pay said sum of twelve thousand dollars to said Bridge Company for its portion of said value and no more; provided further, that such payment by said county to said Bridge Company shall not be made unless and until said cities shall pay the remainder of said value ascertained as aforesaid. And if, in either case, said cities shall be unable to agree upon the respective proportions to be paid by them of the remainder of the value of said bridge ascertained as aforesaid, and shall be unable to agree in what proportions said bridge shall be maintained by them after said payment of said value to said Bridge Company such respective proportions shall be determined at the request of either city, and after notice to the other and hearing, by the County Commissioners of Penobscot County. When said amounts shall be so determined, the said cities shall pay the same to the said Bridge Company and said bridge shall be maintained by said cities in the proportions determined as aforesaid.

'Section 5. From and after payment of said value to said Bridge Company said bridge and its approaches shall be a highway and shall be maintained by said cities of Bangor and Brewer in the proportions agreed upon by said cities or determined by said County Commissioners as above provided.

'Section 6. The County Commissioners of Penobscot County are hereby authorized and directed to proceed forthwith as soon as said value shall be agreed upon or determined as provided by this chapter and the proportionate amount of said value to be paid by said cities shall have been agreed upon by said cities or determined according to the provisions of this chapter, to obtain loan or loans of money for said purpose of paying its portion of the value of said bridge as aforesaid and cause notes or obligations of said county with coupons for interest not exceeding six per cent, to be issued upon such time as they may deem expedient.'

'Section 7. This act shall take effect when approved.'"

THIRD. That at the municipal election held in the City of Bangor on the tenth day of March, A. D. 1902, the legal voters of said city voted upon the following question inserted in the warrants issued for such election, viz:

"Shall the cities of Bangor and Brewer buy and make free the toll-bridge, the county to pay twelve thousand dollars towards the same, at a price to be determined by appraisal as provided by law."

And the number of "Yes" votes thereon was sixteen hundred and sixty-five, and the number of "No" votes thereon was nine hundred and eleven.

FOURTH. That at the municipal election held in the City of Brewer on the tenth day of March, A. D. 1902, the legal voters of said city voted upon the following question inserted in the warrants issued for such election, viz:

"Shall the cities of Bangor and Brewer buy and make free the toll-bridge, the county to pay twelve thousand dollars towards the same, at a price to be determined by appraisal as provided by law."

And the number of "Yes" votes thereon was five hundred and forty, and the number of "No" votes thereon was sixty-five.

FIFTH. That at the April term of the Supreme Judicial Court for the County of Penobscot the cities of Bangor and Brewer filed their petition under the act recited as aforesaid, addressed to the Chief Justice of said court, who, after notice to said Bridge Company and said County Commissioners, after hearing and within twenty days after the filing of said petition, appointed a committee of three disinterested men, who forthwith organized, and after due notice and hearing proceeded under proper instructions from said court, to the determination of the value of said bridge, property and appurtenances, and in assessing and determining such value said committee did not award anything for franchise. And on the fourth day of November, A. D. 1902, the award of said committee was reported to the Supreme Judicial Court in said Penobscot County, finding the value of said bridge property and its appurtenances to be Sixty-two Thousand Three Hundred and forty-eight dollars ($62,348) and

said award on the twenty-first day of November, A. D. 1902, was confirmed by the said Chief Justice as in said act provided, and then became and ever since has been the judgment of said court of record therein.

That under said act, recited aforesaid, it was the duty of the County of Penobscot to pay the sum of Twelve Thousand Dollars ($12,000) to said Bridge Company for its portion of said value, and no more; with a provision, however, that such payment by said county to said Bridge Company is not to be made unless and until said cities shall pay the remainder of said value ascertained as aforesaid.

SIXTH. That the said cities of Bangor and Brewer were unable to agree upon the respective proportions to be paid by them of the remainder of the value of said bridge ascertained as aforesaid, and were unable to agree in what proportion said bridge should be maintained by them after said payment of said value to said Bridge Company, and thereupon, by reason of said inability so to agree as aforesaid, the City of Brewer, as in said act provided, by its petition dated December 16, 1902, requested the County Commissioners of Penobscot County, after notice to the City of Bangor and hearing, to determine such respective proportion as by said act provided. And after notice to the City of Bangor and hearing thereon on the twenty-sixth day of December, 1902, the said County Commissioners of Penobscot County did, by their report thereof made and recorded on the twenty-seventh day of December, A. D. 1902, determine that after deducting from the aforesaid award of Sixty-two Thousand Three Hundred and Forty-eight dollars ($62,348) aforesaid the sum of Twelve Thousand Dollars ($12,000) so to be paid by the County of Penobscot, the City of Bangor should pay as its proportion of the remainder of said award the sum of Forty Thousand Two Hundred and Seventy-eight Dollars and forty cents ($40,278.40) being four-fifths of such remainder, and the City of Brewer should pay as its proportion one-fifth of such remainder so ascertained, to wit, Ten Thousand and Sixty-nine Dollars and sixty cents ($10.069.60) and said commissioners did then, and as a part of the same record, determine that from and after the payment to said Bangor Bridge Company of the above

named sums by said cities of Bangor and Brewer, and Twelve Thousand Dollars ($12,000) by the said County of Penobscot, that said bridge, its approaches, and all expenses incident to the proper maintenance thereof, should be maintained by the cities of Bangor and Brewer in the proportions above named, to wit, Bangor four-fifths and Brewer one-fifth.

SEVENTH. That on said twenty-seventh day of December, 1902, it became the duty of the cities of Bangor and Brewer to pay the aforesaid amounts to the Bangor Bridge Company, and to assume the maintenance of said bridge as a highway upon the payment of the sum of Twelve Thousand Dollars ($12,000) therefor by the County of Penobscot. But your petitioner avers that greatly to the prejudice of the State, and in violation of their public duties so to be performed by them, said cities have hitherto wholly neglected and refused so to perform the duties imposed upon them by the legislature of Maine.

EIGHTH. That on the fourth day of May, A. D. 1903, demand in writing was made upon the City of Bangor and upon the City of Brewer to forthwith pay to the Bangor Bridge Company the amounts so respectively determined as aforesaid under said act, and both said cities have neglected and refused hitherto so to pay the same.

NINTH. That the public safety requires that said bridge be forthwith made safe and convenient for public travel, and that the necessary repairs, renewals and strengthening thereof cannot be made until said cities shall perform their duty aforesaid.

TENTH. Wherefore your petitioner respectfully represents that it is now and ever since the twenty-seventh day of December, 1902, has been the duty of the City of Bangor and of the City of Brewer to pay to the Bangor Bridge Company the amounts as determined as aforesaid under said special act to be respectively paid by said cities, and to assume the maintenance of said bridge in the proportions aforesaid upon the further payment to said Bridge Company of the aforesaid sum of Twelve Thousand Dollars ($12,000) by the County Commissioners of Penobscot County, to the end that such bridge and its approaches should be a highway to be thereafterwards maintained

by said cities of Bangor and Brewer in the proportions determined as aforesaid by said County Commissioners.

ELEVENTH. The State of Maine has no legal or other adequate remedy in the premises.

Wherefore, the said Attorney General prays that a writ of mandamus may be issued from the Supreme Judicial Court against the said City of Bangor, and the said City of Brewer, commanding them to forthwith pay to the Bangor Bridge Company the sum of Fifty Thousand Three Hundred and Forty-eight Dollars ($50,348) in the following proportions: The City of Bangor Forty Thousand Two Hundred and seventy-eight dollars and forty cents ($40,278.40) and the city of Brewer Ten Thousand and Sixty-nine Dollars and sixty cents ($10,069.60) and to assume the maintenance of the bridge and approaches of the Bangor Bridge Company, upon the payment to said Bangor Bridge Company of the sum of Twelve Thousand Dollars ($12,000) by the County of Penobscot, and to thereafterwards maintain the same in the following proportions: The City of Bangor four-fifths, and the City of Brewer one-fifth, and that a rule of Court be issued commanding said City of Bangor and the said city of Brewer to appear before a justice of said Supreme Judicial Court and show cause, if any they have, why the prayer of this petitioner should not be granted.

GEO. M. SEIDERS,
Attorney General for
State of Maine.

The verification was by the relator's oath, "that the foregoing petition by him signed is true in substance and in fact."

H. M. Heath, C. L. Andrews and F. L. Dutton, for the relator.

Enoch Foster, T. D. Bailey, City Solicitor, for respondent City of Bangor.

This action, although in the name of the Attorney General, is for the benefit of the Bridge Company. The Bridge Company has an adequate remedy by action of debt. It cannot use the Attorney General as a figure-head to enforce its private remedies. Spelling on Ex Rel: § 1626.

Although municipal corporations, as public agents, are exempt from suit, except when authorized by statute, yet in this case, if the act of the legislature was valid at all, it expressly authorized the city of Bangor to contract, in reference to this particular subject matter. Assuming the validity of the act, an action would lie against the city for the non-performance of its undertaking, by virtue of the doctrine of authorized contracts, aside from the action on the award.

There is no necessity for the extraordinary remedy of mandamus against municipal corporations in the New England States because a judgment can be enforced and collected without. That is, the property even of private individuals within the city may be seized and sold on execution, to satisfy a judgment legally obtained. These two remedies at law, therefore, not only exist, but are complete.

The writ cannot issue, because the mandate must follow the prayer. The prayer of the petition is to compel the City of Bangor to "forthwith pay to the Bangor Bridge Company, etc." There is neither allegation nor proof that there is any money in the City Treasury, other than that needed for necessary running expenses. And further the case made out by this respondent shows that funds for such payment do not exist.

The prayer should be to compel the city to levy a tax. A municipal corporation is not personal. The mandate must be against the proper officers of the city.

Where mandamus is asked, the specific legal right sought to be enforced must be clear and unextinguishable, not doubtful or requiring litigation to settle it. In this case the supposed right is not clear.

In support of the claim made by the respondent, City of Bangor, that the title to the bridge became vested in the public, at the expiration of the charter in 1896, counsel cited *Police Jury et al.* v. *Thibodoux Bridge Co.*, 44 La. 141; *State* v. *Lawrence Bridge Co.*, 22 Kan. 438; *Com.* v. *Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Central Bridge Corp.* v. *Lowell*, 15 Gray. 110, 114; Elliott on Roads and Bridges, pp. 33, 36.

The defendants agreed to build the bridge, for the convenience of the public, in consideration of the franchise to collect tolls, for a

designated number of years. At the termination of the franchise, they were bound to deliver the bridge to the public, "disburdened of tolls." *Craig* v. *People*, 47 Ill. 487; *State* v. *Lake*, 8 Nev. 276; *Thompson* v. *Matthews*, 2 Ed. Ch. 212.

A judgment may be attacked collaterally in mandamus proceedings for collusion or fraud, when the petition goes behind the judgment sought to be enforced. *Lawrence Mfg. Co.* v. *Janesville Cotton Mills*, 138 U. S. 562; *Ward* v. *Joslin*, 186 U. S. 152; *Wilder* v. *Rio Grande County Commissioners*, 41 Fed. Rep. 512; *Canal Bank* v. *Partee*, 99 U. S. 325; *Howard* v. *City of Huron*, 5 S. Dakota, 539, 26 L. R. A. 493; *Brownsville* v. *Loague*, 129 U. S. 493; *Gayle* v. *Owen*, 83 Ky. 61; Spelling on Ex Rel. § 1470.

Under the doctrine of these cases, the constitutionality of the acts upon which this judgment or award is based, may be attacked.

The acts of 1895 and 1901, both of which are set out and referred to in the petition, are special legislation inhibited by Art. IV, § 14, par. 3 of the State Constitution. By these acts the time for taking toll was continued indefinitely. This is equivalent to granting a new charter to the Bridge Company.

It will not be contended that this extension was for municipal purposes, or that it was a case where "the objects of the corporation cannot otherwise be attained."

Counsel contended that the act of 1901 amending the act of 1895 is null and void, in contravention of the Constitution of the State. *State* v. *Lawrence Bridge Co.*, 22 Kan. 438.

Upon the expiration of the franchise the easement was still in the public, disburdened of tolls, but otherwise unaffected. *Murray* v. *County Commissioners*, 12 Met. 458; *State* v. *Maine*, 27 Conn. 641, 71 Am. Dec. 89.

Counsel contended that the appraisal made by the committee was illegal, since the whole middle part of the bridge, 219 feet in length had been carried away by a freshet subsequent to a vote in favor of taking the bridge, so that when the appraisal was made, only two ends of the bridge were in existence. It has been held in this State, that when the owner of land with buildings thereon agrees to convey it at a future day, on payment of the purchase money by the pur-

chaser and before payment and conveyance, the buildings are destroyed by fire, without fault of either party, the loss must fall upon the vendor; and if the building formed a material part of the value of the premises, the vendee cannot be compelled to pay the purchase money and take a deed of the land alone. *Gould* v. *Murch*, 70 Maine, 288, 35 Am. Rep. 325; *Thompson* v. *Gould*, 20 Pick. 134; *Wells* v. *Calnan*, 107 Mass. 514, 7 Am. Rep. 65.

Counsel urged that the interest of one of the commissioners as a citizen and tax payer of Brewer disqualified him, and that the acts of the board were illegal and void in apportioning the value of the bridge between the two cities; and called attention to the protest entered by Bangor at the hearing before the commissioners.

The act of 1895 vested a discretion in the two cities to take the bridge or not at their option. "Where the statute law vests in a corporation, or in its governing body or officers, a discretion in relation to a particular matter, that discretion will not be controlled by mandamus, whether it has been exercised wisely or unwisely." Thompson on Corporations, § 7829.

Counsel further contended that the statutes of 1895 and 1901 are unconstitutional; first, because they authorize the majority of the voters of a town to vote away the money of the minority against their will, for something which they already own; and, second, these acts impose a perpetual tax on the people, entirely inadequate to the consideration received.

"The Constitution gives no authority to raise money to give away." *Perkins* v. *Milford*, 59 Maine, 318.

F. A. Floyd, City Solicitor, for respondent City of Brewer, submitted without argument.

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

STROUT, J. This is a petition for mandamus. For more than fifty years prior to 1901, the Bangor Bridge Company, under charter from the Legislature, had maintained a toll-bridge over the Penobscot River, between the cities of Bangor and Brewer. By chapter

208 of the Private and Special Laws of 1895, as amended by chapter 360 of the Special Laws of 1901, the two cities, with the assistance of the County of Penobscot, as therein provided, were authorized to "take and purchase the bridge, property and appurtenances" of the Bridge Company at a price to be agreed upon, or if not agreed upon, at the appraisal of a committee of three, to be appointed by the Chief Justice, and to be thereafter maintained by the two cities as a highway. The award of such committee to be conclusive of the value. The proportion of the value to be paid, and the expense of maintenance to be borne by Bangor and Brewer, if not agreed upon, to be determined by the County Commissioners of Penobscot County; March 10, 1902, both cities voted to buy the bridge and make it free. Bangor and Brewer did not agree with the Bridge Company upon the price, and thereupon both cities applied to the Chief Justice for the appointment of a committee, to determine the value of the bridge, property and appurtenances of the Bridge Company. On this petition a committee was appointed, who appraised the value of the Bridge Company's property, at the sum of $62,348.00. The report and appraisal of this committee was accepted and confirmed by the Chief Justice, by consent of the Bridge Co. and Bangor and Brewer on the twenty-first day of November, 1902. All these proceedings appear to be in conformity with the statute.

Bangor and Brewer having failed to agree upon the proportion to be paid by each for the property, or the proportion to be borne by each in its future maintenance, the City of Brewer by petition to the County Commissioners requested them to determine their respective proportions in accordance with section 4, chapter 360 of the Special Laws of 1901. On this petition the County Commissioners determined that Bangor should pay for the purchase four-fifths of $50,348, that being the amount of the value determined by the committee previously appointed, less $12,000 which the statute required the County of Penobscot to pay, and the City of Brewer should pay the remaining one-fifth, and that the expense of the future maintenance of the bridge should be borne by the two cities, in the same proportion. All these proceedings appear to be in due form.

Upon this petition for mandamus to compel Bangor and Brewer to

pay the Bridge Company the amounts thus awarded, and to assume the future maintenance of the bridge and its approaches, in the proportions thus determined by the commissioners, Brewer, by its answer, admits its willingness to perform, but Bangor objects upon several grounds.

It is claimed that the act of 1895 as amended by the act of 1901, "delegated public rights and prerogatives to private individuals and corporations" without consideration, and thereby improperly imposed burdens upon the public.

This contention is without merit. To change a toll-bridge to a free public highway is certainly a matter of public interest, broader than the local advantage to Bangor and Brewer. No prerogative was illegally delegated. The act authorized Bangor and Brewer to purchase the bridge, to make it public and free, or if a purchase was not made, to take it by right of eminent domain and thereafter maintain it for the public use. It was competent for the Legislature to do this, as under the law, if the bridge became a highway, Bangor and Brewer would be bound to maintain it, and there was no impropriety in allowing these cities to declare their desire as a condition precedent to the taking or purchase of the bridge.

It is also claimed that at the expiration of the time limited in the charter of the Bridge Company for the taking of tolls, the bridge became public property as a highway, and that the Legislature could not extend the period for taking tolls, as the acts of 1895 and 1901 provided,—that such extension was equivalent to the granting a new charter, which is prohibited by the constitutional amendment of 1875, since when such corporations can only be created under the general law. This constitutional provision has been held not to apply to charters previously granted, though amended subsequently, nor is such extension equivalent to a new charter. *Farnsworth* v. *Lime Rock Railroad Co.*, 83 Maine, 440; *Foster* v. *Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135; *Vose* v. *Handy*, 2 Maine, 329. This Bridge Company was chartered in 1828, and granted the right to take tolls for fifty years. In 1846 it was granted the right to rebuild its bridge, and its right to take tolls extended to fifty years from the time the bridge should be reopened for passengers. Nothing in either act

provided for forfeiture of the bridge to the public, after the right to take tolls had expired. But if such would have been the result, if no action of the Legislature had occurred, it was certainly competent for the State to waive the forfeiture, that being the only power authorized to claim it. That body, by the act of 1895, extended the time for taking tolls by the Bridge Company. Such extension was within its legitimate authority. *Lincoln & Kennebec Bank* v. *Richardson*, 1 Maine, 80.

It is admitted that the Bridge Company had title by deed to the land approaches to the bridge at both ends, from the bridge to the highways. It admits of great doubt whether such title to real estate could in any event be regarded as forfeited to the public, when the right for taking toll had expired, there being no provision in the charter to that effect.

It is also claimed that the voters in Bangor, at the meeting in March, 1902, when it was determined to "buy and make free the toll bridge," acted under a misapprehension of the facts and of the value of the bridge. But after the vote the cities of Bangor and Brewer, by their petition to the Chief Justice as provided by the act of 1895 as amended by the act of 1901, asked the appointment of a committee to find the value of the bridge, property and appurtenances as provided by the acts. On this petition a committee was appointed, an appraisal made and returned to the Chief Justice and was duly accepted and confirmed by him on November 21, 1902, the Bridge Company and the cities of Bangor and Brewer "consenting thereto." It is now too late for Bangor to raise this objection, in the absence of a fraudulent valuation, which is not claimed.

When Bangor and Brewer had each, at a legal meeting of their voters, consented to take or purchase the bridge, to make it free, as provided in the acts of 1895 and 1901, and the value of the bridge property had been determined, the rights of all parties became vested and the statutes then became imperative upon both cities to pay the price awarded by the committee, and to take the bridge under eminent domain as authorized by section 1, of the statute of 1901. The Bridge Company had no option, and neither Bangor nor Brewer, could by any action at any meeting called subsequently to that in

which the vote had been had, rescind their former vote, or escape the duty imposed by the act of 1901. *Furbish* v. *Co. Com.*, 93 Maine, 129. Nor can they complain that the assessment of value by the committee was erroneous or excessive, since that assessment has been confirmed by the Chief Justice, with their consent.

It appears that on March 22, 1902, one span of the bridge was carried away by a freshet. The petition for appraisal of value was filed on April 14, 1902, and the appraisal was of its value, with that span out. It was in evidence that during the spring, summer and fall of 1902, the Bridge Company replaced this span with one of steel at a cost of about $26,000, and that that span was not included in the appraisal. It is also in evidence and uncontradicted, that at the time of the appraisal, the cities of Bangor and Brewer agreed that the appraisal should be had as the bridge was at the date of the petition, with the span out, and if Bangor and Brewer were finally compelled to pay the award of the committee they should pay the Bridge Company, in addition, the cost of the steel span, and this agreement was then stated by counsel of both cities to the committee. These facts afford a complete answer to the argument that a bridge was to be appraised, and in fact the appraisal was of a part of a bridge only.

A more difficult question is presented. The act of 1895 and that of 1901, both provided that the county commissioners of Penobscot County should determine the proportional amount to be paid by Bangor and Brewer for the bridge property and for its future maintenance. This has been done by the commissioners, but it is strenuously urged that it is not binding, because one of the commissioners was a citizen and tax payer in Brewer, and thereby was interested and incompetent to act. This objection was made by Bangor at the hearing.

The theory of the common law is that any person having a direct pecuniary interest in the result of any controversy, ought not to testify, nor adjudicate in such case, from the fear that his interest may influence his testimony or judgment. He was required therefore to be indifferent as to both parties to the litigation, having no pecuniary interest either way. But there are exceptions to that rule,

sometimes from the necessities of the case, and more generally, as said in *Fletcher* v. *Somerset Railroad Company*, 74 Maine, 436, where the interest either way is "too remote, uncertain, contingent, speculative, theoretic and unsubstantial to be legally estimated."

But it is competent for the legislature to remove the disqualification for interest, as has been done in this State, in case of parties to suits, and other interested witnesses, and jurors, where the town or county in which they pay taxes may be benefited by the recovery. R. S. (1883), c. 82, § 87, and a Justice of this court where his county is interested, R. S. (1883), c. 77, § 1; *Commonwealth* v. *Brown*, 147 Mass. 585, 591, 9 Am. St. Rep. 736, 1 L. R. A. 620. It may do this by express language, or its intention to do so may be inferred. So it may be inferred from the necessities of the case. As was said in *Com.* v. *Ryan*, 5 Mass. 90, that while great care should be taken to provide judges and jurors as free from interest as possible, "it is sometimes not possible perfectly to adhere to it. Every fine to the use of the Commonwealth may affect the interest of every citizen, as it may lessen the public taxes; but if citizens cannot be judges and jurors, no offenses can be punished by fine. Where penalties are given to counties, the inhabitants may have an interest somewhat greater; and where penalties accrue to towns, the interest of the inhabitants may be a little more affected. This is all true in theory, but in practice it cannot be believed to have any affect. As some degree of interest in all cases of public prosecution for fines will necessarily be attached to jurors, it is for the legislature to decide when this theoretic interest shall be no good objection to a juror."

The legislative intention that a slight financial interest shall not disqualify a juror is readily inferred, where otherwise there would be a failure of justice. *Com.* v. *Ryan*, 5 Mass. 90; *Com.* v. *Worcester*, 3 Pick. 462; *Com.* v. *Burding*, 12 Cush. 506. In the latter case it was held that a Justice of the Police Court of Salem could try the case, although he was a tax payer in Salem and the fine went to that town.

If the State condemns land for a public use, the damages must be assessed by a jury of citizens of Maine, unless the parties agree upon

a committee, or none can be assessed and the condemnation would fail for non-payment of damages.

Jurors constantly sit in the trial of criminal causes which result in a fine paid to the state, and on appeals by land owners from the damages awarded by county commissioners on the location of a highway, where the damages are to be paid by the county in which the jurors are tax payers; but we are not aware that an objection on account of interest has ever been seriously entertained in such cases, though the statutes applicable are silent as to the question of interest, the inference being plain that from the necessities of the case the minute interest of the jurors in such cases is not a disqualification.

Our statutes contain many cases in which this same implication arises. In certain cases the county commissioners are authorized to appoint assessors of state and county taxes. R. S. (1883), c. 6, § 108. So in case of damages for public parks by appeal to county commissioners, R. S. (1883), c. 3, § 57—the establishment of ferries, R. S. (1883), c. 20, § 2—purchase of lot for school house by municipal officers, in certain cases, R. S. (1883), c. 11, §§ 56, 57, 58. In case of repairs to a way ordered by the commissioners, they may appoint an agent, in certain cases, to make them, audit the expense, and the town becomes liable therefor. R. S. (1883), c. 18, §§ 53, 54, 55; town ways laid out by municipal officers, damages awarded by them, R. S. (1883), c. 18, §§ 14, 16; assessors of taxes in towns. In all these cases, and others that could be cited, the legislature evidently intended that the officers charged with the duty should act, notwithstanding their minute pecuniary interest.

In many of the instances the officers charged with the duty are necessarily interested as tax payers.

In this case, when the act of 1895 was passed, the Honorable John A. Peters was Chief Justice, and remained so for nearly five years thereafter. He was a citizen of Bangor and a large tax payer in that city. Yet the legislature provided that the Chief Justice should appoint a committee to appraise the value of the bridge property, who were to act under his instructions. The authority to appoint the committee was limited to the Chief Justice, no other person could make the appointment. If the cities had acted within four and a

half years after the passage of the act, as they might have done, and were expected to do, the authority and duty of appointing the committee would have rested with him. Can it be doubted that the legislature intended to confer authority and impose a duty upon him as the Chief Justice, notwithstanding any interest he might have in the result as a tax payer in Bangor? It must have been expected that this duty would be discharged by him. If he could not act, all proceedings under the statute would fail, a result the legislature certainly did not intend. This consideration forces the conclusion that the legislature intended that his remote interest should not disqualify him.

So in both the act of 1895 and that of 1901, it was provided that the county commissioners of Penobscot county should determine the proportion to be paid by Bangor and Brewer, an authority and duty not more important than the appointment of a committee of appraisal, and instructions to it. The legislature understood the probability that one or more of the commissioners were likely to be citizens or tax payers in one of the cities. Yet it said nothing in the act about disinterestedness. It provided no other tribunal to make the apportionment. If for any reason the commissioners could not act, the purpose of the statute and of the two cities to obtain a free bridge must fail. The legislature reposed confidence in the character of the men who then were or should be commissioners, and imposed an important public duty upon them. All of them might be tax payers in one or both of the cities. No provision for disqualification on that account was contained in the act. No reason is perceived why a different rule should apply to the commissioners than that applied to the Chief Justice.

As in the case of the Chief Justice, the inference is overwhelming that the legislature intended to ignore the trifling and contingent interest of a tax payer in either city, too small "to be legally estimated," and that it should not disqualify. As evidence of such intention great stress is laid on the fact that otherwise no result could be attained in *Com.* v. *Ryan*, supra, and *Com.* v. *Burding*, 12 Cush. 506.

The difficulty is not met by the suggestion that the commissioner

residing in Brewer need not have acted, allowing the other members of the board to perform the duty. The statute conferred the power on the county commissioners as persons, not on the board of commissioners as a board. *Machias River Co.* v. *Pope*, 35 Maine, 19. It contemplated having the judgment of the three. They were not to act officially. Besides two or even all might have been tax payers in the city. *State* v. *Intoxicating Liquors*, 54 Maine, 568; *Com.* v. *Emery*, 11 Cush. 411.

It is further insisted that mandamus is not the proper form of remedy. It is true that it will not lie, unless the right is clear, and there is no adequate remedy by suit at law. It may be that after the appraisal by the committee and its acceptance and confirmation, the Bridge Company could maintain action against Bangor and Brewer to obtain payment of the award, but non constat that the Bridge Company desires to part with its property. It may prefer to retain it as a toll bridge, in which case no action would be brought. The corporation cannot be compelled to bring suit, and no execution or other process for collection of the award can issue from the court. The object of the statute was to obtain a free bridge for public use with the consent of Bangor and Brewer. That consent having been obtained, the public are interested that the end sought shall be reached. It should not be suffered to fail by the inaction of the Bridge Company or of the cities of Bangor and Brewer. The duty of the cities to pay, and of the Bridge Company, upon payment, to surrender the bridge, are duties in the performance of which the public have an interest. That interest is and can only be represented by the Attorney General, acting for the State. Mandamus is the appropriate and only process by which the State can compel the performance of the duties owed to the public by Bangor and Brewer, and secure a free bridge for the use of the public. *Sanger* v. *Co. Com.*, 25 Maine, 291; *Weeks* v. *Smith*, 81 Maine, 538; *Knight* v. *Thomas*, 93 Maine, 500; *Mitchell* v. *Boardman*, 79 Maine, 471.

The determinination of the county commissioners of the proportion to be paid by Bangor and Brewer for the bridge property, and for its subsequent maintenance, is final and conclusive, and cannot be attacked, except for fraud or mistake of material facts, neither of

which is proved nor claimed. It cannot be attacked upon the ground of erroneous judgment. It may be said, however, that according to the population and valuation of the two cities, Bangor does not appear to have any cause for complaint of the proportion assigned to it.

The prayer of the petition is that Bangor and Brewer may be commanded forthwith to pay to the Bridge Company the several amounts awarded against them by the committee, and upon the payment of $12,000 by the county to assume the maintenance of the bridge thereafter in the proportions determined by the county commissioners. This is the proper prayer. The cities can make payment from funds in their treasuries, or borrow the money, or assess a tax for the amount, at the option of each. It is not for this court to direct the method. That is left to the determination of each city.

The parties agreed at the argument that the pleadings should be regarded as the alternative writ and return.

Peremptory writ of mandamus to issue as prayed for.

JOSHUA DAVIS, Admr., *vs.* HANNAH J. DAVIS.

Somerset. Opinion November 19, 1903.

Limitations. Removal of bar by payment. *Acknowledgment. New Promise,* to be express. *Evidence.* Written admission not conclusive. *R. S. (1883), c. 81, § 97.*

1. In order to avoid the statute of limitations the written acknowledgment of, or promise to pay, the debt required by R. S. (1883), c. 81, § 97 must have been intentionally made for that purpose.
2. A written statement by the payor of the amount that has been paid upon a promissory note and of the consequent balance, and made for another purpose, is not an express acknowledgment that any balance is due nor an express promise to pay it, as required by the statute.
3. A written admission as to a question of fact made out of court, when it does not operate as an estoppel, is only evidence upon such question however positively and explicitly made. The fact may nevertheless have been otherwise, and a jury be justified in so finding.

Exceptions by defendant. Sustained.

Assumpsit on a promissory note to which defendant pleaded the statute of limitations. At the close of the testimony the presiding justice directed the jury to return a verdict for the amount due on the note after deducting the indorsements thereon. The defendant after the verdict was allowed exceptions to this direction to the jury.

The facts appear in the opinion.

E. N. Merrill, for plaintiff.

G. C. Sheldon and M. F. Sawtelle, for defendant.

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

EMERY, J. This was an action upon an unwitnessed promissory note to which the statute of limitations was duly pleaded in bar. The note matured more than six years before the date of the writ and hence was prima facie barred and the defendant was entitled to

verdict and judgment, unless the plaintiff showed that the statutory bar had been removed. He claimed it had been removed in two ways only; (1) by a written acknowledgment of the debt, or promise to pay it, within six years, and (2) by a partial payment within six years.

I. Independent of any requirement of the statute regarding the new acknowledgment or promise, such acknowledgment or promise to be effective must have been intentional; "must have been deliberately made and not inadvertently, and it will not affect the bar of the statute where the accompanying facts and circumstances are such as to repel the inference, or leave in doubt the question whether the party intended thereby to prolong the period of legal limitation or to remove the bar already attached." We think the above quotation from 19 Am. & Eng. Ency. of Law, 294, states the law accurately and is supported by the cases cited. Thus it was said by the U. S. Supreme Court in *Fort Scott* v. *Hickman*, 112 U. S. 150-164: "Statutes of limitation are statutes of repose and not merely statutes of presumption of payment. Therefore, to deprive a debtor of the benefit of such a statute by an acknowledgment of indebtedness, there must be an acknowledgment to the creditor as to the particular claim, and it must be shown to have been intentional." Before our statute requiring the acknowledgment or promise to be in writing it was declared in *Porter* v. *Hill*, 4 Maine, 41, that the promise must be absolute, and that the acknowledgment must be unambiguous. In *Oakes* v. *Mitchell*, 15 Maine, 360, the words "an arrangement will soon be made to pay the note. I calculate to pay it, and I always calculated to pay it," were held not to necessarily constitute a new promise or acknowledgment as matter of law.

Our statute, R. S. (1883), c. 81, § 97, seems to go even further, as it requires the acknowledgment or promise to be "express." It rules out "implied" or "inferable" acknowledgments or promises. Cent. Dict. *Johnson* v. *Hussey*, 89 Maine, 488, S. C. 92 Maine, 92. Since the statute, the acknowledgment or promise must not only be absolute, unambiguous and deliberately and intentionally made, but it must be in writing and "express."

In this case the payee of the note had deceased intestate, leaving as heirs two brothers and the minor children of a deceased brother, Moody Davis. The defendant was the mother and guardian of these minor heirs. Under these circumstances a writing was prepared by the administrator to be signed by the heirs, and after being signed by the two brothers as heirs it was presented to the defendant for signature, and she signed it. The paper is as follows: "To Joshua Davis, Administrator of the goods and estate of Gilman Davis, late of Harmony in the County of Somerset and State of Maine, deceased:

"We, the undersigned, brothers and sister of the late Gilman Davis, understanding that it was his wish and declaration that in the settlement of his estate the note which he held against his sister-in-law Hannah J. Davis, for the sum of $450. upon which $185. had been paid, should be given up to her upon the payment by her of the balance, $265. due thereon, without interest.

"We hereby request and authorize you as such administrator to accept such sum in full discharge of said note, and this letter to you shall be our receipt and authority for so settling the same.

Gardner S. Davis,
Edward Davis,
Mrs. H. J. Davis, Guardian of minor heirs of Moody Davis."

This writing alone does not remove the statutory bar. It does not appear to have been prepared or signed for that purpose. It does not contain any words of express acknowledgment or promise. While it contains a statement that $185. have been paid on the note there is no express statement that any balance was due or would be paid. It was simply an authority given by the heirs to the administrator to accept a specified amount in full.

Again, the defendant did not sign it as payor of the note, to bind herself personally, but only in her official capacity as guardian of her children and to bind them. It was held in *Gardiner* v. *Nutting*, 5 Maine, 140, 17 Am. Dec. 211, (before the statute requiring the acknowledgment to be in writing) that where the guarantor of a note was appointed a commissioner on claims against the estate of the deceased maker, his allowance of such note as a valid claim against

the estate was not an acknowledgment that it was valid against him. It was held in *Roscoe* v. *Hale*, 7 Gray, 274, that the insertion of a debt in the schedule of creditors, signed, sworn to and filed by the debtor in insolvency proceedings, was not such an acknowledgment of the debt as would remove the statutory bar. The court said: "It is not enough to prove an admission of indebtment if it is accompanied by circumstances which repel the inference or even leave it in doubt whether the party intended to revive the cause of action."

II. Whether a partial payment had been made on the note by the defendant within six years was a much disputed question of fact. The defendant in her testimony stoutly denied ever having made, authorized or ratified any such payment. The plaintiff, however, urges that the above writing was an express and conclusive admission of such payment since it was conceded that the payment there specified, if made at all, was made within the six years. Conceding that the writing was an express written admission of payment it was still only an admission, only evidence of payment. Notwithstanding the admission, the fact might have been otherwise and according to her testimony. No mere admissions in pais, however express or formal, are conclusive unless they operate as an estoppel, which is not the case here. Despite the admission, if any, contained in the writing it was still a question for the jury whether any payment had actually been made.

The presiding justice instructed the jury that the evidence introduced by the defendant constituted no defense to the action, and that a verdict should be returned for the plaintiff. This was clearly error, for if that evidence was true, (as it might be, not being intrinsically improbable,) the defendant as above shown was entitled to a verdict.

Exceptions sustained.

CHARLES GENDRON *vs.* FRANK W. HOVEY.

York. Opinion November 24, 1903.

Judgment. Neither Party, and no further action for same cause. Defendant surrenders nothing. *Practice.*

The entry of "neither party, no further action for same cause" extinguishes the plaintiff's cause of action. But the defendant thereby surrenders no right of action for any cause, whether it grew out of the original action or otherwise.

Agreed statement. Action to stand for trial.

The case appears in the opinion.

E. J. Cram, for plaintiff.

A. Dwyer, for defendant.

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

SAVAGE, J. The defendant sued the plaintiff, and caused him to be arrested upon the writ. The suit was entered in court at the return term by title only, the defendant (plaintiff in that suit) claiming that the writ was lost. At a subsequent term of court, the suit, by agreement of counsel was entered "Neither party, no further action, same cause." Afterward the plaintiff brought this action for an abuse of legal process, in the former proceedings. It now comes to this court upon an agreed statement, in which the sole question to be determined is whether the entry upon the docket in the former case of "neither party, no further action, same cause," in itself, precludes the plaintiff from maintaining this action. We think not.

The entry of "neither party, no further action, same cause" means that by agreement neither party further appears in court in that suit, and it also involves a stipulation that the plaintiff shall maintain no further action for the same cause. The plaintiff's cause of action is

extinguished. The suit is ended, and ended as favorably to the defendant as it would be by judgment in his favor, except that he consents to go out of court without costs. But by agreeing to the entry, the defendant surrenders no cause of action against the plaintiff. He does not agree that no action shall be maintained on his part, for any cause he may have, whether it grew out of the original action, or otherwise.

Action to stand for trial.

INHABITANTS OF THOMASTON *vs.* INHABITANTS OF GREENBUSH.

Knox. Opinion November 24, 1903.

Pauper. Notice, insufficient. *R. S. (1883), c. 24, § 37.*

A pauper notice, by the overseers of one town to those of another, in which the only description of the persons relieved and alleged to be paupers, is, "the children of Alden B. Partridge" is too indefinite to fairly meet the requirements of the statute and is invalid.

Agreed statement. Judgment for defendant.

Action for pauper supplies.

Plea general issue, with brief statement that the notices were insufficient, said notices not stating the number; nor whether they were all or part of the children of Alden B. Partridge; neither did the notices state the age, sex or condition; nor whether the children were living with their parents or apart from them,—the only designation being children. Amount of supplies alleged to have been furnished from December 11, 1901, to January 30, 1903, $170.80. Admitted that the supplies were properly furnished as declared in the writ; admitted that the following notice was sent by Thomaston to Greenbush January 10, 1902, and received by Greenbush Jauuary 11, 1902—

Notice to Overseers of Poor to Remove Pauper.

To the Overseers of the Poor of the Town of Greenbush,
In the County of Penobscot and State of Maine.

Gentlemen:—You are hereby notified that the children of Alden B. Partridge, destitute persons found in our town of Thomaston and having no settlement therein, and being in need of immediate relief, the same has been furnished by our said town, on the account of and at the proper charge of your town of Greenbush where the said children has their settlement; and you are requested to forthwith remove the said children, and to defray the expense of their support in our said town now amounting to . . . .

Dated at Thomaston this tenth day of January A. D. 1902.

S. J. Starrett, Ch { Overseers of the Poor of Thomaston.

Also that a notice in same form was dated and sent by Thomaston to Greenbush April 21, 1902, and received by Greenbush April 22, 1902; and that Greenbush made no reply or denial to either notice;

Alden B. Partridge had deserted his family and they lived in Thomaston;

The children supplied and referred to in the notices were all of the children of said Alden B. Partridge, were minors and were living with their mother in Thomaston when the supplies were furnished and notices given;—and the defendant has no knowledge to the contrary.

J. E. Moore, for plaintiff.

M. A. Johnson, for defendant.

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

SAVAGE, J. Action to recover for pauper supplies. The only question in controversy between the parties is whether the notice which described the persons relieved as "the children of Alden B. Partridge," and in no other way, is sufficiently definite. It is

admitted that the children supplied and referred to in the notice were all of the children of Alden B. Partridge, were minors, and were living with their mother in Thomaston when the supplies were furnished and the notices given.

The statute provides that overseers, "shall send a written notice, signed by one or more of them, stating the facts respecting a person chargeable in their town, to the overseers of the town where his settlement is alleged to be, requesting them to remove him, which they may do." R. S. (1883), c. 24, § 37. The statute does not in any place prescribe what facts are required to be stated, but were the statute now to be construed for the first time, it would certainly seem that among the facts to be stated are those which shall serve to identify the persons relieved, in order that the overseers to whom the notice is given may comply with the request, come to the town, take the persons relieved—all of them and no more—and remove them. And the notice itself should be sufficiently definite to enable this to be done, without outside investigation. Not that the overseers may not be obliged to ascertain by inquiry who are the individuals described in the notice, but the description must sufficiently describe the individuals, so that their identity may be thus ascertained. *Holden* v. *Glenburn*, 63 Maine, 580.

The statute relating to pauper notices has been several times construed by this court. In *Bangor* v. *Deer Isle*, 1 Maine, 329, it was held that a notice stating that "S., his wife, and several of their children" had become chargeable, was not good as to the children. In that case the court seemed to rely upon *Embden* v. *Augusta*, 12 Mass. 306, and *Shutesbury* v. *Oxford*, 16 Mass. 102, cases in which the word "family" had been held to be too general and indefinite, and declined to make any distinction between "family" and "children." The court also cited *Ware* v. *Stanhead-Mount-Fichel*, 2 Salk. 488, where it was decided that an order to remove H. with his wife and children was bad; and Comyn's Digest, Justice of the Peace, B. in which it is stated that an order of removal is bad if it does not state the ages of the children. In *Bangor* v. *Deer Isle*, the court declared that the notice should "state the names of the persons chargeable, or otherwise so describe them, that the overseers may certainly know

whom to remove." It should be observed, however, that the notice in that case stated that "several of their children" were chargeable. It did not purport to cover all of the children, nor state how many or which were chargeable. It was thus clearly indefinite.

In *Dover* v. *Paris*, 5 Maine, 430, the notice was of "one John Stetson and family." The evidence showed that a son of John Stetson was the person relieved. The court held the notice bad, upon the authority of *Embden* v. *Augusta* and *Bangor* v. *Deer Isle*.

In *Sanford* v. *Lebanon*, 31 Maine, 124, the notice stated that "the wife and children of Ivory Herson" had become chargeable, and court and counsel seemed to have assumed, without discussion, that the notice was bad as to the children. It appeared, however, that only a part of the children were in the plaintiff town or had become chargeable there.

The next and last case in this State is *Woodstock* v. *Bethel*, 66 Maine, 569. The notice was that "Mrs. Arabella Estes and her five children" had fallen into distress. The children were not named, nor described as minors. The court after referring to the earlier cases in Maine and Massachusetts said, "These cases have been modified by subsequent decisions," and held the notice good. So in *Orange* v. *Sudbury*, 10 Pick. 22, the notice was that "A. E., and wife and three children" were chargeable; in *Lynn* v. *Newburyport*, 5 Allen, 545, it was "Mrs. A. B. and three children" had applied for relief; and in *Burlington* v. *Essex*, 19 Vt. 91, the order of removal was of a pauper, his wife, "and four children." These cases are all cited in *Woodstock* v. *Bethel*, supra, and in each of them the description of the children was held to be sufficiently definite. In each of these cases the number of the children was stated, and stated correctly.

On the other hand, in *Walpole* v. *Hopkinton*, 4 Pick. 358, a notice that "E. S. and her three children" have become chargeable was held bad for uncertainty, she having four children. The court said "it would not be possible for the defendant to know which of them were the subjects of the request" for removal. In *New Boston* v. *Dumbarton*, 12 N. H. 409, the notice was that "Nancy Towne and her four minor children" were paupers. She had other minor children. The court held the notice bad, saying, "The names of the

children should have been given, or otherwise particularly described, so that it might appear which of her minor children had been relieved."

It is to be noted that in every case where the word "children" in a notice, without names or other particular description, has been held sufficient, the number of the children has been correctly given, and in each case, they were all of the children. In such cases, the overseers would know how many persons were chargeable, and how many were to be removed.

But the plaintiff here argues that the expression "the children" in this notice means impliedly *all* the children, (though it did not in fact in *Sanford* v. *Lebanon*, supra,) and that a notice stating that "all the children" are chargeable is equally valid with one which states correctly the number of the children. And it is said that the notice was true, because all of the children of Partridge were the subjects of relief.

We are unable to agree with the contention of the plaintiff. It goes farther than any case has yet gone. There is a wide difference between "all the children," and a certain number of children. One is indefinite, and the other is definite. A notice in the latter case discloses the number of persons who have been relieved, and who are to be removed, and in the former, it does not. How shall overseers seeking to comply with the request of this notice know, from anything in the notice contained, when they have fully complied with it, and have got *all* the children? Or if they choose to defend, how shall they know how many paupers are sought to be charged to their town, and instances of relief to how many paupers, they must be prepared to meet? They are at least entitled to be informed of the number of persons affected, in order that they may investigate the situation of each person by itself, if they choose.

We think this notice is insufficient.

Judgment for the defendant.

SETH F. SWEETSIR *vs.* SOLOMON H. CHANDLER.

Cumberland. Opinion November 24, 1903.

Tax. Supplemental, how and to whom assessed. *Money at interest. Bonds. Stocks. Scrip. Evidence. R. S. (1883), c. 6, §§ 35, 74, par. V., 91, 92, 93.*

By an assessment of taxes dated May 31, 1902, the defendant was assessed for specific bank stock and "money at interest" and nothing else. The defendant had returned no list to the assessors, and the assessment of "money at interest" was a "doom" so-called, and, in the judgment of the assessors, represented the amount for which the defendant was liable to be taxed on that account. They had no knowledge of any particular items of money at interest.

In May, 1902, the defendant was adjudged to be of unsound mind and a guardian was appointed. The guardian returned to the probate court an inventory of the defendant's estate, including bonds, and stocks and scrip, other than bank stock, all of which were unknown to the assessors at the time of the original assessment. Subsequently the assessors, by supplemental assessment, assessed to the defendant the bonds and stock thus returned.

Suit being brought to recover the supplemental tax, *it is held:*—

1. To sustain the validity of a supplemental assessment, it must appear that the items of property assessed were not assessed in the original assessment, and that they were omitted by mistake.
2. In determining what was assessed in the original assessment, the court is controlled by the assessment itself. That cannot be modified or limited by evidence aliunde.
3. A bond, as commercially known, is an interest-bearing obligation to pay money. It represents, and is the evidence of, an indebtedness. In the hands of a purchaser, it represents money at interest.
4. The phrase "money at interest" includes all forms of interest bearing securities, whether represented by bonds, notes or otherwise, unless the contrary appears from the assessment itself.
5. It does not appear from the original assessment in this case that bonds were not included in it. The assessment was clearly intended as a "doom" to cover all money at interest.
6. Assessors cannot cure an error in the amount of an assessment of money at interest, by securing a revaluation thereof through a supplemental assessment, even though their error arose from their ignorance of the specific kinds of securities in which the money at interest was invested.

7. The supplemental assessment of the bonds was invalid, and the tax thereon not recoverable.

8. The stock and scrip assessed in the supplemental assessment were not included in the original assessment, but were clearly omitted by mistake. Such supplemental tax is valid and recoverable.

9. Corporation stock and scrip are not "money at interest." Stock is the stockholder's proportionate right in the corporation itself, his right to have the corporate purposes carried out, his right to profits, if any, and to a proportionate division of the assets upon dissolution. Scrip is the certificate, or evidence, of the right to obtain shares in a corporation.

10. A supplemental assessment may be laid on property omitted by mistake in the original assessment, even though it may result in raising more money than was voted to be raised, at any meeting of the town.

11. A supplemental assessment must be made to the same person as the original assessment was properly made to. It must be made to him who was the owner April 1, and not to a guardian subsequently appointed.

Exceptions by plaintiff and defendant. Overruled.

PLAINTIFF'S EXCEPTIONS.

This was an action of debt brought under sec. 141 of chap. 6, of the Revised Statutes of Maine, for the collection of a supplemental tax assessed by the proper authorities of the town of New Gloucester against the defendant, Solomon H. Chandler, for the municipal year, 1902, as of April 1st of that year, in accordance with sec. 35 of said chap. 6, the writ bearing date of March 23rd, 1903. Plea of general issue.

At the hearing before the presiding justice, without the intervention of a jury, the right of exception being reserved, it was proved and no contention made but that:—

First,—The annual town meeting of the inhabitants of the town of New Gloucester held March 10th, 1902, was a legal town meeting, duly called and notified;

Second,—The town clerk, the tax collector and the three assessors were duly elected to, and legally qualified for, their respective offices;

Third,—The assessors gave due notice to the inhabitants of the said town of New Gloucester to bring in true and perfect lists of their polls and estates, both real and personal, of which they were

possessed on the first day of April, and the defendant, Solomon H. Chandler, failed to bring in any list;

Fourth, — The invoice, valuation and lists of assessments signed by the assessors on the 31st day of May, 1902, as of April 1st, 1902, a record of which is deposited in said assessor's office, and which is termed "the original list and assessment" is correct and in conformity to the statute requirement;

Fifth, — The rate of taxation in and for the town of New Gloucester for the municipal year of 1902 was .01525 on $1.00;

Sixth, — The whole amount of tax raised by vote of the voters of New Gloucester at the annual town meeting March 10th, 1902, and at adjourned meeting March 29th, 1902, was $12,019.00.

Overlay added by assessors	503.72
Amount of State Tax for year 1902	2,808.25
Amount of County " " "	1,120.09
	$16,451.06

which total sum, viz: $16,451.06, was assessed to the tax payers of New Gloucester in the original lists and assessment of May 31, 1902;

Seventh, — The assessors "doomed" the defendant, and the tax assessed to the defendant was duly and legally demanded and paid;

Eighth, — The said assessors on the 27th day of December, 1902, in accordance with said sec. 35 of chap. 6, R. S. assessed a supplemental tax to the said defendant upon certain property which they claimed to have been omitted by mistake from their original invoice and valuation and list of assessments as of April 1st, 1902, and bearing date of May 31st, 1902, and a list of said property particularly specifying the items thereof and the assessment thereon was entered upon the assessors' record before mentioned together with a certificate under their hands certifying that the property thus listed was omitted by mistake from the original invoice, valuation and list of assessments of May 31st, 1902;

Ninth, — The supplemental list, assessment and certificate were correct and in conformity to the statute requirement;

Tenth,—The property aforesaid claimed to have been omitted by mistake from the original invoice, valuation and list of assessments was in the form of negotiable bonds, shares of stock, and scrip for stock, and it was admitted without controversy that the said bonds, shares of stock, and scrip for stock were in the possession of the defendant on the 1st day of April, 1902;

Eleventh,—The assessors committed a perfect list of this supplemental tax together with a certificate correct in form, and according to the statute requirement to Seth F. Sweetsir, collector of taxes in and for said town of New Gloucester, duly elected and legally qualified as aforesaid, and said collector made due and legal demand before this suit was brought for the payment of said supplemental tax and the payment was refused;

Twelfth,—The defendant, Solomon H. Chandler, was declared of unsound mind by Hon. Charles P. Mattocks, Judge of the Probate Court in and for the County of Cumberland, on the 20th day of May, 1902, and John W. True was duly appointed his guardian, accepted the trust and gave bonds for the faithful discharge thereof, and as such guardian, received into his possession the bonds, shares of stock and scrip for stock included in the aforesaid supplemental tax, and which were in the possession of the defendant on the said 1st day of April, 1902.

A copy of the record of the assessors before mentioned so far as it relates to the original tax assessed to the defendant on May 31st, 1902, a copy of the said record, so far as it relates to the supplemental tax assessed to the defendant on December 27th, 1902, a copy of the pocket valuation book, belonging to Charles P. Bennett, so far as it relates to the taxation of the said defendant, and a copy of the declaration in this suit, were made a part of the bill of exceptions.

The testimony of the three assessors given at the hearing was made a part of the bill of exceptions, but is not reported here.

Upon the facts not in controversy stated in the bill of exceptions and the testimony of the three assessors the presiding justice rendered the following judgment, viz: —

"In this case I find on hearing that the town of New Gloucester

assessed taxes on April 1, 1902, to said Chandler upon money at interest the amount doomed by the assessors, Chandler not having brought in any list of his estate, which tax has been paid.

In December following the assessors made a supplemental tax to Chandler upon certain bonds which he owned on the preceding April, and also upon stock in railroad and other companies and scrip for stock, in all amounting to $53,515, the tax thereon being $816.09. Demand was made for payment on January 29th, 1903.

I rule that the doom of money at interest applied to the bonds, and the supplemental tax upon these is invalid, but that the tax on the stocks and scrip is valid, and being valued and assessed separately, can be enforced and are recoverable in this suit. I accordingly decide that judgment be rendered for the plaintiff in the sum of $816.09, and interest thereon from January 29, 1903, the date of the demand."

And to which judgment wherein the presiding justice decided and ruled that "the doom of money at interest applied to the bonds, and the supplemental tax upon these is invalid" the plaintiff took exceptions.

The defendant also took exceptions to that part of the judgment and decision of the presiding justice in which he ruled "that the tax on the stocks and scrip is valid, and being valued and assessed separately, can be enforced, etc.

G. H. Sturgis and Enoch Foster, for plaintiff.

W. K. and A. E. Neal, for defendant.

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

SAVAGE, J. Action of debt by a collector for taxes assessed by a supplemental assessment.

It appears that the town of New Gloucester at its annual meeting in March 1902 voted to raise by taxation the sum of $12,019. To this the assessors added an overlay of $503.72. The amount of the state tax was $2,808.25, and of the county tax $1,120.09. And the total sum, $16,451.06 was legally assessed to the tax payers by the duly elected and qualified assessors for the year 1902. The

assessors seasonably gave notice in writing to the inhabitants of the town to make and bring in true and perfect lists of all their polls and estates, of which they were possessed on the first day of April of that year. R. S. (1883) c. 6, § 92. Solomon H. Chandler, the defendant, a resident of the town failed to bring in any list, whereupon the assessors assessed him for 92 shares of national bank stock, which was returned to them by banks in accordance with the statute, in the sum of $8,875, and for "money at interest in excess of debts" in the sum of $321,350. The assessment of the "money at interest" was a "doom" so-called. The assessors had no knowledge of any particular items of money at interest, but the assessment represented their judgment of the amount for which the defendant was liable to be taxed, on that account. No other property was assessed. The invoice, valuation and list of assessments were signed by the assessors May 31, 1902, as of April 1, 1902. The tax thus assessed has been paid.

On May 20, 1902, the defendant was adjudged to be of unsound mind by the probate court for Cumberland County, and John W. True was appointed his guardian. The guardian then filed an inventory in the probate court, in which were returned sundry railroad, water, municipal and other bonds, and railroad, water, and other stocks and scrip, amounting in all to $551,586, all of which it is admitted were possessed by the defendant on April 1, 1902, and were liable to taxation. Of these bonds, stock and scrip, the assessors had no knowledge, until after the original assessment was made and committed, although when they made that assessment, they undoubtedly had in mind the reputed large wealth of Mr. Chandler, which it now appears was made up of these bonds and stocks.

On December 27, 1902, in accordance with R. S. (1883), c. 6, § 35, the assessors assessed a supplemental tax to the defendant upon the specific items of bonds, stock and scrip, which had been returned by the guardian in his inventory, certifying in the assessment and in the subsequent commitment thereof to the collector, that the property thus assessed had been omitted by mistake from the original invoice, valuation and list of assessments of May 31, 1902. The last assess-

ment was duly committed to the plaintiff as collector. He made legal demand before suit was brought and payment was refused.

This case was heard at nisi prius by the court without a jury, with the right of exceptions. The presiding justice ruled that the assessment or "doom" of money at interest applied to the bonds assessed in the supplemental assessment, and that the supplemental tax upon these was invalid, but that the tax on the stocks and scrip was valid, and being valued and assessed separately, could be enforced, and was recoverable in this suit, and rendered judgment accordingly. Both parties excepted.

I. The plaintiff excepts to so much of the ruling as holds that "the doom of money at interest applied to the bonds and the supplemental tax upon these is invalid." We do not understand the plaintiff to deny that in its ordinary commercial sense the term "bond" signifies an obligation to pay money. Such a bond contains a promise to pay money, usually to bearer, and hence is negotiable and is transferable by delivery. *Lane* v. *Embden*, 72 Maine, 354. It performs the office of a promissory note. It represents, and is the evidence of, an indebtedness. Its coupons represent the instalments of interest as they become due. The person or corporation issuing the bonds is a borrower, and the purchaser is a lender. The bond purchased has no greater value than a piece of paper except as evidence of the loan and as the means to secure its payment when due. When due the debtor does not buy back the bond, but does pay the debt. Such is the ordinary significance of the term "bonds" when applied to securities such as were assessed in this supplemental assessment as "bonds", and such is its significance with reference to such bonds, when they are assessed for taxes.

Nevertheless.the plaintiff claims that in this case, although money at interest was assessed originally, these bonds were not assessed. The assessors testify that the $321,350 assessed as upon money at interest was for money at interest on mortgages and notes as they understood it, that they did not know that Mr. Chandler owned any bonds or stocks, and that they did not intend to include and did not include any bonds or stocks in the item for money at interest. They point out that on the assessment sheet there was a column for Bonds

Stocks; that in that column they placed the bank stock which they assessed, and that they intended to include in that part of the assessment all bonds and stocks of the defendant, that it did include all the stocks that they knew about and included no bonds specifically because they knew of none.

To sustain the validity of a supplemental assessment it must appear that the items of property assessed were not assessed in the original assessment. It must appear that the property itself had not been assessed at all, and that it had been omitted by mistake. It is not sufficient that the assesssors through lack of information or otherwise have erred in their judgment of the quantity, quality or value of the thing assessed. *Dresden* v. *Bridge*, 90 Maine, 489. If the assessors have once assessed that property, that assessment cannot be revised by a supplemental assessment.

And in determining what was assessed in the first place, we must be governed not by what the assessors intended to do, nor by what they thought they did do, but by what they did do. And in determining what was done by them we are controlled by the official record of their doings, that is by the assessment itself. The assessment cannot be modified or limited by evidence aliunde. This record shows that money at interest was assesssed, and we think such an expression was broad enough to cover all forms of interest-bearing securities, whether represented by notes or bonds or otherwise. And further we hold that all such securities must be deemed to be covered by the phrase, money at interest, unless the contrary appears from the assessment itself. If the assessors have erred in determining the amount of money at interest, they cannot cure their error by securing a revaluation through a supplemental assessment, even though their error arose from their ignorance of the specific kinds of securities in which the money at interest was invested.

But the plaintiff claims that the original assessment here does show that "bonds" were not included in the money at interest. The assessment sheet was ruled into columns. One column was headed by the words STOCKS BONDS, another by the words, MONEY AT INTEREST. And it is argued that because the word Bonds is placed at the head of a column, distinct from a column headed by

the words Money at Interest, it must be held that the assessors did not intend to include, and did not include bonds under the assessment of money at interest. We do not think this conclusion follows. However the columns were headed, it was competent for the assessors to assess bonds separately from other items of money at interest, as perhaps they would have done had they known of them; or they might assess them collectively as money at interest. In this case as to bonds they did neither. They did not attempt to assess by items of any kind, or to exclude any items from any particular class. They "doomed" the defendant. They made no assessment for bonds, in the appropriate column, but they assessed such a lump sum in the column for money at interest, as in their judgment the defendant was liable to be taxed for. R. S. (1883), c. 6, § 93. And that covered undisclosed bonds. Having done so, they could not afterwards by supplemental assessment assess particular items which were covered by the terms of the original assessment. The ruling of the justice at nisi prius in this particular was therefore right, and the plaintiff's exceptions must be overruled.

II. But the defendant does not admit that any portion of the supplemental tax is recoverable, and he excepts to the ruling, "that the tax on the stock and scrip is valid, and being valued and assessed separately can be enforced and is recoverable in this suit."

The defendant contends, in the first place, that the full amount of the money which the voters of New Gloucester voted at the annual meeting to raise was assessed in the original assessment, and that by the payment of the original tax assessed against him, he has paid his full share thereof; and further that the assessment of a supplemental tax under such circumstances would be in violation of R. S. (1883), c. 6, § 91, which provides that "no assessment of a tax by a town or parish is legal, unless the sum assessed is raised by vote of the voters, at a meeting legally called and notified." Such an objection as this would apply to all supplemental assessments. And yet the statute elsewhere expressly provides for them. R. S. (1883), c. 6, § 35. Taking both of these statutory provisions together, it is evident that the provisions of section 91 were not intended to apply to supple-

mental assessments, but to original ones, and that a supplemental assessment may be laid on property omitted by mistake in the original assessment, even though it may result in a surplus in the town treasury.

Again, it is contended that the supplemental assessment should have been made to the guardian of Mr. Chandler, and not to himself, under R. S. (1883), c. 6, § 14, paragraph V, which provides that "the personal property of all other persons (than minors) under guardianship, shall be assessed to the guardian in the town where the ward is an inhabitant." We do not think so. The original assessment, though dated May 31, was made as of April 1, 1902. On April 1 Solomon H. Chandler was sui juris. He had no guardian. The assessment of that date was made to him. It could have been made to no other. A supplemental assessment is a part of the original, an amendment of it—a supplement to it. *Bangor* v. *Lancey*, 21 Maine, 472. Like the original it must be made as of April 1, and we think it must be made to the same person as it would have been if it had been made on April 1. The authorities relied on as showing the contrary do not do so in fact. In *Fairfield* v. *Woodman*, 76 Maine, 550, and *Dresden* v. *Bridge*, 90 Maine, 489, the representative parties to whom taxes should have been assessed were appointed and qualified prior to April 1 of the years when the taxes in question were assessed. Not so here.

And lastly, the learned counsel for the defendant suggest that if "bonds" are money at interest, stocks may also be so regarded, and if so, that they were covered by the original assessment of money at interest. This suggestion cannot prevail. The distinction between stocks and bonds is essential and vital. We have already considered bonds. Stock, in corporation law, instead of being the evidence of indebtedness, is a right to partake according to the party's subscription or ownership, of the surplus profits obtained from the use and disposal of the property of the corporation. Angell and Ames on Corporations, § 557. A share of stock is the interest which the shareholder has in the corporation, which is the right to participate in the profits of the corporation, and, upon its dissolution, in the division of its assets. *Burrall* v. *Bushwick R. R. Co.*, 75 N. Y. 211. The

stockholders do not own the corporate property. The corporation owns the property, but in a broad sense, the stockholders own the corporation. And without too much refining, to assess stock is to assess the stockholders' proportionate right in the corporation itself, his right to have the corporate purposes carried out, his right to profits, if any, and to a proportionate division of the assets upon dissolution. This differs toto coelo from money at interest. These observations apply equally to scrip, which in corporation parlance is the certificate, or evidence, of the right to obtain shares in a corporation. It follows, therefore, that the defendant can take nothing by his exceptions.

Both bills of exceptions overruled.

INHABITANTS OF SPRINGFIELD *vs.* LUCIUS BUTTERFIELD.

Penobscot. Opinion November 26, 1903.

Tax. Assessor, ineligible, tax void. *Officer,* acts of void when de facto. *R. S., c. 3, § 12. Stat. 1885, c. 335.*

1. By the provisions of R. S., ch. 3, § 12, as amended by the laws of 1885, ch. 335, a collector of taxes who has not had a final settlement with the town is ineligible to the office of selectmen or assessor of taxes; and although he may have been formally elected as assessor, and may have been regularly sworn, and may have acted, he is merely an assessor de facto.
2. In this state, a tax assessed by a de facto board of assessors, or by a board, one of whose members is a de facto assessor, is void and uncollectible.
3. The question of the validity of such a tax may be raised in a suit by the town to recover the tax.
4. In this case the tax assessed is void and uncollectible by reason of the fact that one of the assessors when elected was a collector of taxes who had not had a final settlement with the town.

On report. Judgment for defendant.

Debt to recover a tax. The case appears in the opinion.

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

M. Laughlin, for defendant.

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

SAVAGE, J. Action of debt for taxes assessed in the year 1900.

The only defense set up is that one of the assessors of the plaintiff town for that year was ineligible to the office of assessor, and hence that although regularly elected and sworn, he was only an assessor de facto, and not de jure. Upon this premise, the defendant contends that the assessment was void. To this the plaintiff replies that it is a general rule that the acts of an officer de facto are valid when they concern the public or the rights of third persons, and cannot be indirectly called in question in a suit in which said officer is not a party, and that the right of the officer can only be questioned in a suit against him; and further that the question whether a person exercising the office de facto is an officer de jure cannot be settled in proceedings between third parties, citing *Hooper* v. *Goodwin*, 48 Maine, 79.

It appears that notwithstanding the provisions of R. S. (1883), c. 3, § 12, as amended by the public laws of 1885, c. 335, that "treasurers and collectors of towns shall not be selectmen or assessors, until they have completed their duties as treasurers and collectors and had a final settlement with the town," the plaintiff town did, at the annual meeting in 1900, elect as one of the selectmen and assessors a person who, in 1898, had been elected collector of taxes, and had qualified and acted as such, and who, at the time of his election as selectman and assessor, had not had a final settlement with the town, as collector of taxes. Such an election is expressly prohibited by the statute, and is void. *Spear* v. *Robinson*, 29 Maine, 531; 1 Dillon on Municipal Corporations, § 196; 23 Am. & Eng. Encyclopædia of Law, 2nd ed. 338. Such a collector is ineligible to the office of selectman or assessor, and although he may have been formally elected, and may have been regularly sworn, and may have acted as assessor, he was at most an assessor de facto, and not de jure.

We must, therefore, decide whether a tax assessed by a board of assessors one of whom is an assessor de facto only, is valid, and collectible in a suit by the town. The general rule respecting the

validity of the acts of de facto officers, undoubtedly is as stated and claimed by the plaintiff. Such acts are, in general, valid when they concern the public and the rights of third parties, and cannot be called in question in a suit between third parties. But they may be called in question when the de facto officer is a party to the suit, and seeks to justify, or maintain his right, by virtue of an illegal appointment or election.

And it may well be questioned whether, in an action by a town to recover taxes assessed by an ineligible assessor it can shelter itself behind the general rule as stated. *Dresden* v. *Goud*, 75 Maine, 298. The town illegally elected the assessor de facto. The town's right to recover depends upon giving effect to its own illegal act, as if it were legal. Although an assessor is a public officer, and not an agent of the town, yet he acts solely for the town in its municipal capacity. Although the assessor assesses state and county taxes, neither the state nor the county is pecuniarily interested in the performance of his duties, for the state and county look to the town for their respective taxes, whether assessed and collected or not, and the town looks to the individual taxpayers, and collects if it can. The rights of the public are not concerned, except as to that part of the public which the town represents, or is. The proposition is not whether the acts of such a de facto officer may bind the town, as undoubtedly they may, *Opinion of the Court*, 70 Maine, 565; but whether they bind a third party. No third party, unless the town be a third party, sets up any right under the acts of the de facto assessor. On the contrary, the defendant assails them, and says they were to his wrong and injury. And as held in *Dresden* v. *Goud*, 75 Maine, 298, the defendant is not a third party within the meaning of the rule, and the suit is not a collateral one, but is a direct impeachment of the proceedings. If it be true that an offending town may shield itself behind the rule giving validity to the acts of officers de facto, it follows as a practical result that a town may wilfully violate the express and salutary provisions of the statute in question, with impunity. For although individuals might by appropriate proceedings inquire by what warrant the officer holds his office, the expense and delay attending such proceedings would be prohibitory in ordi-

nary cases. But it is not necessary to decide the question in the general form presented. Nor is it necessary to collate the decisions in other jurisdictions, touching the assessment of taxes. Such decisions are not all in harmony with one another. Many hold that an assessment of taxes by a de facto assessor is valid, and cannot be questioned in a suit for the taxes by the town. Nevertheless, we think the rule is too firmly established in this state to be now overruled, or questioned, that taxes assessed by de facto board of assessors, or by a board one of whose members is de facto assessor are void and uncollectible, and that the question may be raised in a suit for the taxes by the town.

In *Williamsburg* v. *Lord*, 51 Maine, 599, which was a suit to recover land claimed by forfeiture for non-payment of taxes, it did not appear that one of the persons who were elected assessors was even sworn or acted as assessor. The court held the assessment invalid, saying, "two assessors are not authorized to assess a tax when they only have been qualified." And this decision was affirmed in *Sanfason* v. *Martin*, 55 Maine, 110.

Dresden v. *Goud*, 75 Maine, 298, was a suit by a town to recover taxes. No assessors were chosen by the town, and, by virtue of the statute, the selectmen became assessors and acted as such. But they were not sworn as assessors. It being claimed that they were assessors de facto, and that their acts as such were binding upon the persons against whom the taxes were assessed, the court said:—"Assuming that these men, acting as they did as assessors, by color of an election which if legal, would have made them such, still the principles applicable to officers de facto, would not apply here. The question here presented involves necessarily the competency of the persons to do the act, or make the assessment. The statute requires as a condition precedent to the maintenance of the action, that the tax should be "legally assessed," and the proper oath is a condition precedent to the authority of the assessor to assess. . . . Besides, the defendant is not a third person, nor is there any third person to avail himself of the act or attack the assessment collaterally. The act operates directly upon the defendant. It is his property and his alone that is at stake, and the contest is not a collateral one, but a

direct impeachment of the legality of the assessment. True, the assessors are not a party to the action, but the town which stands in their place and which they represented, is such party, and has no more rights simply because the statute provided that the action should be in its name."—In the same case the court quoted with approval the following language from *Tucker* v. *Aiken*, 7 N. H. 113. "The general principle undoubtedly is, that the acts of an officer de facto are valid, so far as the public or the rights of third persons are concerned; and that the title of such an officer cannot be inquired into in any proceeding to which he is not a party. But proceedings founded upon the assessment and collection of taxes have been supposed to form an exception to this rule; or rather, a different rule has been supposed to be applicable to such proceedings."

In a suit upon a collector's bond, in *Machiasport* v. *Small*, 77 Maine, 109, the court held that a tax assessed by two assessors, when they alone have been qualified, is void, following *Williamsburg* v. *Lord*, and *Sanfason* v. *Martin*, supra. In this case it did not appear that a third assessor had been elected.

It was decided in *Orneville* v. *Palmer*, 79 Maine, 472, that when assessors took the oath of office before the moderator, who was not authorized to administer it, they were not legally qualified to perform the duties of office, and could not assess a legal tax.

In *Lord* v. *Parker*, 83 Maine, 530, 534, WALTON, J., said, "It is well settled that a tax assessed by three assessors without their being sworn, is illegal and not collectible."

In *Bowler* v. *Brown*, 84 Maine, 376, an assessment was declared invalid, because there was no sufficient evidence that the assessors had been sworn.

In *Jordan* v. *Hopkins*, 85 Maine, 159, where an assessment had been made by two assessors legally chosen and sworn and another person who had been chosen and sworn as a selectman only, the court said that it felt "constrained to decide that the assessment was vitiated by the illegal participation of the unsworn assessor in making the same."

A consideration of the opinions in the foregoing cases leads to the conclusion that it is well settled law in this state that to sustain an

action by a town to recover taxes, as well as in actions involving forfeitures for non-payment of taxes, it must be shown that the tax was legally assessed, that the assessors were legally chosen and qualified, and had jurisdiction over the persons and estates assessed; that if two only of the assessors are qualified by being sworn, the other not qualified and not acting, the assessment is void; that if none of the assessors are qualified, they are merely assessors de facto, and their assessment is void; and if two are qualified and one is not, the assessment is equally void. The unqualified assessor is merely a de facto assessor, and his participation in the assessment is illegal, and vitiates it. And without him, there are only two qualified assessors, and they cannot make a legal assessment. And we can perceive no distinction, at least none favorable to the plaintiff here, between a case where all the board were legally elected and only two were sworn, and one where only two were legally elected, though all three were sworn In neither case is the assessment made by assessors all of whom are legally elected and qualified. In both cases the assessment is made by a board of assessors, who are in part officers de facto.

We hold, therefore, that the assessment of taxes in this case by assessors, one of whom was ineligible to the office by statute, was illegal and void, and that it is competent for the defendant to attack it in this proceeding. *Dresden* v. *Goud*, supra.

Judgment for defendant.

JAMES R. THURLOUGH *vs.* WILLIS R. DRESSER.

Aroostook. Opinion November 26, 1903.

Landlord and Tenant. Lease. Imperfect description of premises. *Record,* Notice to third parties. *Chattel Mortgage. R. S. (1883), c. 91, § 1.*

1. Third persons are chargeable with notice of no more than they can ascertain from the record of a mortgage, or from being put upon their inquiry by the record.
2. Notice of the mortgage of a crop to be planted in 1899 is not notice of a crop planted or to be planted in 1900.
3. A lease of "twelve acres of a farm in Caswell" with the crops to be grown upon it the "ensuing season," but containing no more particular description of the land, was given to the defendant, as security, March 22, 1900. It was dated by mistake, "March 22, 1899," and was recorded, as dated, in the town clerk's office, April 11, 1900. The lessor, on June 29, 1900, gave the plaintiff a chattel mortgage of the crops then growing upon a farm in Caswell which was particularly described. This mortgage was duly recorded July 4, 1900. The defendant's lease was intended to cover a portion of the farm described in the plaintiff's mortgage. Potatoes growing on "the twelve acres" at the date of the plaintiff's mortgage were taken by the defendant.
4. Assuming that the defendant's lease, properly construed, is an equitable mortgage, *it is held,* that the record of the lease, although prior in time to the plaintiff's mortgage, was insufficient to give the plaintiff constructive notice of the defendant's equitable lien or claim. It was too indefinite in the description of the land, and was actually misleading as to time.
5. It follows that the plaintiff shows a superior title to the potatoes in question.

Facts agreed. Judgment for plaintiff.

Trover by mortgagee under a chattel mortgage for the conversion of potatoes by the landlord who claimed title under a lease.

The case appears in the opinion.

H. W. Trafton, for plaintiff.

W. B. Hall, for defendant.

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

SAVAGE, J. Trover for potatoes.

On February 24, 1900, the plaintiff in writing agreed to convey to one Bennett certain real estate in Caswell Plantation, on condition that Bennett should first pay to the plaintiff, $75 January 1, 1901, $75 March 15, 1901, and should make five other payments at other specified dates beginning March 15, 1902, and ending March 15, 1906. The contract, as we construe it, provided that the plaintiff should convey the premises to Bennett after the first two payments were made, and that Bennett should then mortgage back the premises to the plaintiff to secure the payment of the five remaining installments of the purchase price, and interest annually. Bennett on his part gave seven notes for the seven installments of the purchase price, and agreed to execute and deliver to the plaintiff, on or before June 15th of each year until the first two notes with all annual interest accrued had been paid, a first chattel mortgage upon all the crops then planted and growing upon the premises to secure the payment of those two notes and annual interest. Bennett entered into possession under this agreement. Afterwards on March 22, 1900, Bennett leased twelve acres of "a farm in Caswell" to the defendant, the lease to run until January 1, 1901. The land intended to be leased was a part of that embraced in the foregoing agreement. The lease, by a clerical error was dated March 22, 1899, and was recorded, as written, April 11, 1900, in the clerk's office at Caswell Plantation. In the lease Bennett agreed to plant, cultivate and harvest a crop of potatoes upon the land, and deliver them to the defendant, who was to market them, and with the proceeds, reimburse himself for the price of certain fertilizer which he had sold to Bennett, and pay Bennett the balance. The lease, in fact, was given to the defendant as security for the price of the fertilizer. No potatoes were growing on the land at the date of the lease. On June 29, 1900, Bennett, in accordance with his agreement with the plaintiff, made a chattel mortgage to him of the crops, including potatoes, then growing upon the premises which the plaintiff had agreed to convey to Bennett.

This mortgage was recorded in the clerk's office at Caswell Plantation, July 4, 1900. In the season of 1900, Bennett raised a crop of potatoes on the land leased to the defendant, and delivered the same to the defendant on the premises, in the harvest time, and after the chattel mortgage to the plaintiff had been recorded. The defendant carried them away, and to recover their value the plaintiff brings this action. The original agreement between the plaintiff and Bennett was not recorded anywhere. The plaintiff "had no other notice of the lease to the defendant than that contained in the public record." Whether this expression in the agreed statement means that he had actual notice of the record, but no other notice, or that he had no actual notice, either of the mortgage or of its record, is not clear. We think it is immaterial which it is.

Upon these facts, the plaintiff claims title to the potatoes under his mortgage of June 29, 1900, made and recorded while they were growing. The defendant claims title under his lease of March 22, 1900, made and recorded before the potatoes were planted. He claims that the lease was in effect an equitable mortgage, and sufficient to give rise to an equitable title when the potatoes came into being. *Kelley* v. *Goodwin*, 95 Maine, 538. Assuming that the defendant's contention is correct that a lease of land and crops to be grown upon it, given as security, may be regarded as an equitable mortgage, still we think the defendant cannot prevail in this case, notwithstanding his lease or mortgage was recorded first.

By Revised Statutes (1883), ch. 91, § 1, it is provided that "no mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the city, town or plantation organized for any purpose in which the mortgagor resides, when the mortgage is given." To shut out the claim of a subsequent mortgagee, an equitable mortgage must be recorded, the same as a legal one. *Kelley* v. *Goodwin*, supra. The purpose of the statute clearly is that all persons may have notice of the mortgage, of the property mortgaged, and of the character and extent of the incumbrance created. The mere record of a valid mortgage gives constructive notice to all. All are presumed to know

its contents, for any one interested can obtain knowledge by examining the record. But a record is not constructive notice of more than the record itself discloses. Third persons are chargeable with notice of no more than they can ascertain from the record or from being put upon their inquiry by the record. *Partridge* v. *Swazey*, 46 Maine, 417.

If we apply these principles to the defendant's lease and record, it will appear that they were wholly insufficient to give notice of the truth. When the plaintiff took his mortgage of the growing crops in June, 1900, he was entitled to know, by record at least, whether there was any prior mortgage of the same crops. The records if consulted would have shown only that in the lease dated (though by mistake) March 22, 1899, Bennett was asserted to be in possession of a farm in Caswell, twelve acres of which he leased to the defendant "to be planted with potatoes in the ensuing season." There is nothing in the lease to indicate that the farm was the one the plaintiff had agreed to sell Bennett. The description would apply to any other farm in Caswell as well. And the crop mortgaged was the one to be planted the "ensuing season," namely, the season of 1899. Notice of the mortgage of a crop to be planted in 1899 is not notice of a crop planted or to be planted in 1900. And if we should say, which we do not, that the fact that the record of the lease showed that it was to run to January 1, 1901, should have made an investigator of the records suspicious that there was error in the date of the lease, and that the lease properly covered the season of 1900,—and so put him upon inquiry,—how should he ascertain which one of the many farms in Caswell he should inquire about? *Stedman* v. *Perkins*, 42 Maine, 130. The case at bar is clearly distinguishable from *Partridge* v. *Swazey*, supra. We think the lease in this case and its record, are altogether too indefinite and uncertain to give notice to the plaintiff that the crop of potatoes of which he was taking a mortgage in June, 1900, had already been mortgaged to the defendant. The defense fails.

In accordance with the stipulation of the parties, the entry is to be,

Judgment for the plaintiff for $119 and interest from the date of the writ.

HERBERT A. EDWARDS *vs.* RANDOLPH C. BROWN.

Aroostook. Opinion November 26, 1903.

Sales. Delivery, taking possession by agent. *Stat. of Frauds. R. S. (1883), c. 111.*

Plaintiff and defendant made a verbal agreement that the plaintiff would buy the defendant's hay in his barn, estimated to be between fifteen and twenty tons, for six dollars a ton.

Plaintiff was to press the hay in defendant's barn, and after it was pressed defendant was to haul it to the depot.

Plaintiff employed Giberson to press the hay. He went to defendant's barn and pressed the hay, for which he was paid by the plaintiff. Defendant did not haul the hay to the depot, but sold it to other parties.

In an action to recover damages for the breach of contract, the defendant interposed the Statute of Frauds as a defense.

Held; that the delivery by defendant of the hay to Giberson, plaintiff's agent, and the pressing by him, was a sufficient delivery and acceptance by the plaintiff to satisfy the Statute of Frauds.

On report. Action to stand for trial.

Assumpsit for breach of contract of bargain and sale of a certain quantity of hay, alleged by the plaintiff to have been sold by him to the defendant. Defense, want of delivery.

L. C. Stearns and E. A. Holmes, for plaintiff.

W. P. Allen and G. H. Smith, for defendant.

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

STROUT, J. The facts are these: Early in June plaintiff and defendant at plaintiff's store made a verbal agreement that the plaintiff would buy the defendant's hay in his barn, estimated to be between fifteen and twenty tons, for which plaintiff was to pay six dollars a ton, plaintiff to press the hay in defendant's barn, all to be done before haying time; and after the hay was pressed defendant was to haul the hay to the depot or to the store-house, plaintiff's

place of business at the depot. About the first of July defendant asked plaintiff if the press was going over, and was told that it was. He said he did not want it to go till the following Wednesday, the sixth of July. Plaintiff employed Thomas Giberson to press the hay. His press and men to operate it were at defendant's barn on July sixth, and pressed the hay, being nearly nineteen tons, into bales of 200 to 300 pounds each, and marked the bales. Plaintiff paid for the pressing at two dollars per ton. Defendant refused to allow plaintiff to have his hay after it was pressed, and this action is brought to recover the damages.

In defense the statute of frauds is pleaded.

Giberson was employed and paid by plaintiff to press the hay. For that purpose he was the agent of the plaintiff. In pressing, he acted for the plaintiff and under his authority, and had actual physical possession of the hay while so engaged. The permission of defendant to this is evidence of a delivery by him. This was a sufficient acceptance and receipt by the plaintiff to satisfy the statute of frauds, and it would seem sufficient to pass title to the hay, subject, of course, to plaintiff's right to reject, if the hay was not merchantable. This principle is recognized in *Dyer* v. *Libby*, 61 Maine, 45; *White* v. *Harvey*, 85 Maine, 212; *Penley* v. *Bessey*, 87 Maine, 533.

The hay was left in defendant'a barn after it was pressed by plaintiff's agents, as plaintiff's hay, to be hauled to the depot by defendant in accordance with the agreement. That was the only purpose for its remaining there. When defendant refused to haul the hay to plaintiff's store-house at the station, which he had agreed to do, he violated his legal contract, and became responsible to the plaintiff for his damages, for which this action is brought. By the terms of the report,

Case to stand for trial.

WILLIAM F. YOUNG *vs.* SAMUEL QUIMBY.

Penobscot. Opinion November 30, 1903.

Will. Devise, Construction. *Words,* "Residue of my land lying on east side of Bennoch road." *Heirs.*

1. In construing a will, if the court is not affirmatively convinced that the testator intended to devise certain real estate, the statute of descents must be allowed effect and such real estate be adjudged to belong to the heirs.
2. Apart from the required formalities of execution and certain essential words to give legal effect to intention, the language of a will is to be understood in its ordinary, popular meaning unless it clearly appears it was used with some other meaning.
3. While the word "residue" applied to estate or property generally, as in the usual residuary clause of a will, may include all the remaining estate whether in possession, remainder or reversion; when applied only to a given parcel of land its popular meaning is simply the remaining acres of that parcel, and not the remaining estate in the parcel.
4. A testator owning a field of fifteen acres "east side of the Bennoch Road" devised the eastern five acres to his wife for life. He then devised to a son "the residue of my (his) land lying on the east side of the Bennoch Road." *Held;* that the son took only the remaining ten acres, and that the estate in the five acres after the death of the widow was undevised and descended to the heirs.

On report. Judgment for defendant.

Real action to recover a parcel of fifteen acres of land in Old Town, lying on the west bank of the Stillwater branch of the Penobscot River east of the Bennoch road, and south of the road leading from Gilman's Falls to Old Town.

The controversy was over the five acres immediately adjoining the river.

The plea was the general issue with the following brief statement and disclaimers:—

"And for brief statement defendant further says: That the title in fee simple in and to an undivided three-fifths of the following described portion of the premises described in plaintiff's writ is in the defendant and not in the plaintiff, to wit: to five acres of land with

the buildings thereon, commencing at the road leading to Old Town village and running at right angles westerly a sufficient distance to embrace five acres, from thence on a line to the river.

"That he disclaims any right, title or interest in or to the remaining two-fifths of the above described land.

"That he also disclaims any right, title or interest in and to any and all the remaining land described in the plaintiff's writ."

The facts appear in the opinion.

J. F. Gould, for plaintiff.

Counsel contended that the will showed that the testator intended to dispose of all his property. That the will clearly showed the testator intended to devise to his son Warren all his real estate on the east side of the Bennoch road, subject only to a life estate of Sarah Lancaster in the five acres next to the river.

W. H. Powell, for defendant.

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

EMERY, J. Henry Lancaster, at the time of making his will, was thus situated: He had a wife and four children and some grand children by a deceased child. He owned a tract of land in Oldtown bordering on the Stillwater Branch of the Penobscot River and extending from the river westerly across the "Bennoch Road," there being fifteen acres east of that road. He also owned buildings situated on this tract next the river, and these, so far as appears, were all the buildings he owned. It does not appear whether he owned any other real estate or any personal estate outside of household furniture, some cows, a horse and a yearling colt. In this situation he made the following will:

"I Henry Lancaster of Oldtown being in full possession of mental faculties and as my last will and testament do hereby bequeath the following property of which I am in lawful possession.

To my wife Sarah Lancaster I hereby give her in her right of dower, or during her natural life, possession of all my buildings and five acres of land whereon the said buildings stand commencing at

the road leading to Oldtown Village and running at right angles westerly a sufficient distance to embrace five acres from thence on a line to the river; and also my cows and all my household furniture.

To my son Warren B. Lancaster I give the residue of my land lying on the east side of the Bennoch road, and my horse.

To my son Zelotes M. Lancaster I give all my land lying west of the Bennoch road and my yearling colt. I further give to my son Joshua Lancaster & William H. Lancaster and Rosannah F. Farrar and Judith A. Stevens and Syrene B. Burnham one dollar to each to be paid at the term of one year from my demise equally by Warren B. and Zelotes M. Lancaster.

The interlining was made before signing.

Henry Lancaster."

His wife Sarah survived him and occupied the buildings and the five acres next the river according to the will. His son Warren also survived him and occupied the ten acres east of the road and between the road and the widow's five acres. The widow has now deceased and the question is what was Henry Lancaster's will respecting that five acres and the buildings after his wife's death. Was it his will that Warren should have it in addition to the ten acres specifically devised to him?

If, after all, the court finds itself unable to solve the question it must return a negative answer. If it is not affirmatively convinced that Henry Lancaster in fact intended his son Warren to have the five acres and the buildings after his wife's death, the statute of descents must be allowed full effect, and the property in question be adjudged to have descended to the heirs, even though the court is not convinced that Henry Lancaster intended it to go to his heirs. "It is a general rule that if it is uncertain and doubtful whether the testator intended to devise real estate, the title of the heir must prevail." *Blaisdell* v. *Hight*, 69 Maine, 306, 309, 31 Am. Rep. 278.

On the other hand, there is a general presumption that when a man sets down to make his last will and testament, he intends to dispose of all his property by that will and leave nothing to the operation of the statute of descents. But this is merely a presumption of

fact which may quickly disappear in any given case. Again, a will is not a legal document of the character of a statute or treaty, or court pleadings, or judgments in which certain words have a particular legal meaning often widely different from the popular meaning. Apart from the required formalities of its execution and certain essential words necessary to give effect to intention, it is like a letter written to express the writer's desire and will, and its language and words are to be understood in their ordinary, popular meaning unless it is clearly apparent they were used with some other meaning.

In this case Henry Lancaster first devised all his buildings and the five acres next to the river and on which the buildings stood to Sarah for life. He then devised to Warren "the residue of my land lying on the east side of the Bennoch road, and my horse." As already stated there were ten acres east of the Bennoch road and between that road and the widow's five acres. Pausing here to consider the meaning of the word "residue," we do not see anything in the will indicating its use in any particular technical sense. It is not applied to estate or property generally, as in the usual residuary clause of a will, but is limited to a particular parcel of "land," that "east of the Bennoch road." The first definition of "residue" given by Webster is "that which remains after a part is taken, separated, removed or designated." The first definition in the Cent. Dict. is, "that which remains after a part is taken, separated, removed or dealt with in some other way." Applying these definitions we see that the testator had first "taken, separated, removed or designated, or dealt with in some other way," the five acres next the river. "That which remained" would seem to be the ten acres and no more. Assuming, as we should, that the testator used the word "residue" in this ordinary sense, we are not convinced that he intended by it to also give to Warren the five acres and the buildings after the death of his wife. If he did really so intend he has not made it sufficiently apparent. It may be, and indeed it seems probable, that he had no intention at all in the matter, that he did not think of it. If that be so, the statute of descents and not the court must supply the omission.

Apart from the language itself one circumstance especially militates against Warren's claim. The buildings and all the testator's

buildings were on the five acres, and the five acres themselves possessed the whole river frontage. This property was therefore presumably of much comparative value. Nothing appears in the case indicating that the testator preferred his son Warren to his son Zelotes who took the land west of the road, or indicating any reason why he should so greatly prefer him to his other children as to give him all the buildings and the valuable river frontage besides the ten acres. We are not convinced that he did so intend, and hence the title of the heirs must prevail.

According to the terms of the report the plaintiff who claims under Warren must be nonsuit.

Plaintiff nonsuit.

NIRA C. HOLBROOK *vs.* SELDEN F. GREENE.

Somerset. Opinion November 30, 1903.

Mortgage, Of real estate. *Trees and Grass,* Removal of. *License,* To cut 15 or 20 M feet of lumber, to pay interest, taxes and insurance. *Trover.*

1. Permission given by a mortgagee of real estate to the mortgagor to cut and remove timber for the purpose of paying taxes and insurance on the mortgaged property and back interest on the mortgaged debt, does not authorize the mortgagor to use the timber for the payment of his debts to other parties. Such parties acquire no title to the timber as against the mortgagee.
2. A mortgagee taking possession of the mortgaged premises in the absence of the mortgagor is not required by the law to give personal notice thereof to the mortgagor or his assigns.
3. After possession taken by the mortgagee, even without personal notice to the mortgagor or his assigns, the latter cannot lawfully remove the grass then growing on the mortgaged premises without the consent of the mortgagee.
4. After possession taken by the mortgagee he has all the rights of a mortgagee in possession though his possession is not so visible, notorious and exclusive as is required to acquire a title by disseisin.

5. The value of timber and grass taken from mortgaged premises by the mortgagor or his assigns is a question which a jury can determine better than the court.

Action of trespass. Motion by defendant for new trial. Overruled.

There were four counts in plaintiff's writ. The first was for forcibly breaking and entering plaintiff's close in Solon, and seizing and carrying away twelve tons of hay. The second count was also in trespass quare clausum for cutting and carrying away trees from the same close. The third count was trespass de bonis for shingles, timber, logs and cord wood. The fourth count was in trover for the same goods and chattels described in the third count.

The plea was the general issue with a brief statement.

In substance, the brief statement set out that one Harry A. Nelson was at the date of said plaintiff's writ, and long before the owner of the premises described; that plaintiff held a first mortgage on said premises; that the defendant held a second mortgage on said premises; that said defendant foreclosed his mortgage by newspaper publication in April, 1901, by due proceedings; that said plaintiff foreclosed her mortgage by newspaper publication in June, 1901; that said Harry A. Nelson remained in possession and retained control of said premises to October 1, 1901; that as far as said defendant's connection with said hay mentioned in said writ is concerned, said defendant on or about April 10, 1901, was authorized and directed by said Harry A. Nelson to harvest or sell said hay, and to take charge of said premises and of said hay; that in pursuance of said directions, and by license of said Harry A. Nelson, said defendant on or about July 1, 1901, entered upon said premises and cut, but did not carry away or otherwise disturb, a small amount of hay, to wit: 1000 pounds; that said defendant made no other entry on said premises; that said defendant afterwards, to wit: on or about July 5, 1901, in pursuance of the direction and license of the said Harry A. Nelson, bargained and sold all the grass standing and cut on said premises to one L. P. Cates for the sum of $15.00, which was a fair cash value for the same; that said wood and lumber were not removed from said premises by said defendant, but were cut and removed therefrom by

said Harry A. Nelson; that said wood and lumber were left in said defendant's possession by said Harry A. Nelson; that said defendant took charge of said wood and lumber with the knowledge and consent of the plaintiff, and at her request and with her license; and that all the above mentioned and described proceedings occurred prior to October 1, 1901.

The plaintiff, the first mortgagee, introduced in evidence the following letter, written by himself to the mortgagor: —

"Mr. Harry A. Nelson, Solon, Me.

Dear Sir:

Yours just received and in reply will say, I am willing to do just as I agreed to. You have no note that is due until one year from next March 19th. My interest is all I want and I shall not ask any one to pay for any lumber twice.

I am willing you should cut fifteen or twenty thousand feet of lumber to pay interest, taxes, insurance &c. I shall not make any claims on such amount of lumber cut and hauled prior to Jan. 1st, 1902.

Yours truly, Nira C. Holbrook.

Jan. 29th, 1901.

Skowhegan, Maine."

The verdict was for plaintiff for $125.25.

D. D. Stewart, for plaintiff.

T. J. Young, for defendant.

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

EMERY, J. There was evidence from which the jury might lawfully have found the following facts.

I. The plaintiff, Mrs. Holbrook, held a duly recorded mortgage given by one Nelson on his farm. In January, 1901, there were interest, taxes and insurance remaining unpaid. The plaintiff, in reply to his application, wrote Nelson that she was willing he should

cut fifteen or twenty thousand feet of lumber from the mortgaged land "to pay interest, taxes, insurance etc." This was the only permission ever given. Nelson cut some lumber but instead of applying it to the payment of interest, taxes or insurance, he turned it over to Mr. Greene, the defendant, in part payment of a debt due him, and the plaintiff had to pay the taxes and insurance out of her own funds and had to forego the interest on the mortgage debt. The defendant converted the lumber to his own use.

The mortgage being duly recorded, all persons dealing with the mortgagor, Nelson, were affected with notice of the plaintiff's title as mortgagee and must be held to have known that Nelson could not lawfully, as against the mortgagee, cut and sell lumber from the mortgaged premises without some special authority therefor from her. Such persons, therefore, were bound to inquire into the extent of the mortgagor's authority, and if it was for a special limited purpose as in this case, they were bound to limit their dealings accordingly. Under the limited authority given in this case the defendant gained no title to the lumber by taking it in payment of his claim against Nelson, the mortgagor, and hence became liable to the plaintiff for its value.

II. About May 1, 1901, Nelson, the mortgagor, moved off the premises into another town and left them unoccupied. He practically abandoned them and all intention of redeeming them from the mortgage. On the 28th day of the following June the plaintiff, the mortgagee, having begun proceedings by publication for foreclosure, entered on the premises with a witness for the purpose of taking possession of them under the mortgage.

She posted a written notice of such taking possession, with the date, on the door of the dwelling-house. She did not herself move on the premises nor put any tenant on them, but she arranged with the adjoining neighbor to look after them for her. Nelson, the mortgagor, had left some furniture and farming implements on the place, but the jury could lawfully have found that nevertheless he had abandoned the place to the mortgagee.

Afterward the defendant, sometime in July, converted the grass on the premises to his own use claiming to have authority to do so from Nelson. Nelson having abandoned the premises and the plaintiff having taken possession, he could give no title to the growing grass and the defendant acquired no title from him. The defendant claims, however, that the plaintiff could not acquire possession as against the mortgagor or his assigns without giving him or them personal notice of her entry for that purpose, which she did not do. He also claims that her entry was fruitless as against the mortgagor and his assigns, because she did not retain such an open, visible, actual possession as would suffice to make a title by disseisin of the record owner. Neither of these claims can be sustained. It is not necessary for a mortgagee to give personal notice of his entry to an absent mortgagee who has abandoned the premises; or to his assigns out of possession; nor, having entered and taken possession, is it necessary for him to regard himself as a disseisor and to fortify his possession to that extent. He is not a disseisor, but is holding possession under his legal title and may await acts of disseisin by others before further asserting his title. The only right left to the mortgagor or his assigns is the right to redeem from the mortgage.

III. The defendant complains that the jury appraised the value of the lumber and hay too high. The appraisal does seem to us rather high, and is higher than we would have made, but the jury is the better, as well as the legal, tribunal for such questions of value; and as we see no reason to doubt that the jury's appraisal is their honest, deliberate judgment, we must decline to substitute our judgment for theirs.

Motion overruled.

SEVEN STAR GRANGE No. 73, PATRONS OF HUSBANDRY, in Equity,

vs.

MELVIN R. FERGUSON.

Waldo. Opinion November 30, 1903.

Corporations. Officers, treasurer estopped to deny its existence. *Grange. R. S. (1871), c. 55. Stat. 1876, c. 71.*

1. One who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally organized.
2. One who accepts and exercises the office of treasurer of an association assuming to be a legal corporation, is estopped to deny the capacity of the association to sue him as a corporation for the recovery of property intrusted to him as such treasurer.
3. The fact that an association or corporation has voted to apply its property to the payment of its debts, does not authorize its outgoing treasurer to retain its property for that purpose.

On report. Bill sustained.

The case is stated in the opinion.

R. F. Dunton, for plaintiff.

W. P. Thompson, for defendant.

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

EMERY, J. A number of men, exceeding seven, became associated together at Troy in Waldo County into a Society named "Seven Star Grange No. 73 Patrons of Husbandry." These persons were expressly authorized by chap. 55 of the R. S. (1871), as amended by laws of 1876, chap. 71, to organize themselves into a corporation in the mode therein provided. Some steps were taken by members of the society prior to 1877 to incorporate under that statute, with the same name. Whatever the validity of these steps, the society there-

after held meetings, elected successive treasurers and other officers, passed votes, raised funds and otherwise assumed to be a corporation. Some of these funds were deposited in the Pittsfield National Bank in the name and to the credit of the "Seven Star Grange No 73 Patrons of Husbandry;" and a bank book therefor issued by the bank to the treasurer of the Grange.

The defendant was at one time prior to 1902 elected treasurer of the Grange, and accepted the office, and as such treasurer received and had the custody of the book containing the previous treasurer's accounts and also the bank book above named. In the spring of 1902 another person was chosen treasurer of the Grange, and demanded of the defendant the account book and the bank book, which demand was refused. The Grange thereupon brought this bill in equity to compel the surrender of these books.

In the bill the plaintiff is described as "Seven Star Grange No. 73 Patrons of Husbandry duly incorporated and located at Troy in the County of Waldo." The defendant in his answer denies that the Grange is or ever was duly or otherwise incorporated.

We do not think it necessary to decide the question of the strict legality of steps undertaken for incorporation. Whether duly incorporated or not, the Grange has maintained an existence and organization in fact which the defendant recognized as sufficient when he accepted office under it and took charge of its property as its treasurer. When he is only asked to return that property to the Grange or its new treasurer, he cannot be heard to assert that the Grange had no existence or organization sufficient to make him treasurer or to hold the property intrusted to him as such. He must at least restore the status quo. *Beal* v. *Bass*, 86 Maine, 325. "One who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally organized." *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 478.

The defendant further claims that the money in the bank should be paid to certain creditors of the Grange, and introduced evidence of certain votes of the Grange to the effect that its surplus funds should be paid to certain creditors. There is no evidence, however, that he was ever directed to make such payments, and he is no

longer treasurer of the Grange and cannot draw the fund out of the bank. None of the creditors appears to have obtained any lien on the funds, much less any lien or claim on the bank book itself and the account book; and these two items, the books, are all he is asked to return to the Grange. No reason is shown why he should not do so.

Bill sustained with costs.
Decree to be made according to this opinion.

ALBERT H. BURROUGHS *vs.* ELIZABETH E. CUTTER.

WILLIAM W. CUTTER, In Equity,

vs.

OSCAR H. HERSEY, Admr., and others.

Cumberland. Opinion November 30, 1903.

Will. Power of sale, not exercised. *Equity,* Construction of will. *Jurisdiction,* Multiplicity of suits. *Guardian,* Sales by, void.

1. When an executor is given power in the will to apply the property of the testator to the support and education of a minor child and is authorized to sell and convey property for that purpose, and dies without having done so, the power and authority do not pass to the minor nor to his guardian unless expressly so stated in the will.
2. In this case there was no provision in the will giving such power to the guardian of the minor and hence a sale and conveyance by him of real estate of the testator, though under regular license from the probate court, passed no title.
3. The will in this case having been once construed by the court at the suit of the administrator de bonis non and the rights of the devisees thereunder fully defined, the court declines to entertain a bill by a guardian of a minor devisee to obtain an opinion as to his powers and duties as such guardian.
4. What the guardian shall do with money received by him under a void sale of what he supposed was his ward's estate, is not a question to be determined in a suit for the construction of a will.

5. The fact that several lots of land are claimed under the same title does not alone give the court jurisdiction in equity to determine the title in order to avoid multiplicity of actions. It must further appear that an action at law will not fully determine the question.

See *Purington* v. *Hersey*, 96 Maine, 166.

On report. Judgment for plaintiff in action at law. Bill in equity dismissed.

Real action against a purchaser from the guardian of Marie J. Purington, to recover a lot of land claimed to have been conditionally devised to the demandant, one of the legatees, by the second item of the will of Helen J. Purington, deceased; and bill in equity against Selina Purington, Admr., Solomon Haskell, and Albert H. Burroughs, asking for a construction of the will. The prayer of the bill was as follows:—

"Wherefore to save a multiplicity of suits, your orator prays that the court will construe the provisions of said will, and will particularly determine:

1. "Whether, under said will, such title to these several parcels of real estate described therein vested in said Marie J. Purington as to enable her guardian to sell and convey the same under proper proceedings in the Probate Court, to provide means necessary for the support and education of his ward.

2. "If this question is answered in the affirmative, and if the sale of the Burroughs' lot was otherwise valid, to whom shall the guardian pay the balance in his hands, as stated in the ninth paragraph.

3. "And also determine and state whether any, and if any, what interest or estate under the terms of said will vested in said Dora Purington or her heirs.

4. "And for such further and other relief as the nature of your complainant's case may require and to your Honors may seem meet."

The case appears in the opinion.

F. M. Ray, for plaintiff Burroughs, in action at law.

J. H. Drummond, Jr. and Wm. Lyons, for defendant Cutter, in action at law.

J. H. Drummond, Jr. and Wm. Lyons, for plaintiff Cutter, in equity.

F. M. Ray; Enoch Foster and O. H. Hersey; L. T. Mason and Gorham N. Weymouth; Wilford G. Chapman, for defendants, Hersey, Admr., and others.

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

EMERY, J. The first case is an action at law, a writ of entry, to recover possession of a parcel of land in Westbrook. The second case is a bill in equity to determine the construction of the will of Helen J. Purington deceased. We will first consider the former case, the action at law.

I. The plaintiff shows title as devisee under the will of Helen J. Purington deceased, by the first and second clauses of which the demanded land was devised to Marie J. Purington, her heirs and assigns forever, provided she reached the age of twenty-one years or left issue, and in case she died without issue before arriving at that age, the demanded land was devised to Mr. Burroughs, the plaintiff, in fee. Marie J. Purington died without issue before becoming of age, and hence by the terms of those clauses the demanded land vested in the plaintiff in fee. *Hersey* v. *Purington,* 96 Maine, 166.

The defendant claims title under a sale and conveyance of the demanded land to him by the probate guardian of Marie J. Purington, made before her death and after the death of the testatrix, under a license from the probate court.

If nothing further were made to appear it is clear that such sale and conveyance were futile to divest the plaintiff of his estate under the will, and that judgment must be for the plaintiff. The guardian could convey no more than the ward could, and the ward's estate in the demanded land utterly ceased at her death.

But the defendant goes further and invokes the fourth clause of the will as follows:

"I order and direct my executrix herein named to apply all, or whatever is necessary, of the rents, profits and income of my real and personal estate to the support and education of my said daughter

Marie J. Purington, giving her a high school, and if she desires a seminary or collegiate, education and should the rents, profits and income of my estate, real and personal prove insufficient for that purpose, I order and direct my executrix to first sell the real estate situated on the westerly side of Spring Street in said Westbrook, and after the proceeds of the same shall have been applied to the support, clothing and educating as aforesaid of my said daughter, Marie J.; and should they prove insufficient, I order and direct my executrix to next sell the house and lots situated on Stroudwater Street near the Portland and Rochester Railroad, and should that also prove insufficient, for said purposes, I order and direct my executrix to sell the house and lot situated at the corner of Main and Stroudwater Streets, being the one in which I now live;—and it is my wish and desire, and I so order and direct that nothing contained in the second (2) provision herein made shall prevent, or in any way interfere in, my executrix disposing of the whole of my estate, real, personal and mixed, for the support, clothing and educating as aforesaid of my said daughter Marie J. Purington."

In the second clause of the will the devise to the plaintiff is made contingent on the land not having been sold under this fourth clause. Dora Purington was appointed executrix but had died without having disposed of any part of the real estate of the testatrix under the fourth clause, and before the death of Marie and before the beginning of proceedings by the guardian of Marie to make sale.

Upon the death of Dora, the executrix, did her power or interest in the demanded land, under this fourth clause of the will, pass to Marie, or her guardian, so as to become the subject of a probate sale of real estate? We think not. There is no provision in the will that it should, and we know of no such provision in any statute or rule of law. The testatrix must have intended that some person or persons other than Marie herself, a minor, should dispose of the property and expend the proceeds. In *Clifford* v. *Stewart*, 95 Maine, 41, the will read "I give to my grandchildren one thousand ($1000) to each one, and I wish and direct that this shall be devoted and expended for their education." The grandchildren were minors and the court held they were incapable in law of receiving and apply-

ing the funds for themselves, and that the testatrix must have intended some other person to hold the fund and execute the trust.

The defendant argues that the administrator de bonis non with the will annexed, after the death of the executrix, could not execute the power or hold the interest devised under the fourth clause, since the trust and confidence of the testatrix were reposed only in the executrix, Dora. If this argument be sound then a fortiori the guardian of Marie could not exercise the power and trust so reposed. He is further removed from the testatrix and her estate than is the successor to the executrix.

The defendant argues also that the interest of Dora, the executrix, in the land under the fourth clause of the will was heritable, and that Marie as an heir of Dora inherited half the land upon Dora's death. As already explained, the estate of Dora under the fourth clause, whatever it was, was solely to enable her to execute the trust or power therein conferred, and upon her death was to vest only in such persons, if any, as were empowered to execute that trust or power. Marie, the infant beneficiary, was not empowered by the will or by the law to exercise that power. *Clifford* v. *Stewart*, supra.

The question is mooted who could exercise this power or execute this trust, if not the guardian of Marie? That question does not arise in this case, and hence is not answered. The plaintiff, however, cites upon the point: R. S. (1883), c. 64, § 21; *Clifford* v. *Stewart*, 95 Maine, 46, and other cases in Maine under that statute.

It follows that the defendant took no title from the conveyance to him, and that judgment must be for the plaintiff.

II. The will of Helen J. Purington disposed of her entire estate real and personal. It has been fully construed by this court at the suit of the administrator de bonis non with the will annexed, as reported in *Hersey* v. *Purington*, 96 Maine, 166. In that opinion the estates of all the devisees were defined sufficiently for their guidance and that of the administrator and no further opinion was asked for. The costs of that suit were made a charge on the estate. The present bill is brought by one who is neither administrator, nor devisee, nor even heir. The remaining questions are not between

devisees, nor between administrator and devisees, but only between the heirs or representatives, and grantees of a deceased devisee, and only concern title to real estate. Such questions mooted by persons claiming under such devisees should be determined in an action at law, or under some circumstances by a bill in equity to quiet title. They do not concern the estate of the testatrix and are not within the scope of the statute giving the court jurisdiction in equity to construe a will. *Jackson* v. *Thompson*, 84 Maine, 44; *Hersey* v. *Purington*, 96 Maine, 166; *Burgess* v. *Shepherd*, 97 Maine, 522.

Nor can the bill be maintained under the head of avoidance of multiplicity of actions. So far as appears, one action will determine the question of title finally as between any two claimants or sets of claimants.

Nor can the bill be maintained for the purpose of informing the guardian of Marie J. Purington what to do with the money he received from purchasers under his attempted sales of land. If he is only a stakeholder and is threatened with conflicting suits, he may bring a bill of interpleader against the conflicting claimants. The question is not within the scope of the statute under which this bill was brought.

No other grounds are suggested upon which the bill can be sustained and we think it must be dismissed for want of jurisdiction in equity, but without costs since the respondents have not objected on that ground.

In the action at law judgment for the plaintiff with damages assessed at one dollar.
Bill in equity dismissed.

MARY E. THOMAS, Petitioner, *vs.* EDMUND W. THOMAS, Executor.

Knox. Opinion November 30, 1903.

Costs, Persons entitled. *Parties. Practice. R. S.* (*1883*), *c. 82*, §§ *117*, *124*, *130.*

1. The court has power to admit a defendant in an action at law to appear and file within the first two days of the return term a motion to dismiss the action for want of sufficient service of the writ, even though he declares and notes upon the docket that he appears for that purpose only and for no other purpose.
2. A defendant so appearing and filing such a motion to dismiss becomes thereby a party to the action, and if his motion be sustained and the action dismissed, he is the "prevailing party" and is entitled to costs by force of the statute R. S. (1883), c. 82, § 130.
3. While the decision in a case at law is the act of the court, the judgment following the decision is the act of the law; and the clerk of the court should record the full consequent judgment of the law as well as the decision of the court. When a party is entitled by law to costs as a consequence of a decision of the court, the record should show a judgment for costs.
4. If the clerk of the court omits to record a judgment for costs in such a case, the court has power at any time (certainly upon notice and hearing and in some cases without either), to cause the omission to be supplied and a full proper record made showing a judgment for costs.

Thomas v. *Thomas*, 96 Maine, 223.

Exceptions by plaintiff. Sustained.

Petition for amendment of record in the action reported in 96 Maine, 223, and for costs.

At the December term, 1902, the said Mary E. Thomas, by her counsel, filed a petition asking for a correction of the record of the clerk in that case by including therein a judgment in her favor for costs in the case commenced by Edmund W. Thomas as aforesaid against her. At the April term, 1903, the matter was heard by the presiding justice who ruled as a matter of law that in the case of Edmund W. Thomas, executor, vs. Mary E. Thomas, which was entered as aforesaid at the September term 1901 of this court, and in which no sufficient service was made upon the writ, that the said

Mary E. Thomas, was not a prevailing party within the meaning of the statute, and was not a party to said action, because of the fact that no service of any kind had ever been made upon her, and thereupon denied said petition. To which ruling and denial of said petition the petitioner duly excepted.

The petition and the opinion of the court in *Thomas* v. *Thomas*, 96 Maine, 223, were made a part of this bill, and all facts stated in said opinion considered as if set out as facts in this bill of exceptions.

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

D. N. Mortland, for respondent.

It is plain that Mary never became a party to the action and has no more legal interest in the record than an entire stranger who is not named. Can a person who is not a party to an action, by petition legally ask the court to have the record, in a named case in which he is not a party, amended? Surely not. The record in the case named in the petition is extended and completed. There is no error in it so far as anything that ever took place in court, or appears by any minutes or papers on file. The petitioner in her petition says, that the record "although setting forth the various proceedings in said action, is erroneous and incomplete, in that it does not record a judgment for defendant for costs." I submit, how can that be so? If the record, as the petition states, set "forth the various proceedings in said action" and there were a special judgment or one by force of law for costs, would not the proceeding, minutes and papers on file have shown it? If there were none such was not the record perfect and complete? Can such record now, on petition, be enlarged and new matter inserted aliunde, or entirely outside of the original record by reason of some existing fact, which would call for a new adjudication and a new and enlarged record?

The petitioner asks in substance, not for an amendment but for an addition, upon a new adjudication, and after it has gone off the docket and the record has been extended. We contend there is no law that authorizes such a procedure except it may be a writ of error or on a petition for review. In this case the record has been extended as provided by R. S. (1883), ch. 79, §§ 11 and 12. If it is

correct and is a true recital of the proceedings, it cannot now be amended, enlarged or extended.

"Every entry is a statement of the act of the court, and must be presumed to be made by its dictation, either by a particular order for that entry, or by a general order, and recognized practice which presupposes such an order." *Reed* v. *Sutton*, 2 Cush. 115; *Willard* v. *Whitney*, 49 Maine, 235.

Revised Statutes (1883), c. 82, § 117, provides that "in all actions the prevailing party recovers costs unless otherwise specially provided." Now if one is a prevailing party in an action, he is entitled to costs by force of statute law without any judgment or decree to that effect. But in order to be a prevailing party he must first become a party to the action and subject himself to the jurisdiction of the court. A person cannot, I say, be a prevailing party unless he is a party. This petitioner is not now, and never was a party to that suit, and never subjected herself to the jurisdiction of the court. In *Pomroy* v. *Cates*, 81 Maine, 377, and cases cited therein, the adverse party appeared and became subject to the jurisdiction of the court. Counsel also cited and commented on *Ames* v. *Winsor*, 19 Pick. 247; *Mudgett* v. *Emery*, 38 Maine, 255; *Jones* v. *Sutherland*, 73 Maine, 157.

Costs cannot be allowed and taxed at this time under this process. R. S. (1883), c. 82, § 136; Stat. 1885, c. 362. By failing to appeal from the clerk's taxation, she waived all rights.

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

EMERY, J. Edmund Thomas, Ex'r, sued out from the court in Knox County an original writ of attachment in an action at law against Mary E. Thomas. In the writ she was described as "of Philadelphia, in the State of Pennsylvania, and now commorant in South Thomaston in the County of Knox." Upon this writ the officer made return that he had "attached a chip, &c." and "summoned the said defendant by leaving at her last and usual place of abode a summons for her appearance at court." This writ was

entered at the return term in Knox County, and on the first day of the term counsel for her filed in the action a motion to dismiss it for want of legal or sufficient service. He specified, however, that he appeared in the action only for the purpose of moving to dismiss the action for want of due service of the writ and for no other purpose. No appearance was ever formally entered for any other purpose. The court, however, heard her counsel on the motion to dismiss, and sustained it and dismissed the action. The plaintiff thereupon carried the matter to the law court upon exceptions, where both sides were again heard and the ruling below sustained. *Thomas* v. *Thomas*, 96 Maine, 223. This decision, of course, dismissed and finally disposed of that action in favor of the defendant.

I. In the present proceeding the first question is whether the defendant in that action, thus dismissed after hearing on her motion, became thereby entitled to costs as "the prevailing party," under R. S. (1883), c. 82, §§ 117, 124. It is contended that she was not a "party" at all within the meaning of that term, because she had not been legally served with process, and had not appeared to answer to it. This is equivalent to contending that her declaration (or that of her counsel) that she appeared only to move to dismiss and for no other purpose, barred her from having any standing in court as a party.

We do not think the contention can be sustained. Whatever she or her counsel stated by way of qualification or limitation of her appearance, she did appear in the court and in the action, and was allowed to file a motion in the case and was heard upon it, and the motion was sustained. It has long been the practice in this State to recognize an appearance for such a purpose and to hear and determine the question presented, even though the defendant declares that he appears for that purpose only. It certainly is within the court's power to do so. It is for the interest of the court, as well of the litigants, to have the question of the sufficiency of an attempted service determined in limine. It has been expressly held in some jurisdictions that such was the defendant's right, of which he was not deprived by any attempted limitation of the purposes of his appearance. *National Furnace Co.* v. *Moline Malleable Iron Works*, 18

Fed. Rep. 86; *Lung Chung* v. *Northern Pac. Ry. Co.*, 19 Fed. Rep. 254; *Lyman* v. *Milton*, 44 Cal. 630; *Newton* v. *Woodard*, 9 Neb. 502. We are not aware that the right has ever been questioned in this State though often claimed and admitted.

But this question of right is not necessarily involved here. Whether the court could lawfully have refused to recognize and to entertain her motion until she appeared generally without limitation as to purpose, need not be decided here. Nor is it necessary to decide here whether her attempted limitation of her appearance was of any avail; whether having appeared for any purpose she did not subject herself to the jurisdiction of the court for all purposes. In this case the court, as it had the power to do, did recognize her, did entertain her motion, and heard her upon it without objection, and rendered judgment. If, at the time of this hearing and judgment, the defendant was not a "party" in the action what was she? Why did the court hear her at all if she was not a party to the action? Why did the law court hear her? Was either hearing ex parte? Was there only one party to all these proceedings and that one the party resisting them? It seems clear to us that after the defendant's appearance had been recognized as sufficient to allow her to file her motion and the motion was allowed to be filed, there were then two parties before the court, and those the parties to the action, the plaintiff and defendant. The defendant, by her motion allowed to be filed, tendered an issue in law; that issue was joined and there was a trial of it to the court, and a judgment rendered upon it, which judgment was a final judgment in the action itself. This issue, trial and judgment were necessarily between two parties, the plaintiff and defendant in the action. *Pomroy* v. *Cates*, 81 Maine, 377, 379.

It was suggested at the argument of this present issue that the defendant should be regarded as having appeared as amicus curiae only. But she did not appear as amicus curiae, nor did her counsel. She appeared as defendant, was recognized as defendant, was allowed to file her motion as defendant, and was heard as defendant. The court had the power to recognize and hear her as defendant. The counsel appeared for her and moved on her part, as it was held in *Skillman* v. *Coolbaugh*, 9 N. J. L. 246, he was limited to do, if he

would move at all. Had her motion been overruled and she had excepted as "a party aggrieved," would not the law court have entertained her exceptions?

We think it clear the defendant was a party, that she prevailed, and that the judgment of dismissal in her favor carried costs by force of the statute. We find no cases in this State in conflict with this view. In *Tibbetts* v. *Shaw*, 19 Maine, 204, it was held that the writ itself was void for want of the court seal. The question of costs was not presented and the remark about it was mere dictum. *Hodge* v. *Swasey*, 30 Maine, 162, was a complaint for costs in an action not entered and in which no service was attempted to be made upon the defendant. Cases about costs in petitions for partition are not applicable since a petition for partition is not an action within the purview of the statute cited. *Counce, Petr.*, v. *Persons Unknown*, 76 Maine, 548. In *Mudgett* v. *Emery*, 38 Maine, 255, the decision was simply that the party claiming costs had not prevailed in the action. In *Jones* v. *Sutherland*, 73 Maine, 157, the writ did not contain the name of the plaintiff. There was no plaintiff against whom a judgment could be rendered. *Steward* v. *Walker*, 58 Maine, 279, was a trustee process. No notice of any kind was attempted to be given the principal defendant. He did not assume to appear till several terms after the return term. It was held that he was too late to tender a motion to dismiss. In the opinion the court said: "If called in by a defective notice, he (the defendant) might maintain such dilatory plea as the facts would authorize." In the case at bar the defendant was called in by a defective notice and appeared and filed her motion to dismiss within the time limited for dilatory motions or pleas.

II. Having thus held that the defendant in the action *Thomas* v. *Thomas*, 96 Maine, 223, was the prevailing party in the disposition of that action, it follows that the judgment in that case was also that she recover her legal costs, though no mention of costs was made by the presiding justice who dismissed the action, nor by the law court which overruled the exceptions to that dismissal. The law ex proprio vigore added the recovery of costs to the decision of the court without

any further action by the justices of the court. What the law thus annexed was a part of the full judgment of the law consequent upon the decision by the court, and was to be recorded as the judgment. It was the duty of the clerk in recording the decision of the court to record the action of the statute.

In this case, however, the clerk in recording the judgment after receiving the certificate of the decision of the law court, omitted all mention of any judgment or order as to costs. The defendant seasonably filed her taxation of costs and asked to have them passed upon by the clerk and execution issued, but the clerk refused to consider the application, or issue execution, on the ground there was no judgment for costs.

The record as made up by the clerk does not show any such judgment, and hence the defendant in her petition now before us asks the court to have the record corrected so as to show a judgment for costs as well as for dismissal of the action.

The plaintiff, the respondent here, insists that this cannot be done on motion or petition, even after notice and hearing, but only by writ of error or petition for review. If the error or omission were one made by the court itself then the respondent's contention would have foundation. In this case, however, the error or omission was not that of the court but that of the clerk, a ministerial officer. He did not make up and record the full judgment really rendered. The record he made does not express the actual judgment in full. The court has ample power to correct erroneous or incomplete records to make them exhibit accurately and fully the judgments rendered; certainly upon motion, notice and hearing, and often of its own motion without either. *Lewis* v. *Ross*, 37 Maine, 230, 59 Am. Dec. 49; *Willard* v. *Whitney*, 49 Maine, 235; *Rockland Water Co.* v. *Pillsbury*, 60 Maine, 425; *Balch* v. *Shaw*, 7 Cush. 282; *Frink* v. *Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172.

The presiding justice having ruled as matter of law that this petition could not be sustained on the facts stated, the decision must be,

Exceptions sustained.

ELSIE A. WILBUR *vs.* WILLARD I. WHITE.

Androscoggin. Opinion December 2, 1903.

Master and Servant, Liabilities for injuries to third persons. *Negligence. Independent Contractor.*

1. The relation of master and servant does not exist between the owner of land and a contractor, over whom he has no direction or control, whom he employs to move a certain building without designating the route, the contractor to furnish all the needed means, labor and appliances therefor, for a specified price; their relation is that of employer and contractor, and the land owner is therefore not liable for damages resulting to a third person from the sinking by such contractor of a post or deadman in the highway with a chain and hook attached, used in such removal of the building and left in the highway.
2. The general rule in such cases is that the sub-contractor alone is responsible.
3. Where one employs another to do an act unlawful in itself, he will be liable for an injury caused by such act. *Held;* that the moving of the building in this case and which had been removed and was no longer in the highway did not cause the plaintiff's injury, but that the contractor's negligence in leaving the chain and hook in the highway after the removal of the building was the proximate cause of the injury.

On report. Judgment for defendant.

This was an action on the case wherein the plaintiff alleged, in substance, that the defendant without any authority, license or permission sunk a piece of timber known as a deadman, to which was attached an iron chain and a large iron hook, in the wrought and traveled part of Knapp Street in the town of East Livermore.

The hook and chain attached to the deadman extended from the timber and lay upon the surface of the ground in the street, and the deadman and chain were wrongfully, negligently and without license therefor suffered by the defendant to remain in the street for a long period of time. While traveling on the street the wheel of the plaintiff's carriage was caught by the hook of said chain, thereby

breaking and overturning the wagon and throwing out and injuring the plaintiff.

G. E. McCann and A. L. Kavanagh, for plaintiff.

The plaintiff does not rest her claim to recover solely upon the negligence of the defendant, or his sub-contractor, but upon the unlawful acts of the defendant as principal contractor in moving this building through said public highway, or causing it to be done, and as a direct result thereof causing a public nuisance to be created in said public highway, from which she has, while in the exercise of due care, suffered special damages; also upon the further ground that the thing which the defendant contracted with Clarry to do (move a building through the public highways) was intrinsically dangerous, and that the defendant is therefore liable to respond in damages notwithstanding the intervention of an independent sub-contractor.

It must have been understood by the defendant when he contracted with Clarry, and when he sub-contracted with Walker, that this building was to be moved in the usual way through the public highways of the town of East Livermore.

This large hook attached to the timber in the manner in which it was, and lying in the wrought and traveled part of the public highway, created a most dangerous defect or obstruction therein and consequently was a public nuisance.

Highways are laid out and constructed for the purpose of public travel and not to move buildings through or over. The use of the public highways for that purpose is wrongful. No permit was obtained nor asked from the municipal officers of East Livermore. Such a permit would have been no protection had it been obtained, as the municipal officers of a town have no authority to grant a permit for public highways to be used for such a purpose. *Leavitt* v. *Railroad Co.*, 89 Maine, 519.

Defendant under the circumstances disclosed in this case is liable, notwithstanding the intervention of Walker as an independent or sub-contractor. *Congreve* v. *Smith*, 18 N. Y. 79; *Creed* v. *Hartman*, 29 N. Y. 591; *Chicago* v. *Robbins*, 2 Black (U. S.) 426; *Dygert* v. *Schenck*, 23 Wendell, 446; *Coupland* v. *Hardingham*, 3 Camp. 398;

Woodman v. *Railroad Co.*, 149 Mass. 335; *Veazie* v. *Railroad Co.*, 49 Maine, 119; *Railroad Co.* v. *Morey*, 47 Ohio, 207; *Lowell* v. *Railroad Co.*, 23 Pick. 24; *Conners* v. *Hennessey*, 112 Mass. 96; *Joliet* v. *Harwood*, 86 Ill. 110.

G. D. Bisbee, R. T. Parker; J. H. Maxwell, for defendant.

Every person has by law the right to a reasonable use of the highway, to go on foot, with a team or even to move a building. It is the manner that he exercises this right that determines his liability. *Judd* v. *Fargo*, 107 Mass. 263; *O'Linda* v. *Lothrop*, 21 Pick. p. 297, 14 L. R. A. p. 560, note. Stones, brick, lime, sand and other material for building may be placed in the street provided it is done in the most convenient manner. *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 268; *Com.* v. *Passmore*, 1 Serg. & R. 217.

The street may be used to move buildings through. No license is required from the selectmen before moving the building. Even if required, the procuring of the license was a detail of the moving which it was the duty of the sub-contractor to attend to. If a license had been given to sink the deadman, it would not have protected Walker in leaving it in the street. The want of such a license in no way contributed to the injury.

There is no allegation that the defendant contracted with Walker to move a building through the streets, or that he knew that Walker was to use deadmen or knew of Walker's negligence in leaving the deadman and chain in the street.

The plaintiff's declaration is simply that the defendant himself wrongfully placed a deadman and chain in the street and left it there. And he must prove his case as alleged. There is not a particle of proof to sustain the allegations of the declaration. Our court has said: "The declaration must contain all the allegations necessary to make out the plaintiff's case. In this State the general rules of pleading are simple and must be adhered to." *Bennett* v. *Davis*, 62 Maine, 545; *Shorey* v. *Chandler*, 80 Maine, 411; *Coolbroth* v. *Maine Central R. R. Co.*, 77 Maine, 165.

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

STROUT, J. Clarry made a contract with this defendant to move a building from one site to another, and after its removal to put in a basement and make repairs upon the outside. The means and appliances for the removal, and the route over which the building was to pass were not mentioned in the contract, but were left wholly to the defendant. The defendant before doing anything under his contract made a contract with Walker, by which Walker was to remove the building to the new site, for an agreed lump sum. As in the first contract, the means, appliances and route were left wholly to Walker, who was to furnish all needed materials and labor, this defendant making no suggestion to nor exercising any control over Walker in any matter connected with the removal. The method adopted by Walker was to sink in the highway a stick of timber, called a deadman, and attach to that a chain with a large hook to which was connected a tackle and fall, which, operated by horse power, drew the building along. Walker completed his contract and placed the building on its new site, and was paid by the defendant the contract sum. Clarry paid White the sum he had agreed to pay. The deadman was sunk to the level of the way and in the traveled part, but the chain and hook were above the ground, and were left there by Walker or his servants after the removal of the building had been fully accomplished.

The plaintiff was driving on the way, and apparently the hook upon the chain caught in the wheel of her carriage, and she was thrown out and injured. She claims that the defendant is responsible.

The relation of master and servant did not exist between the defendant and Walker. The latter was an independent contractor, performing his contract in his own manner, and supplying all appliances, and was in no manner under the control or dictation of the defendant. The general rule in such cases is that responsibility for the negligence of such contractor rests upon him alone. *Leavitt* v. *B. & A. R. R. Co.*, 89 Maine, 509, 36 L. R. A. 382.

This is conceded by the plaintiff.

But to the rule there are certain exceptions, one of which is, when a party is discharging a public duty he cannot be freed from his obligation to protect the public by subletting the work. *Lowell* v. *B. & L. R. R. Corp.*, 23 Pick. 24, 34 Am. Dec. 33. Another exception is where one employs another to do an act unlawful in itself, he will be liable for an injury such act may occasion. *Ellis* v. *Sheffield Gas Consumers' Co.*, 2 El. & Bl. 767. Plaintiff claims that this case falls within this exception. The act to be done was the removal of the building from one place to another,—a perfectly legal act. It could be performed without violating any provision of law. The contract did not call for any such violation, nor did it call for the removal over the highway. But even if that was the route anticipated by the parties, as likely to be adopted, it would not necessarily follow that a common nuisance would thereby be created. The size of the building, the width of the way, amount of travel over it, the expedition of the removal, and appliances and motive power employed, were all factors in the determination of that question. The case throws no light upon these.

But the conclusive answer to the plaintiff's claim is, that the moving of the building over the highway was not the proximate cause of plaintiff's injury. The moving had been completed, the building was on its new site, and whether while in the removal it was a nuisance or not, it had been removed before the accident, and was in no sense its proximate cause. Walker or his servants negligently left the chain and hook in the way, after the removal had been fully accomplished, and the hook caused the injury, not the building in the way, or its passage over it. This defendant had nothing to do with placing or leaving the chain and hook in the way, nor was it his negligence or that of his servant in allowing it to remain.

We perceive no principle of law which makes this defendant liable.

A full and exhaustive discussion of the law on this subject may be found in *Hilliard* v. *Richardson*, 3 Gray 349, 63 Am. Dec. 743; *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine, 373, 46 Am. Rep. 400; *Chicago* v. *Robbins*, 2 Black, 418.

Judgment for defendant.

JAMES E. WRIGHT, and others, In Equity,

vs.

WILLIAM J. O'BRIEN, and another.

Sagadahoc. Opinion December 4, 1903.

Equity, Liquor nuisance. *Practice*, bill and petition. Allegation of future illegal use, *R. S. (1883), c. 27, § 1; Stat. 1891, c. 98.*

1. A proceeding in equity, brought under the provisions of R. S. (1883), c. 17, § 1, as amended by ch. 98 of the Public Laws of 1891, to enjoin a liquor nuisance, is to be governed by the general rules of equity procedure. But it is not subject in every respect to the strictness of equity pleading.
2. It is maintainable, although it is not alleged in the bill, that the defendant intends to continue the illegal use complained of.

On exceptions by defendant to overruling a demurrer to a petition in equity.

Petition in equity for suppression of liquor nuisance. Sustained.

The case is stated in the opinion.

F. E. Southard, for plaintiffs.

Counsel cited: *State* v. *McKenzie*, 42 Maine, 392; *State* v. *Hussey*, 60 Maine, 410; *State* v. *Robbins*, 66 Maine, 324; *Carleton* v. *Rugg*, 149 Mass. 550.

H. M. Heath, C. L. Andrews, F. L. Dutton; F. L. Staples, for defendants.

The statute, it is true, defines in the opening sentences the elements of a nuisance and says that upon alleging and proving such facts an injunction may be issued. Strictly and literally construed, it would seem as if the pleader need allege no more than such facts as would show a past illegal use of the building. Such, however, is neither a fair nor reasonable construction of the statute. The legislature did not intend to abolish the rules of pleading surrounding the use of the statute. If the future use is to be restrained, and that is the essential element of the statute, an intention to continue a future illegal

use, well alleged as stated above, should be equally well alleged as to futurity. Such a construction does the public no injustice and is in harmony with the well settled science of equity pleading.

This point was not raised or decided in the adjudicated case in the 96th Maine, p. 559, nor was it raised or decided in the case in 149 Mass. page 550, where the Massachusetts court by a bare majority of one sustained the constitutionality of the law. The court will notice in the Massachusetts case that specific questions were submitted to the court upon the report, and that this was not one of them. We submit it to the court as a question of plain and simple pleading, and it would seem to be not only consonant with the principles of justice, but demanded by the science of equity pleading that the petitioner should allege by proper statements a threatened or intended future illegal use. Otherwise, construing the statute strictly, injunctions are to be issued based wholly upon a past history. While in no sense contending that this would make the statute penal, as contended in *Davis* v. *Auld*, 96 Maine, 559, it would certainly put the court in a position of using this remedy as a quasi punishment. Such was not the intention of the legislature.

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

SAVAGE, J. This is a proceeding in equity brought by twenty disinterested voters, under the provisions of chap. 98 of the Public Laws of 1891, to enjoin the defendant from the further use of certain premises as a liquor nuisance. The case comes to this court on exceptions to the overruling of the defendant's demurrer by the presiding justice below. The bill alleges a past and a present illegal use of the premises. The only point taken in support of the demurrer is that it is not alleged in the bill that the defendant intends to continue the illegal use. It is contended that bills in equity of this class must be framed in accordance with the general rules in equity relating to injunctions against nuisances, and that in bills to restrain an unlawful use of property, it is the rule that it must be alleged and proved, among other things, that the defendant

has threatened such unlawful use or intends to continue an unlawful present use.

This is indeed, a proceeding in equity, and it is doubtless true that it is to be governed by the general rules of equity procedure,— though it may not be, as we shall see, subject in every respect to the strictness of equity pleading. It is regarded as a bill in equity, though it is called a "petition" in the statute. It is likewise true that at common law in case of a private nuisance, or of a common nuisance when the complainant is specially injured, if the nuisance consists in an unlawful use of the property, the party seeking to have it enjoined, should allege and prove that the defendant intends to continue the unlawful use. And there are other things, too, that the plaintiff in such case must allege and prove, as that the threatened injury will be irreparable, or that pecuniary compensation will be inadequate, or that relief is necessary to prevent the multiplicity of suits, or that for some other reason the remedy at law is inadequate.

But this is not the case of a nuisance at common law, and these complainants are not seeking personal relief against a private wrong. The nuisance complained of here is a public nuisance, a common nuisance. It is declared to be so by statute. The proceeding is a statutory one. The statute not only defines what is a nuisance of this sort, but it declares precisely what facts shall be alleged in order to entitle the complainants to an injunction. The injunction may be to restrain, enjoin or abate the nuisance. It is intended not only to restrain or enjoin a future illegal use of the premises, but to abate a present existing illegal use. It is to stop a present use. It could not be employed to prevent a threatened illegal use, unless the present use were also illegal. For, it is a place "used for the illegal sale or keeping of intoxicating liquors, or where intoxicating liquors are sold for tippling purposes," that is a nuisance. R. S. (1883), c. 17, § 1. A place not now so used, but intended or threatened to be so used, is not a nuisance.

The legislature unquestionably had the right to declare such places to be nuisances, it had the right to provide for their abatement by proceedings in equity, *Davis* v. *Auld,* 96 Maine, 559, and it also had the

right to prescribe the facts which it should be necessary to allege in a bill or "petition" for an injunction. It declared that the court should have jurisdiction in equity upon the petition of twenty legal voters "setting forth any of the facts" contained in R. S. (1883), c. 17, § 1. That section declares that a place used for the illegal sale or keeping of intoxicating liquors is a nuisance. The bill alleges that the defendant "now is and for at the least three years last past has been engaged in the illegal sale and keeping for sale of intoxicating liquors in said place." This is certainly an allegation of one of the facts mentioned in the statute. It is an allegation of all that the statute in terms requires. To require more would be to read into the statute language that it does not contain, and to sacrifice substance to an uncalled for technicality. That the legislature did not have in mind the technical requirements of a bill in equity at common law may be inferred, we think, from the use of the word "petition" in the statute, instead of "bill." Petition is a word of more common import and ordinarily is not subject to the niceties of pleading that a bill in equity is.

Exceptions overruled.

DANIEL S. GRAFFAM, Petitioner, *vs.* FANNIE E. COBB, and others.

Cumberland. Opinion December 8, 1903.

Exceptions, Petition for allowance of. *Probate. Appeal*, Time of hearing. *R. S.* (*1903*), *c. 63, § 33; c. 77, § 55. Stat.* 1893, c. 174, § 1. *R. S. Mass.* (1902), c. 173, § 110.

A petition to the law court representing that exceptions alleged by the petitioner in the court below were disallowed by the presiding judge, and asking that the truth of the exceptions may be established before this court, should set forth all the material facts relating to the exceptions and be verified by affidavit.

Such affidavit to verify the petition is not accepted, however, as evidence of the truth of the exceptions, but upon motion of either party a commissioner will be appointed to take the depositions of such witnesses as may be produced on either side.

In this case no motion was made for the appointment of a commissioner to take testimony and no testimony was taken. The only evidence, therefore, which this court can properly consider respecting the rulings complained of in the court below, is found in the copies of the docket entries made at the time of the rulings, and the admissions of the petitioner contained in the several petitions signed by him.

The provision of R. S. (1903), c. 63, § 33, that a petition for leave to enter an appeal from a decree of the judge of probate "shall be heard at the next term after the filing thereof" is directory and not mandatory. It is to be assumed that the legislature was not seeking to control the discretion of the court in the discharge of ordinary judicial functions, but to impress upon the minds of the parties as well as upon the court the importance of an early settlement of all questions of which the probate court has jurisdiction. It must be construed to mean that the petition is cognizable and in order for hearing at the next term after filing, and that the parties are entitled to be heard at that term unless in the exercise of a sound discretion, and in the furtherance of justice, the court for good and sufficient cause shall otherwise order.

There is no evidence in the case having any tendency to show that the order for the continuance given in *Graffam, Admr., Petr.*, v. *Ray et als*, now complained of, was not given in the exercise of the sound discretion of the court and in the furtherance of justice; and, as such, the ruling was not subject to exceptions.

A petition for leave to enter such an appeal is addressed to the discretion of the presiding justice, and his decision is final and not subject to exception. In *Graffam, Guard., Petr.*, v. *Cobb*, the other case, the petition was addressed to the sound judicial discretion of the presiding justice, and it was dismissed by him in the exercise of that discretion. His ruling was not subject to exceptions and for that reason doubtless, the petitioner's exceptions were disallowed.

Petition to establish exceptions. Dismissed.

Petitioner, pro se.

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

WHITEHOUSE, J. This was a petition presented to this court "sitting as a law court" representing that the exceptions alleged by the petitioner in two cases in the court below were disallowed by the presiding judge and asking that the "exceptions may be allowed and a hearing had" by this court.

Section one of chap. 174 of the Laws of 1893, R. S. (1903), c. 77, § 55, is as follows: "If the justice disallows or fails to sign and return the exceptions, or alters any statement therein, and either party is aggrieved, the truth of the exceptions presented may be established before the supreme judicial court sitting as a court of law, upon petition setting forth the grievance, and thereupon, the truth thereof being established, the exceptions shall be heard, and the same proceedings had as if they had been duly signed and brought up to said court with the petition. The supreme judicial court shall make and promulgate rules for settling the truth of exceptions alleged and not allowed."

In this enactment our legislature adopted verbatim section 11 of chap. 115 of Mass. Gen. Stat. 1860, which now appears in section 110 of chap. 173 of the Revised Laws of Mass. 1902. In that state the rule established by the supreme court respecting the procedure under this statute, requires the petition to set forth all the material facts relating to the exceptions and to be verified by affidavit; it also requires a copy of the petition to be delivered to the adverse party ten days at least before the term at which the petition is entered. *Phillips* v. *Hoyle*, 4 Gray, 370, and note. But the affidavit required

by this rule to verify a petition to establish exceptions is not accepted as evidence of the truth of the exceptions. It is the practice in that state, however, upon motion of either party, to appoint a commissioner to take the depositions of such witnesses as may be produced by either party. *Com.* v. *Marshall*, 15 Gray, 202.

Since the enactment of this statute in our State, only two petitions based upon it have been presented to this court, and thus far the court has omitted to "make and promulgate" any rule for "settling the truth of exceptions alleged and not allowed." But as observed by the court in *Hadley* v. *Watson*, 143 Mass. 27, 28, "The right to prove exceptions has always been regarded as strictissimi juris. The purpose of a petition to prove exceptions is to contradict and control the statement of a judge made under his oath of office and his official responsibility. It is fit that, before this court entertains such a petition, some person with a knowledge of the fact should make oath to their truth."

In the case at bar, neither the petition nor the accompanying declaration is verified by affidavit. It is to be observed, however, that the petitioner does not claim to be aggrieved by reason of any mis-recital of facts, or any alteration of statements found in a bill of exceptions that was actually allowed. His complaint is, that each of the two bills of exceptions prepared by him was disallowed as a whole by the presiding judge. Neither of the bills contained any statement of a material fact which could become the subject of controversy in this case, with a possible exception to be hereafter considered. The obvious question in each instance was whether the petitioner was entitled to any exceptions at all to the ruling given. In view of this fact, and of the absence of any provision of statute or rule of court expressly requiring the petition to be upon oath, the entire case has received from this court the same careful examination that it would have received if the petition and accompanying declaration had been verified by affidavit.

At the the October term, 1902, of the supreme judicial court in Cumberland County, this petitioner Daniel S. Graffam entered two petitions to the supreme court of probate under R. S. (1903), c. 63 § 33, for leave to enter appeals from the decrees made by the judge,

of probate for that county in the two cases respectively of *Graffam, Petitioner* v. *Ray et als.* and *Graffam, Petitioner* v. *Cobb,* the twenty days allowed for taking such appeals by section 31, having expired. Section 33 provides that: "If any such person from accident, mistake, defect of notice, or otherwise without fault on his part, omits to claim or prosecute his appeal as aforesaid, the supreme court, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted with the same effect, as if it had been seasonably done; and said petition shall be heard at the next term after the filing thereof." In *Graffam, Petitioner* v. *Ray et als,* the decree sought to be reviewed related to the enforcement of an order of the probate court for the production of books and documents alleged to be material in the discovery of the truth concerning the estate of Elias S. Dodge, of which the petitioner was administrator de bonis non. In *Graffam, Petitioner* v. *Cobb,* the decree complained of required the petitioner to account for a balance found to be due from him as guardian of Fanny E. Cobb.

On both of these petitions notice was duly ordered at the October term of the supreme court, and made returnable at the following January term. The only evidence which this court can properly consider respecting the rulings of the court complained of at the January term, is found in the copies of the docket entries made at the January term, and the admissions of the petitioner contained in the several petitions in the case signed by him. Even if the general allegation in the petition of a fraudulent conspiracy against the petitioner should be deemed material and could properly be considered without a more specific statement of the grounds upon which the charge is based, there is no evidence before this court to substantiate the charge, and no motion was made for the appointment of a commissioner to take testimony for that purpose. Fraud is never to be presumed, but must be clearly proved by competent testimony.

Having recourse then to the docket entries in *Graffam, Admr., Pet'r* v. *Ray et als,* January term, 1903, it appears that on the third day of the term the case was continued until the next April term; that on the fifth day the petitioner filed exceptions to the ruling whereby the case was continued, making reference to the provision

of the statute above quoted declaring that "the petition shall be heard at the next term after filing thereof." On the thirteenth day the exceptions were disallowed by the presiding judge. In his petition to the court asking to have the exceptions "allowed and heard," the petitioner makes the following statement in relation to this order for the continuance of the case:

"Your petitioner requested the court to assign a day for hearing on said petition, and the said court refused until all the answers were filed in court, and claimed that the respondents had three days to file their answers, and your petitioner was asked by the court to come in Thursday morning, and when your petitioner appeared as required by the court, the court claimed that he had assigned that day for hearing, and asked your petitioner if he wanted the petitions continued, but was informed by your petitioner that he had come in to have a day assigned for hearing, and the said court gave your petitioner his choice to have the petition dismissed or continued to the April term, and the said court continued petition No. 155 to the April term against the wishes of your petitioner."

With respect to the purpose and effect of the statute requiring a hearing at the next term after entry, it is quite obvious that the legislature desired to impress upon the minds of the parties, as well as upon the court, the importance of an early settlement of all questions of which the probate court has jurisdiction. But it is familiar experience in the court that, without the fault of either party, circumstances often arise and events occur which render it impossible to have such a hearing at the first term without defeating the object for which this right of petition was given. The time of the hearing was not designed to be of the essence of the privilege granted so as to be a condition precedent to the enjoyment of the fruits of it. The statute was an instruction or direction given for the purpose of insuring a more prompt administration of the law. It must be construed to mean that the petition is cognizable and in order for hearing at the next term after filing, and that the parties are entitled to be heard at that term, unless in the exercise of a sound discretion, and in the furtherance of justice, the court for good and sufficent cause shall otherwise order. It would be unjust to assume that the legislature

was seeking to control the discretion of the court in the discharge of ordinary judicial functions. It did not intend to impose upon the court an imperative duty to order a hearing at the first term even though it should appear that such a ruling would unmistakably work a manifest injustice. Nor is it necessary to impute to the legislature any such purpose. As an admonition to the parties and a direction to the court, the enactment affords full opportunity for the fulfillment of the legislative intention without invading the judicial province. It is more consonant with reason and justice, as well as constitutional law, to construe the statute in question as directory and not mandatory. *State* v. *Smith*, 67 Maine, 328; Endlich on Inter. of Stat. § 431, and note, and § 436, with cases cited; *State* v. *Intox. Liquors*, 80 Maine, 57.

Furthermore, it appears from the petitioner's own statement of facts above quoted that he was not ready for a hearing in *Graffam Petitioner* v. *Ray et als.* at that time appointed by the court at the January term, and was allowed the option of having it dismissed or continued to the April term. Although he says the continuance was ordered against his wishes, it is a fair inference that in the exercise of the choice given him, he preferred to have it continued and not dismissed.

There is no evidence in the case having any tendency to show that the order for the continuance was not given in the exercise of the sound discretion of the court and in the furtherance of justice, and as such the ruling was not subject to exceptions. *State* v. *Damery*, 48 Maine, 327; *Rumsey* v. *Bragg*, 35 Maine, 116.

No exceptions appear to have been taken to the action of the court dismissing the petition at the following April term of the court.

In the case of *Graffam, Guard., Pet'r* v. *Fannie E. Cobb*, the docket entries show that on the third day of the January term, being the next term after the filing of the petition, an answer was filed, a hearing had, and the petition dismissed. To this ruling of the court dismissing the petition, exceptions were "alleged and disallowed." In the bill of exceptions disallowed, it is stated that this petition was "dismissed without hearing by the said court." But as already noted the only evidence relating to this or any other question of fact in the

case, is found in the docket entries introduced by the petitioner and the admissions contained in the petitions signed by him. The terms of the docket entry upon this point are: "Answer filed. Hearing had. Petition dismissed with costs." If it be assumed, therefore, that the action of the court in disallowing the exceptions was influenced by the statement that the petition was dismissed without a hearing, the petitioner's evidence not only fails to "establish the truth of his exceptions," but clearly and effectually disproves the allegation that the petition was dismissed without a hearing.

It is wholly improbable, however, that the exceptions in this case were disallowed by reason of this misstatement of fact. It had been distinctly held in two recent decisions of this court that a petition for leave to enter an appeal from a decree of the judge of probate is addressed to the discretion of the presiding justice, and that his decision is final and not subject to exception. *Sawyer, Pet'r* v. *Chase*, 92 Maine, 252; *Goodwin, Pet'r* v. *Prime*, 92 Maine, 355. The ruling in question did not relate to any question of law which was expressly reserved for the decision of this court. Neither was the presiding judge required to determine the original issue in the probate court respecting the settlement of this petitioner's account as guardian of Fannie E. Cobb. As observed in the opinion in *Goodwin* v. *Prime*, supra: "He was simply to satisfy himself that the petitioner was without fault on his part in omitting to appeal within the statute time, and that justice required a revision of the decree. . . . . The petition was addressed to the judicial discretion of the justice of the supreme court of probate. The law court cannot substitute its discretion for his." Discretion implies that in the absence of positive law or fixed rule, the judge is to decide by his view of expediency, or of the demands of equity and justice. *State* v. *Wood*, 23 N. J. L. 560.

In his petition for leave to enter the appeal the petitioner states as his reason for not seasonably claiming it, that the decree was "issued at a time when your petitioner was in financial distress having been laid off from his work four months without any apparent cause and afflicted with severe sickness in his family, and entirely without means to employ an attorney or to get other aid necessary to enter an appeal

in the twenty days allowed by law." Upon this statement alone the presiding judge might well have reached the conclusion that the omission to take the appeal was not "from accident or mistake," or "without fault" on the part of the petitioner, within the meaning and contemplation of the statute in question. The petition was dismissed by the presiding judge in the exercise of a judicial discretion; his ruling was not subject to exceptions, and for that reason, undoubtedly, the petitioner's exceptions were disallowed.

Petition dismissed.

JOHN J. DIXON, Admr., *vs.* GUSTAVUS SWIFT, and others.

Cumberland. Opinion December 8, 1903.

Negligence, Duty of property owners to employees and visitors.
Licensee, Want of due care.

It is well settled law that owners of property on which dangerous conditions exist, are liable in damages to persons in their employ who are injured thereby, when ignorant of the danger and in the exercise of due care.

In such case persons going upon the property on business of the owner are deemed to do so by an implied invitation of the property owner, who owes them the duty to make their premises and entrance thereto reasonably safe, also to give ample warning of their dangerous condition.

These duties of the property owner are not extended to a trespasser or mere licensee. Such person must take the premises as they are in fact, and he assumes all risk of injury from their condition.

Upon the question whether the plaintiff's intestate, who lost his life by falling into a tank in the defendants' premises and left open by the negligence of their servants, went upon the premises as a trespasser, licensee, or by the defendants' invitation, it appeared that he was not there on any business connected with the defendants; that he had a gratuitous message to deliver to an employee there but having no relation to the business conducted there; that he was calling socially upon his acquaintances, and at best was indulging his curiosity to look over the place where he had been on previous occasions.

Held; that he was a mere licensee, and the defendants owed him no duty except that they should not wantonly injure him; also that the negligence the defendants' servant in leaving the tank, with its heated contents open and exposed, imposed no liability upon them to this licensee, and that the case fails to show evidence of an invitation to the intestate to enter or be on any part of the defendants' premises, or that he exercised due care.

On report. Judgment for defendant.

Action on the case for damages for negligence of the defendants, resulting in injuries to the plaintiff's intestate on the seventh day of October, 1901, which caused his death on the following day.

From the evidence offered by the plaintiff it appeared that the defendants at that time owned, managed and controlled a rendering plant at East Deering, and were in the business of rendering tallow, etc. Their factory was located on the easterly side of Presumpscot Street, and about thirty rods from the street. The premises were unenclosed and an open driveway led from Presumpscot Street to the factory. The engine-house was situated on the northerly end of the factory building and the two were connected by a narrow covered passageway about 7.9 feet wide, from which passageway there were entrances both to the factory and the engine-house. There were doors leading into the passageway both from the easterly and westerly ends. In the passageway were four tanks or vats, three of which were along the southerly side and one directly in front of the door at the easterly end, these tanks being used for the reception of hot fat. The dimensions of the latter tank were 5.66 feet by 3.8 feet, and 3.1 feet in depth, and it was covered by a wooden cover hung on hinges, which, when opened, rested against the northerly side of the passageway. This passageway was in common use for all persons, both employees and others, for entrance to the factory and to the engine-house. There were no signs either at the entrance to the premises, or at the door of the factory, or anywhere on the premises forbidding persons to go there.

On said seventh day of October, Michael L. Quigley, an employee of said defendants, whose duty it was to skim the fat in said vat, opened the cover of the vat for the purpose of skimming it, leaving the door opening into the easterly end of the passageway open, or at least unfastened, and immediately returned to the main building to

perform other work, leaving the open vat and the door unguarded and with no notice on the door, or elsewhere, to warn any person approaching of danger.

At the time when the vat was opened, plaintiff's intestate, William J. Dixon, was on the premises and immediately thereafter started from the stable of the defendants to go into the engine-house and through the covered passageway. Reuben Misener, an employee of said defendants, who was then at said stable, and who was acquainted with the location of the vat in front of the door of the passageway, knew that Dixon was going into the engine-house but gave him no warning of the existence or location of the vat.

As Dixon approached the easterly door of the passageway and was near to it, one Melvin Bell, the engineer of defendants, who was standing on the platform on the easterly side of the building and within six feet of Dixon, and who knew that the vat was open and the door unfastened, spoke to Dixon and at the same time saw that he was going directly toward the passageway, but did not warn him of the danger of entering by said door.

Dixon stepped into the door, stopped and looked into the passageway, but, failing to see the open vat, stepped forward and, at the first step, plunged into the open vat, which was filled or nearly so, with fat heated to a temperature of about two hundred degrees. He died on the following morning from the injuries so received.

Dixon's purpose in entering the premises was to deliver a business message to one Henry Hawkins, the fireman of the defendants and in their employ in the engine-house. This message did not pertain to the business of the defendants but was a message sent by Hawkins' brother through Dixon.

The evidence introduced by the defendants tended to show that Dixon and one Sanborn were merely loafing on the premises when the accident happened. Dixon himself was acquainted with the buildings and in particular with the interior of the passageway. Once he entered the passageway by the westerly door and stood about fifteen minutes while the vats were being skimmed, watching the process; he went up to the Rendering Company now and then in a friendly way. He never worked for the company. Sanborn testi-

fied that Dixon said, when they met on the morning of the accident, "Let's go up to the Rendering Company. I want to see some of the boys up there" and that accordingly he went up there "merely loafing around."

On the day Dixon left Nashua, N. H. for Portland, one Henry Hawkins asked Dixon to take a message to Hank Hawkins; in his own words, "I told him to tell Hank to send me up a barrel or a half a barrel of clams." Hawkins went on to state that clams were sometimes dug by the men on the flats near the Rendering Company.

Misener with whom Dixon talked in the stable for about fifteen minutes testified that Dixon and Sanborn were wandering leisurely about the premises of the Rendering Company with no particular object except to see Hank Hawkins. The defendants further claimed that there was no evidence that either Dixon or Sanborn had, or claimed to have, on the day of the accident any business connected with the business carried on by the defendants at the Portland Rendering Company, but that they went up there merely "to see some of the boys."

F. V. Chase, E. H. Mason, S. L. Hallinan, for plaintiff.

Counsel cited: *Tobin* v. *P. S. & P. R. R. Co.*, 59 Maine, 183, 188; *Sweeny* v. *Old Colony R. R. Co.*, 10 Allen, 368; *Zoebisch* v. *Tarbell*, 10 Allen, 385; *Knight* v. *P. S. & P. R. R. Co.*, 56 Maine, 234, p. 244; *Cooley* v. *Hill*, 93 E. C. L. 556; *Low* v. *Grand Trunk Ry.*, 72 Maine, 313; *Parker* v. *Portland Pub. Co.*, 69 Maine, 173; *Pomponio* v. *R. R. Co.*, 66 Conn. 528; *Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577; *Smith* v. *London & St. Katharine Docks Co.*, 3 Law Rep., C. P. Cases, 327; *Cooley* v. *Hill*, 4 C. B. N. S. 556; *Carleton* v. *Franconia Iron & Steel Co.*, 99 Mass. 216; *Stewart* v. *Harvard College*, 12 Allen, 58, p. 67; *Oliver* v. *Worcester*, 102 Mass. 489, pp. 496, 502; *Barry* v. *New York, Etc. R. R.*, 92 N. Y. 287; *Beck* v. *Carter*, 68 N. Y. 293; *Ryder* v. *Kinney*, 62 Minn. 85; *Engel* v. *Smith*, 82 Mich. 1; *Hydraulic Works Co.* v. *Orr*, 83 Pa. St. 332; *Schilling* v. *Abernethy*, 112 Pa. St. 437; *U. P. Ry.* v. *McDonald*, 152 U. S. 262; citing with approval *Lynch* v. *Nurdin*, 1 Q. B. 29; *R. R. Co.* v. *Stout*, 17 Wall. 657; and *Keefe* v. *Ry. Co.*, 21 Minn. 207; *Bird* v. *Holbrook*, 4 Bing. 628; *State* v. *R. R.*, 52

N. H. 528; *Foren* v. *Rodick*, 90 Maine, 283; *Pollard* v. *M. C. R. R.*, 87 Maine, 55; *Atwood* v. *Bangor, Etc. Ry. Co.*, 91 Maine, 399; *Com.* v. *M'Pike*, 3 Cush. 181; *State* v. *Wagner*, 61 Maine, 178, p. 193; *State* v. *Walker*, 77 Maine, 488; Greenl. Ev. (16 ed.) Vol. 1, §§ 162f-162g.

C. F. Libby, F. W. Robinson and L. Turner, for defendants.

Counsel cited: In *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552; *Low* v. *G. T. R. R.*, 72 Maine, 313, 321; *Plummer* v. *Dill*, 156 Mass. 426; *Redigan* v. *B. & M. R. R.*, 155 Mass. 44; *Cowen* v. *Kirby*, 180 Mass. 504, 506; *Parker* v. *Portland Publishing Co.*, 69 Maine, 173; *Holmes* v. *N. E. R. W. Co.*, 4 Ex. L. R. 257; *Cusick* v. *Adams*, 115 N. Y. 55, 59; *Plummer* v. *Dill*, 156 Mass. 426; *Severy* v. *Nickerson*, 120 Mass. 306; *Fitzpatrick* v. *Cumberland, Glass Co.*, (Sup. Ct. N. J. 1898), 4 Am. Neg. Rep. 193; *Clark* v. *Manchester*, 62 N. H. 577, 580; *Oil Co.* v. *Morton*, 70 Tex. 401; *Lackat* v. *Lutz*, 94 Ky. 287; *Woolwine's Admr.* v. *Ches. & Oh. Ry.*, 36 W. Va. 329; *Moffatt* v. *Kenny*, 174 Mass. 311, 315; *Zoebisch* v. *Tarbell*, 10 Allen, 385; *Victory* v. *Baker*, 67 N. Y. 366; *Benson* v. *Baltimore Traction Co.*, 77 Md. 535, 20 L. R. A. 714; *Reardon* v. *Thompson*, 155 Mass. 472, 474; *Redigan* v. *R. R. Co.*, 155 Mass. 44; *Stevens* v. *Nichols*, 155 Mass. 472, 474.

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

STROUT, J. Defendants were the owners operating a rendering plant at East Deering, and were in the business of rendering tallow, etc. The premises were on the side of Presumpscot Street, and about thirty rods from the street. They were unenclosed, and an open driveway led from the street to the factory. The engine-house was at the northerly end of the factory building, and the two were connected by a narrow covered passageway, seven and nine-tenths feet wide. At its easterly end there was a door five and nine-tenths feet high and two and twenty-five hundredths feet wide. The threshold was one and one-tenth foot from the ground. This door had no latch; it swung outward and was fastened on the inside by a rope

wound upon a nail in the casement. From the southerly side of the passageway a door led to the main building, and opposite that was a door to the engine-room. On the southerly side of the passageway there were four tanks, one of them in front of the easterly door to the passageway, and about one foot distant therefrom; it was a little more than five feet by three and one-half feet in size, and three feet deep. The top of this tank was one and four-tenths feet above the cement floor, and over it was a cover with a hinge, which could be turned up when desired for the purposes of the company. When the cover was down, it was three-tenths of a foot below the threshold of the easterly door.

On the day of the accident, November seventh, 1901, this tank contained about three feet of water, covered by fat, heated to a temperature of about 200 degrees. A few minutes before the accident a servant of defendants had raised the cover of this tank, for the purpose of skimming the fat, and went away to attend to some other business, leaving the cover up and the tank uncovered. While the testimony is conflicting, the weight of evidence is, that the easterly door in close proximity to this tank was then open,—certainly not fastened. No sign or other warning of danger was posted at that door. It was occasionally used by others than servants of the defendants.

William J. Dixon, plaintiff's intestate, went in through this easterly door, and immediately stepped or fell into the tank, and was so badly scalded and burned that he died the following day. Plaintiff seeks to recover damages for the injury.

The conditions existing there at that time were very dangerous. If the deceased had gone there upon business, connected with the company, and was ignorant of the exposed tank, and in the exercise of due care, and had received an injury therefrom, the defendants would unquestionably be liable. In such case, he would have been there by the implied invitation of defendants; and to him they would have owed a duty to make the entrance to their works reasonably safe, or to have given ample warning of their dangerous condition. No duty was owed to a trespasser or mere licensee, save to abstain from wanton injury. Such person must take the premises as they are in fact, and he assumes all risk of injury from their condition. So

held in this State in *Parker* v. *Portland Publishiny Company,* 69 Maine, 173, 31 Am. Rep. 262; *Campbell* v. *Portland Sugar Company,* 62 Maine, 561. We do not understand that the learned counsel for the plaintiff claims otherwise.

The question recurs, whether plaintiff's intestate was there, as a trespasser, licensee, or by invitation of defendants. It is not claimed that he was on any business connected with that of the defendants. He had a gratuitous message to deliver to one of defendant's servants, but it had no relation to the business there conducted. He was a resident of another state, on his vacation at the time. He was acquainted with one or more of defendants' servants employed at the rendering-works, and presumably intended to call upon them socially. At best, he was a mere licensee, indulging his curiosity to look over the plant, where he had been on previous occasions. Toward him defendants owed no duty, except they should not wantonly injure him. The negligence of defendants' servant in leaving that tank, with its heated contents, open and exposed, imposed no liability upon them to this licensee. Nothing appears in the case which can be construed as an invitation to the intestate to enter that door, or to be on any part of defendants' premises. The cases cited by plaintiff, such as *Low* v. *Grand Trunk Railway,* 72 Maine, 313, 39 Am. Rep. 331; *Stratton* v. *Staples,* 59 Maine, 94, and *Campbell* v. *Sugar Co.* supra, were all cases where the party entered by the implied invitation of the proprietor. To such, of course, the duty was owed that the premises should be reasonably safe.

Upon the ground of due care by the intestate, it is difficult to perceive that it was exercised by him. The day was clear and bright; the door was open; the tank cover raised and leaning against the wall, a few inches from the entrance. If he had looked at all, it seems incredible that he would not have seen that open tank, directly in front of him, and about one foot distant. It is argued that the color of the hot fat was so near the color of the greasy cement floor, that he was deceived. That is possible, but it seems improbable.

But upon the ground that he was a mere licensee, to whom no duty was owed, there must be,

Judgment for defendants.

STATE OF MAINE BY INFORMATION OF THE ATTORNEY GENERAL

vs.

TWIN VILLAGE WATER COMPANY.

Lincoln. Opinion December 8, 1903.

Quo Warranto, Against Water Company. *Corporations*, Powers and Franchises. Non-user of same. *Priv. and Spec. Laws, 1893, c. 607; 1895, c. 10.*

The Glidden Water Illuminating and Power Company, subsequently changed to the name of the Twin Village Water Company, was incorporated and authorized by c. 607, Special Laws of 1893, to furnish water to Nobleboro, Newcastle and Damariscotta and their inhabitants for domestic, sanitary and municipal uses, and the extinguishment of fires, and to furnish electric lights for lighting streets in those towns, and to dispose of electric light and power to individuals and corporations.

Besides the necessary power of eminent domain, it was also authorized to contract with the towns, or any village corporation and with other corporations and individuals to supply water or electric light or power.

The act provided that in case no portion of the works of the corporation should be put into operation within two years of the date of the approval of the act, March 28, 1893, "the rights and privileges" granted should be null and void. By an additional act, c. 10, Special Laws, 1895, approved Feby. 1, 1895, the time within which some portion of the work should be put in operation was extended to four years from that date.

On or before Jany. 1, 1897, the company had put in operation its water plant, and has ever since so continued such operation and furnished water to the towns under the charter. It has never furnished electric light or power as authorized by its charter.

Upon information filed by the Attorney General in the nature of quo warranto because of this omission, claiming in behalf of the State that the corporation should be ousted from that portion of its charter which relates to electric lights and power, *held;*

1. As this branch of corporate rights is distinct and separate from the rights as to water, it is competent to render such a decree if the evidence warrants.

2. It was a condition precedent that the corporation should have in operation some portion of its works within the limited time. This it did. It had its water plant in operation within that time. It then became vested with the full chartered powers.

3. The act contemplated that other portions of the works, and of course the duty appertaining thereto, would be further delayed. No time was fixed by the act within which such remaining portion should be put in operation. The law then requires it to be done within a reasonable time.

4. The burden of proof rests upon the State to establish its allegations. There is no evidence of any usurpation by the corporation. Non-action in regard to electricity is all that is shown; nor is the allegation that the defendants prevent the use of streets by any other corporation of any weight. The charter authorizing the use of streets is not exclusive. It does not prevent the Legislature from granting like authority to another corporation.

5. The suspension of the exercise of the franchise for the time it has existed to furnish electric light and power, under the circumstances of the case as they appear in evidence, are not in the opinion of the court sufficient cause to require a decree of ouster.

6. The acts of the corporation, as well as the testimony of its officers, negative the intention to abandon this branch of the company's franchise and give reason for delay. The delay is not wilful in the sense of a disregard of public interests, but because the towns and their citizens did not want and would not take the electricity. The public has not suffered, because the public did not desire the accomodation.

7. Until the towns or their inhabitants, desire electric light and power, the defendant corporation may well be excused from the exercise of its chartered power in that regard.

See *Twin Village Water Co.* v. *Damariscotta Gaslight Co.*, *post*.

On report. Information by Attorney General. Dismissed.

The proceeding by the Attorney General is as follows:—

STATE OF MAINE.

Lincoln, ss. Supreme Judicial Court, April Term, A. D. 1903.

State of Maine.

By information of GEORGE M. SEIDERS, Attorney General,

vs.

TWIN VILLAGE WATER COMPANY.

Be it remembered that on the twenty-ninth day of October, in the year of our Lord one thousand nine hundred and two, George M. Seiders, Attorney General of the State of Maine, comes before the

court in his proper person and by virtue of his office, and in behalf of said State gives the court to understand and be informed that the Twin Village Water Company did on the first day of October, in the year of our Lord one thousand nine hundred and two, usurp and still continues to usurp the following liberties, privileges and franchises, to wit:

In that during the time aforesaid it has exercised the powers, privileges and immunities incident by law to a corporation aggregate, and as such has claimed a franchise to furnish electric lights for lighting streets in the towns of Nobleboro, Newcastle and Damariscotta, and to dispose of electric light and power to individuals and corporations therein, all which liberties, privileges and franchises the said Twin Village Water Company during said time hath usurped upon said State, and still doth so usurp, to the great damage of said State.

And the said Attorney General, by virtue of his office aforesaid, and in behalf of said State, further gives the court to understand and be informed as follows:

1. By chapter six hundred and seven of the Private and Special Laws of Maine for the year one thousand eight hundred and ninety-three the Twin Village Water Company, then known by the name of the Glidden Water Illuminating and Power Company, was duly authorized by the Legislature of Maine to furnish water for the extinguishment of fires and for domestic, sanitary and municipal uses to the towns of Nobleboro, Newcastle and Damariscotta and the inhabitants thereof, and to furnish electric lights for lighting streets in said towns and to dispose of electric light and power to individuals and corporations.

2. That by chapter ten of the Private and Special Laws of Maine for the year one thousand eight hundred and ninety-five the name of said corporation was changed from the Glidden Water Illuminating and Power Company to the Twin Village Water Company, and it was therein provided that in case no portion of the works of said corporation should be put into operation within four years from the date of the approval of said Act, the rights and privileges therein granted should be null and void, and said Act was approved on the first day of February of said year one thousand eight hundred and ninety-five.

3. That prior to the first day of February, one thousand eight hundred and ninety-nine, the said corporation organized under its charter and the amendment thereof aforesaid, and put into operation a portion of its works within four years from the date of the approval of said chapter ten of the Private and Special Laws of the year one thousand eight hundred and ninety-five by building a waterworks plant and by commencing the furnishing of water for the extinguishment of fires and for domestic, sanitary and municipal uses to the towns of Newcastle and Damariscotta prior to the first day of January in the year one thousand eight hundred and ninety-seven, and has ever since continued to operate the said water plant.

4. That the said Twin Village Water Company has neglected since the passage of said chapter six hundred and seven of the Private and Special Laws for the year one thousand eight hundred and ninety-three to furnish electric lights for lighting streets in the towns of Nobleboro, Newcastle and Damariscotta, and to dispose of electric light and power to individuals and corporations therein as by its charter aforesaid provided.

And the said Attorney General gives the court to understand and be informed that the said Twin Village Water Company has long since, to wit: on the thirtieth day of September, in the year of our Lord one thousand nine hundred and two, forfeited all its franchises under its charter aforesaid to furnish electric lights for lighting streets in said towns of Nobleboro, Newcastle and Damariscotta, and to dispose of electric light and power to individuals and corporations therein, together with all the rights, privileges, powers, immunities, liberties and franchises aforesaid thereunto appertaining by law.

(1.) Because he says that by the acceptance of the aforesaid charter and of the franchise therein created so to furnish electric lights and power as aforesaid, the said Twin Village Company became charged with the public duty of furnishing electric lights for lighting streets in the towns of Nobleboro, Newcastle and Damariscotta, and of disposing of electric light and power to individuals and corporations therein, and of thereby serving the public.

(2.) Because the said Twin Village Water Company has neglected and unreasonably refused for a period of more than nine years to

perform its aforesaid public duties under its contract with the State so to do.

(3.) Because the said Twin Village Water Company has wilfully, intentionally and unlawfully refused to perform its aforesaid chartered duties and has abandoned the same.

(4.) Because the aforesaid franchise so to furnish electric lights for lighting streets in said towns of Nobleboro, Newcastle and Damariscotta and to dispose of electric light and power to individuals and corporations therein became the property of the State of Maine on said thirtieth day of September in the year of our Lord one thousand nine hundred and two, when so forfeited as aforesaid, but the said Twin Village Water Company so illegally wrongfully withheld the same from the State since the said thirtieth day of September as aforesaid down to the present day, and has claimed and is still claiming to hold the said franchise as its own, and is illegally and unlawfully preventing the occupation of said streets by any other corporation that might otherwise be lawfully authorized to occupy the same, to the great detriment of the public and in violation of the trusts of its charter, and in wilful perversion of the objects, duties and public obligations thereof.

And the said Attorney General further gives the court to understand and be informed that the foregoing illegal acts and doings by the said Twin Village Water Company done and performed, and the failures and omissions to do and perform the acts by the said charter and Act amendatory thereto required, and the forfeiture of all charter rights consequent thereon for furnishing electric lights as aforesaid for said towns, and notwithstanding the expiration of all charter rights as aforesaid, the said Twin Village Water Company has during all the time since said thirtieth day of September, one thousand nine hundred and two, now last past, usurped and doth usurp from said State the liberties, privileges and franchises following, to wit:

The powers, privileges and immunities incident by law to a corporation aggregate to furnish electric lights for lighting streets in the towns of Nobleboro, Newcastle and Damariscotta, and to dispose of electric light and power to individuals and corporations therein, all which liberties, privileges and franchises the said Company during

said time hath usurped and still doth usurp from said State, to its great damage and injury.

Wherefore the said Attorney General prays the advice of the court in this behalf in the premises, and that due process of law may be awarded against the said Twin Village Water Company in this behalf, to answer to this court by what warrant it claims to use and exercise the powers, privileges and franchises aforesaid.

Dated this twenty-ninth day of October, in the year of our Lord on thousand nine hundred and two.

GEO. M. SEIDERS,
Attorney General for the State of Maine.

(Order of Notice.)

SEAL

Upon the foregoing petition it is ordered, that the petitioner give personal notice to the said Twin Village Water Company of the pendency thereof, serving an attested copy of said petition and of this order of Court thereon thirty days at least before the next Term of the Supreme Judicial Court to be holden at Wiscasset in and for the County of Lincoln on the fourth Tuesday of April, A. D. 1903, that it may then and there appear at our said Court and show cause, if any it have, why the prayer of said petition should not be granted.

LUCILIUS A. EMERY,
Justice, S. J. Court.

Oct. 31, 1902.

(Officer's Return.)

STATE OF MAINE.

Cumberland, ss. November 3d, 1902.

I this day made service of the within petition and order of Court upon the Twin Village Water Company by giving to Herman M. Castner, its President, in hand a copy thereof, said copy being duly attested by Charles L. Macurda, Clerk of Courts for said County of Lincoln.

C. L. BUCKNAM,
Deputy Sheriff.

Answer of Twin Village Water Company Corporation to said Information.

The said Twin Village Water Company Corporation denies that it has usurped on the first day of October, in the year of our Lord one thousand nine hundred and two, and denies further that it does now usurp any liberties, privileges or franchises as alleged in said Information, and asserts that if it has during the time aforesaid exercised the powers, privileges and immunities incident by law to a corporation aggregate, and if it has as such claimed a franchise to furnish electric lights for lighting streets in the towns of Nobleboro, Newcastle and Damariscotta, and to dispose of electric light and power to individuals and corporations therein, it has rightfully done so under power and authority conferred upon it by the Legislature of said State, duly approved.

The said Twin Village Water Company Corporation admits and relies upon the several Legislative Acts set out in said Information of said Attorney General, which are mentioned in paragraphs one (1), two (2) and three (3) thereof, and derives its power and authority to exercise the liberties, privileges and franchises before mentioned, under said Acts, and asserts that it has fully complied with and performed all and singular the conditions imposed upon it by said Legislative Acts.

And the said Twin Village Water Corporation denies that on the 30th day of September, in the year of our Lord one thousand nine hundred and two, it has forfeited all of its franchises under its charter aforesaid, to furnish electric lights for lighting streets in said towns of Nobleboro, Newcastle and Damariscotta, to dispose of electric light and power to individuals and corporations therein, together with all the rights, privileges, powers and immunities, liberties and franchises aforesaid, as specified and set forth in paragraph four (4) of said Information and in the four subdivisions or specifications of said paragraph four (4).

And the said Twin Village Water Company Corporation further asserts and gives this Honorable Court to be informed, that said

Twin Village Water Company Corporation is a corporation chartered by special acts of the Legislature of the State, by chapter 607 of the Private and Special Laws of the State of Maine for the year 1893, as amended by chapter 10 of the Private and Special Laws of the State of Maine for the year 1895, and as further amended by chapter 335 of the Private and Special Laws of the State of Maine for the year 1897, all of which Acts, together with the Act of incorporation set forth in and by ch. 239 of the Private Laws of 1887, being herein referred to, are made and form a part of this answer to said Information, and said Twin Village Water Company Corporation asserts that said Act of Chapter 607 of the year 1893, as amended, was a continuation of said chap. 239 of the Private Laws of 1887, with the addition of the right to furnish electric light in said towns, which addition was necessary because of the inability of the incorporators to finance said company unless by its charter it had the right to furnish lights as well as water in and to said towns.

And the said Twin Village Water Company Corporation further asserts and gives this Honorable Court to be informed, that by said charter the said Twin Village Water Company Corporation is authorized to furnish electric lights for lighting the streets of Nobleboro, Newcastle and Damariscotta, and to dispose of electric light and power to individuals and corporations therein; that said company is further authorized by said charter, for accomplishing the purposes of its incorporation, to lay down pipes, set poles, and extend wires in and through the streets and ways in said towns of Nobleboro, Newcastle and Damariscotta, and to take up, replace and repair all such pipes, poles and fixtures as may be necessary for such purposes; and that it is authorized for such purposes to contract with said towns of Nobleboro, Newcastle and Damariscotta, with the village corporations that may exist, or either of said towns, and with other corporations and individuals; and is by said charter authorized to make, generate, sell, distribute and supply electricity in the towns aforesaid.

And the said Twin Village Water Company Corporation further asserts and gives this Honorable Court to be informed, that the amendment to the charter of the defendant corporation as made by chapter 10, Private and Special Laws of the State of Maine for the

year 1895, among other things provided, "In case no portion of the works of this corporation shall have been put into operation within four years from the date of the approval of this Act, the rights and privileges herein granted shall be null and void;" that the Act containing said clause was approved on the first day of February, A. D. 1895; that the said Twin Village Water Company Corporation began actual operations under said charter and put into operation some portion of its works on or before the first day of January, A. D. 1897, and has ever since said time continued to operate its works under said charter and to perform all duties therein imposed upon it; and that the franchise of said Twin Village Water Corporation now and ever has been in all respects in full force and virtue.

And the said Twin Village Water Company Corporation further asserts and gives this Honorable Court to be informed, that by virtue of its said charter, by virtue of the rights and privileges thereby conferred, the performance of its duties therein imposed, and the laws of the State of Maine, the said Twin Village Water Company Corporation has acquired special and exclusive privileges and rights and is authorized to accumulate, store, sell and distribute water, to make, generate, sell, distribute and supply light in the towns and places aforesaid until such rights and privileges shall be abridged by special act of the Legislature of the State of Maine; that under, by virtue of and depending upon its rights and privileges aforesaid, the said Twin Village Water Company Corporation has expended large sums of money in the development of its plant and property, and in performing and preparing itself to perform and conduct the business which it is, as aforesaid, authorized to do, and the public duties imposed upon it under said charter, and has therefore acquired and has the control of a water privilege and is storing, distributing and supplying water in said towns of Nobleboro, Newcastle and Damariscotta, and has built a power house and other structures sufficient for and with the intention of fulfilling all its purposes aud all business it is authorized to do, and has installed steam power therein; and that the same has been done within the time mentioned in said charter and the amendment thereof, made by chapter 10 of the Private and Special Laws of the State of Maine for 1895, with a purpose and view of exercising

all the rights conferred by said charter and the amendments thereof to the fullest extent; and that in the development of its said plant and the exercise of its rights aforesaid it intends in good faith to conduct all branches of business authorized by said charter and the amendments thereto.

And the said Twin Village Water Company Corporation further asserts and gives this Honorable Court to be informed, that upon the faith of its rights and privileges aforesaid, and secured by a mortgage of its franchise and property, it has issued, negotiated and sold a large number of its bonds; that the value of the franchise and property of the said Twin Village Water Company Corporation is in large part dependent upon its rights as in this paragraph of this answer is set forth, and upon its right and authority to generate, sell, distribute and supply light in said towns of Nobleboro, Newcastle and Damariscotta.

And the said Twin Village Water Company Corporation further asserts and gives this Honorable Court to be informed, that it has in all things done and performed by it, under and by virtue of its rights, privileges, powers, immunities and franchises aforesaid granted, acted in good faith, and has ever been ready and desirous of installing electric lights in the towns aforesaid, but has never been able to obtain any encouragement from the inhabitants of said towns, or either of them, although it has attempted so to do, sufficient to warrant the installing of an electric plant and equipping the same for the purpose mentioned in said charter.

And the said Twin Village Water Company Corporation further asserts and gives your Honorable Court to be informed, that it has complied with every condition precedent, if any, contained in this charter and the amendments thereof, and if there are any conditions subsequent, contained in said charter and the amendments thereof, which this Honorable Court shall find have not been fully performed, this corporation respectfully submits that they are not such as to warrant the Court in sustaining the Information of the Attorney General in this behalf; and the the said corporation respectfully contends that there has been a substantial compliance with and a readi-

ness to perform every condition mentioned in said charter and the amendments thereof on the part of this said corporation, and that it has acted in good faith, not only for the best interests of the corporation but of the public.

And the said Twin Village Water Company Corporation further asserts and gives this Honorable Court to be informed, that at the last session of the Legislature of this State, to wit: in the year 1903, the Legislature acting for and in behalf of the State, had its attention called to the question which is raised by this Information, and the Legislature, after a full examination of the question, refused to act or disturb this corporation in the exercise of the powers, liberties and franchises conferred upon it as hereinbefore set forth.

And the said Twin Village Water Company Corporation further submits that it has reason to believe and does believe that this proceeding was not instigated by the Attorney General of his own motion, and solely out of regard to the rights and interests of said State, but that he has simply allowed his name and office to be used by private parties in bringing this proceeding for their own purposes and for the purposes of competition with the vested rights, liberties, privileges and franchises of this corporation.

Wherefore said Twin Village Water Company Corporation denies that since the thirtieth day of September, in the year of our Lord one thousand nine hundred and two, or at any time, it has usurped, or has ever usurped from said State any liberties, privileges or franchises, or that it doth still usurp the same, but asserts and claims that all the liberties, privileges, powers and franchises exercised by it have been conferred on it by the Legislature of said State, and that all conditions, to the present existence and continuance of all said liberties, powers, privileges and immunities incident by law to a corporation aggregate, to furnish electric lights for lighting streets in the towns of Nobleboro, Newcastle and Damariscotta, and to dispose of electric light and power to individuals and corporations therein, as well as all conditions, to the present existence and continuance of all said liberties, privileges, powers and franchises contained in any of the legislative acts referred to in said Information, or in this answer, have been fully complied with, or if any of them have not

been complied with, the same have been waived on the part of the State.

TWIN VILLAGE WATER COMPANY
By Enoch Foster,
Arthur S. Littlefield, } *Attorneys.*

The plaintiff at the hearing in the court below rested on the information and answer for a prima facie case. After the introduction of evidence by the defendant, the parties agreed that upon so much of the evidence as is legally admissible the full bench were to render such judgment as the legal rights of the parties might require.

H. M. Heath, C. L. Andrews, and F. L. Dutton; H. E. Hall, for plaintiff.

1. The forfeiture of a franchise is not confined to the franchise as an entirety. It was distinctly decided in the *Oldtown Bridge case,* 85 Maine, 17, that there may be judgment of forfeiture of a part of a franchise and of re-seizure into the custody of the State of that portion of the franchise forfeited.

In *Comm.* v. *Sturtevant,* 182 Pa. St. 323, it was decided that quo warranto lies to forfeit the exclusiveness of a franchise as well as to forfeit the entire franchise itself. In the following cases judgment was rendered for ouster of part of the franchise. 84 Cal. 118; 10 Conn. 167; 31 Kans. 454; 43 Pa. 301; 35 Ohio, 264; 26 Ohio, 399.

2. The ground of forfeiture alleged is such long continued non-user of the electric light franchise contained in the respondent's charter as to raise a legal presumption of abandonment.

All charters are granted upon a tacit condition that the grantee shall act up to the end or design for which they were incorporated. Wood on Railroads, Vol. 3, p. 2085. This clearly means within a reasonable time. Territory cannot be occupied by a railroad charter or an electric light franchise perpetually without building, and certainly if not perpetually then the limit must be some reasonable time according to the circumstances of each particular case.

It cannot be controverted that all charters of public corporations contain an implied condition that the corporation will within a reasonable time faithfully execute the purposes of the grant, and that if not

executed the State as the grantor may re-take its grant for condition broken. The following cases hold that it is the tacit condition in every charter that the State may resume its franchise for non-user. *Donald* v. *State*, 48 Ark. 321; *Ward* v. *Farwell*, 97 Ill. 593; *State* v. *Minn. Central Railway*, 36 Minn. 246; *McIntire Poor School* v. *Zanesville*, 9 Ohio, 203; S. C. 34 Am. Dec. 436.

Booth, on Street Railways, § 51, says that a franchise to occupy and use streets for railway purposes may be lost by non-user, and the forfeiture, when not declared by statute or ordinance, may be enforced by proceedings in quo warranto.

Morawetz, on Private Corporations, discusses the question of the power of court to compel the construction of a railroad by mandamus, and holds the better rule to be that no such power exists, upon the ground that forfeiture of the franchise for non-user is a sufficient remedy for the State.

In *Heard* v. *Talbot*, 7 Gray, 119, it was held that non-user or failure to perform the express or implied duties of a charter is a cause of forfeiture.

3. That the Twin Village Water Company has been so financed in the past as to be unable financially to utilize its electric light franchise is no defense.

The court say in *People* v. *Plainfield Avenue Gravel Road Co.*, 105 Mich. 9, that inability to perform its functions, no matter what the reason is, is one of the most potent grounds for forfeiture. The plea of financial disability is a confession.

The court held in *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns. 1, that non-user, abuse or neglect of franchises is cause of forfeiture, their being a tacit condition in every such grant that a corporation shall act up to the end of its institution. So, too, an inability through misfortune to answer the design for which the body politic was instituted is also a cause of forfeiture. In *Penobscot Dam Co.* v. *Lamson*, 16 Maine, 231, it was held by way of dictum that franchise may be lost by any neglect of corporate duty.

4. No question is raised by the pleadings as to parties, but the authorities are uniform that it is unnecessary in a case like this to bring into court any party save the corporation itself.

It is the uniform rule that all parties having an interest in a franchise by way of mortgage, bond, contract, license or title of any kind are bound by causes of forfeiture that happen while the franchise and the duties thereto appertaining are under the control of the corporation.

So decided in *Com.* v. *Turnpike Co.*, 5 Cush. 509, where the court held that the Commonwealth knows no adverse party but the corporation. The court said that all having any pecuniary interest in the loss must use needful vigilance to protect their interests without being made parties. For similar rulings see *People* v. *Globe Mutual Life Insurance Co.*, 91 N. Y. 174; *Silliman* v. *Railroad Co.*, 27 Gratt. 119; *Campbell* v. *Talbot*, 132 Mass. 174.

Enoch Foster and O. H. Hersey; A. S. Littlefield and K. M. Dunbar, for defendant.

Necessary allegations: Thompson Corp. §§ 6608, 6793, 6798; *State* v. *Atchison, etc., R. R. Co.*, 24 Neb. 164, 8 Am. State Rep. p. 181, note. Burden of proof: High Ex. Rem. 2nd ed. § 667, a; Thompson Corp. § 6804.

Failure complained of is a condition subsequent and a liberal construction is to be given; performing as near as possible is sufficient: *State* v. *Real Estate Bank*, 5 Ark. 595, 41 Am. Dec. p. 113. Failure must be wilful: High Ex. Rem. § 648; *Com.* v. *Commercial Bank*, 28 Pa. St. 389; *State* v. *Pawtuxet Corp.* 8 R. I. 188; Thompson Corp. § 6608.

Reasonable allowance must be made for circumstances and conditions: *Commercial Bank of Natchez* v. *State*, 6 Smed. & Mar. 623, 53 Am. Dec. p. 108–9; Thompson Corp. § 6613. Failure to perform the impossible is no ground of forfeiture: *People* v. *Kingston Turnpike Co.*, 23 Wend. 193, 35 Am. Dec. 555. Duty not absolute; public demand for performance an important element: *Com.* v. *Fitchburg R. R. Co.*, 12 Gray, 180, 188–189.

Discretionary powers of the court: *State* v. *Atchison R. R. Co.*, supra; Thompson Corp. § 6617. Forfeitures not favored: *State* v. *Atchison R. R. Co.*, supra.

Abandonment: *Raritan Water Power Co.* v. *Veghte*, 21 N. J. Eq. 463. Legislative waiver: Stat. 1895, c. 102; 23 Am. & Eng.

Ency. Law, 2nd ed. p. 607; *State* v. *Real Estate Bank*, supra; *State* v. *Atchison R. R. Co.*, supra.

This proceeding instituted for private purposes: Thompson Corp. § 6812.

Quo warranto does not lie upon a simple claim of right to a franchise, but only a usurping it: *People* v. *Thompson*, 16 Wend. 654: *Atty. Genl.* v. *Superior & St. Croix R. R. Co.*, 93 Wis. 614; 23 Am. & Eng. Ency. Law, 2nd ed. p. 601; High Ex. Rem. § 602; 17 Ency. Pl. & Pr. 397, note 4; *Chincleclamouche Lumber & Boom Co.* v. *Com.* 100 Pa. St. 438.

Distinction between franchise and powers: *State* v. *Minn. Thresher Mfg. Co.* 40 Minn. 225.

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

STROUT, J. Information by the Attorney General, in nature of quo warranto.

By chap. 607 of the special laws of 1893, the Glidden Water, Illuminating and Power Company was incorporated and authorized to furnish water to Nobleboro, Newcastle and Damariscotta and their inhabitants, for domestic, sanitary and municipal uses, and the extinguishment of fires,—and to furnish electric lights for lighting streets in those towns, and to dispose of electric light and power to individuals and corporations. It was also given the right of eminent domain so far as necessary to accomplish the purposes of the corporation. It was also authorized to contract with the towns or any village corporation, and with other corporations and individuals, to supply water or electric light or power. The Act provided that in case no portion of the works of the corporation should be put into operation within two years of the date of the approval of the Act, which was March 28, 1893, "the rights and privileges" granted by the Act should be null and void. By chap. 10 of the special laws of 1895, amending the act of 1893, the name of the corporation was changed to the "Twin Village Water Company," and the time within which some portion of the works should be put in operation, to preserve the charter,

extended to four years from the date of approval of the Act of 1893. This amendment was approved February 1, 1895, and took effect at that date.

On or before January 1, 1897, the company had put in operation its water plant, and has ever since continued such operation and furnished water to the towns under the charter. It has never furnished electric light or power as authorized by its charter. Because of this omission, the State claims that the corporation should be ousted from that portion of its charter which relates to electric lights and power. As this branch of corporate rights is distinct and separate from the rights as to water, it is competent to render such a decree if the evidence warrants. *King* v. *London*, 2 T. R. 522; *State* v. *Old Town Bridge Corporation*, 85 Maine, 33.

All express conditions contained in the act of incorporation, which are precedent to the right of the corporation to do business, must be substantially complied with before the corporation can exercise its full powers. Express conditions subsequent must also be substantially met, or the corporation will lose its right to continued existence, or the continued exercise of full corporate powers, dependent upon the extent of forfeiture imposed by the condition. *People* v. *Kingston and Middletown Turnpike Road Co.*, 23 Wend. (N. Y.) 193, 205, 35 Am. Dec. 551. In addition to express conditions imposed by the charter, other conditions may be and often are implied, but as to these a somewhat more liberal rule is applied. In this case, the corporation was authorized to supply water and electrical light and power. This authority carried with it the implied obligation to perform all the objects for which the charter was granted, but this duty should be construed with some reference to actual conditions and needs.

It was a condition precedent that the corporation should have in operation some portion of its works, within the limited time. This it did. It had its water plant in operation within the time. It then became vested with the full chartered powers. The Act contemplated that other portions of the works, and of course the duty appertaining thereto, would be further delayed. No time was fixed by the Act within which such remaining portion should be put in operation. The law then would require it to be done within a reasonable time.

The distinction between franchises and powers should not be overlooked. A "franchise" given by Finch, adopted by Blackstone, and accepted by every authority since, is "a royal privilege or branch of the King's prerogative, subsisting in the hands of a subject." To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power,—a privilege or immunity of a public nature which cannot legally be exercised without legislative grant. It follows that the right, whether existing in a natural or artificial person, to carry on any particular business, is not necessarily or usually a franchise. The right given this corporation to furnish electric light and power, aside from the right of eminent domain, authorized a business which was open to any individual, without special legislative grant, and falls within the definition of powers. In these the public have less interest, than in the use or abuse of franchises, in their nature exclusive, and existing only by grant from the State. Non-user or misuser of powers, unless carried so far as to amount to a misuser of the franchise to be a corporation, or so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfils the end for which it was created, are matters for the stockholders, and do not call for interference by the State, nor justify a decree of ouster. *State* v. *Minnesota Thresher Manuf'g Co.*, 40 Minn. 213, an instructive case upon this subject.

The information alleges that by the Act of 1895, defendant's charter was to become null and void, unless some portion of its works were in operation within four years after February 1 of that year. That within that time it had put in operation a water works plant, but that it has failed to furnish electric lights and power, and "has neglected and unreasonably refused" to do so, and has "wilfully, intentionally and unlawfully refused to perform its aforesaid chartered duties, and has abandoned the same," and is still claiming "to hold the said franchise as its own, and is illegally and unlawfully preventing the occupation" of the streets in the towns "by any other corporation that might otherwise be lawfully authorized to occupy the

same," and has "usurped the liberties, privileges and franchises" appertaining to furnishing electric light and power.

The burden of proof rests upon the State to establish its allegations. There is no evidence of any usurpation by the corporation. Non-action in regard to electricity is all that is shown, and that is in no sense usurpation,—nor is the allegation that defendants prevent the use of streets by any other corporation of any weight. The charter, authorizing the use of streets, is not exclusive. It did not prevent the Legislature from granting like authority to another corporation.

There remains only the fact that the corporation has not furnished electric light and power, which is not denied, as the ground for a decree of ouster.

The evidence shows that the corporation, in erecting its works, made provision for generating electricity, and has steam power sufficient to operate its water works and an electric plant, and is desirous of installing the same, and distributing electricity as soon as the towns or individuals are willing to take it and pay a reasonable price therefor, and that it has made efforts with the towns and individuals to that end, but without success thus far, and that it is ready and willing to do so, whenever it can receive reasonable assurance that it can be done upon a reasonably paying basis. They have not wilfully refused to do this business, nor abandoned the idea of doing it.

Is such a suspension of the exercise of the power to furnish electric light and power, for the time it has existed, sufficient cause to require the court to decree an ouster from the power? We think not. In granting the right, it cannot be supposed that the Legislature intended to impose upon the corporation the duty of establishing an electric plant, with all the appliances for its distribution, when neither the towns nor individuals wanted it or would become purchasers. It looked to the future, and it is not improbable that a different feeling may obtain in the towns in the near future. If so, the preparation already made and expense already incurred to that end, will be available to the corporation, which ought at least to have further time and opportunity to fulfill this one of the objects of its incorporation.

In this view we are not without authority.

Abandonment is a question of intention. Non-user is a fact in determining it. "Its weight depends upon the intention to be drawn from its duration, character and accompanying circumstances." *Raritan Water Power Co.* v. *Veghte*, 21 N. J. Equity, 480. Here the acts of the corporation, as well as the testimony of its officers, negative the intention to abandon, and give a reason for delay.

It has not been wilful, in the sense of a disregard of public interests, but because the towns and their citizens did not want and would not take the electricity. The public has not suffered, because the public did not desire the accommodation.

It is said by the court in *State* v. *Pawtuxet Turnpike Corp.* 8 R. I. 188, "It is not every failure to perform a duty imposed that will work a forfeiture." "A specific act of non-feasance not committed wilfully, and not producing or tending to produce mischievous consequences to any one, and not being contrary to particular requisitions of the charter, will not be" ground for a forfeiture. To the same effect are *Attorney General* v. *The Superior & St. Croix R. R. Co.*, 93 Wis. 612; *Heard* v. *Talbot*, 7 Gray, 119. In *Commonwealth* v. *Fitchburg Railroad Co.*, 12 Gray, 180, the railroad had abandoned running passenger trains upon a branch of its road, because the business was insufficient to support them. The court, recognizing the general principle that conferring powers upon railroad corporations to carry freight and passengers, imposed upon them the duty, at reasonable times and for reasonable compensation, to run trains, held that it had qualifications. The court said, "It is clear that the duty required is not more than to meet and supply the public wants. These are measured by the business actually done, or what could be clearly shown would be done, if increased facilities were granted." No "just implication from the powers and privileges conferred upon the corporation require that trains for passengers or frieght should be provided which are not wanted, or which the business upon the road would utterly fail to support." The information asking forfeiture for failure to run passenger trains was dismissed. The reasoning in that case applies with full force to this.

Until the towns of Nobleboro, Newcastle and Damariscotta, or their inhabitants, desire electric light and power, the defendant cor-

poration may well be excused from the exercise of its chartered powers in that regard. When the towns, or their inhabitants, in sufficient numbers to justify its exercise, require or will take the electric light and power, it will be the duty of the corporation to furnish it. This, its officers say, it is ready, willing and able to do. If at that time the corporation fails to supply the demand, it will be derelict in its duty, and an application for ouster may be sustained. Meantime, neither the general public, nor that of the three towns, can suffer inconvenience from the unexercised power held by the corporation. Ouster of the corporation at this time can be of no benefit to any one, but may be a possible, perhaps probable, serious loss to the corporation, and therefore unjust.

The Legislature at its last session, has indirectly expressed an opinion on the subject, when it refused to charter a gas company for Damariscotta and Newcastle.

Information dismissed.

FRED V. MATTHEWS

vs.

WILLIAMS MANUFACTURING COMPANY, and others.

Cumberland. Opinion December 9, 1903.

Contracts, joint and several. *Promise*, express and implied. "*Proportional Share.*"

Inadequate instructions and those that withdraw from the consideration of the jury the evidence relating to the principal question between the parties and upon which the jury should pass, afford grounds for a new trial.

In an action of assumpsit on account annexed for professional services and disbursements the plaintiff declared upon a joint promise of three defendants, one of whom only was served with process or appeared. The defense was that the promises were several. After verdict for the plaintiff against the only party who appeared and defended, exceptions were taken by him to the following portion of the charge of the presiding justice:—

"If the contracts which were made with these three defendants were not alike, were not identical, the joint nature of the contract would be destroyed, and it would become a contract of another kind, and the plaintiff would be obliged to pursue his remedy against each one severally. But if these three defendants employed the plaintiff to attend to the several accounts . . . . and to take measures for expunging the claims of preferred creditors or any other procedure connected with the bankruptcy proceedings, for their common benefit, each to pay his share of the expenses . . . . then I instruct you as matter of law that they would be joint contractors. Some question has been raised as to the understanding or meaning or legal effect of the term 'each to pay his share of the expenses'. And yet, if there were no arrangement as to each paying his share of the expenses, the law would imply such payment as between the joint contractors, under the law of contribution."

Counsel for the defendant, at the close of the charge requested the following instructions: "If the plaintiff proves that he made identical terms with the three parties defendant and it appears that the agreement was that the three parties defendant were each to pay one-third only of the plaintiff's bill, or to share it in any other proportion, it was not a joint agreement, and the plaintiff cannot maintain the action." This the court declined to give.

The instruction complained of declares "as matter of law" that the defendants would be joint contractors if the plaintiff's services were "for their common benefit, each to pay his share of the expenses."

The fact that the services were rendered for their common benefit is not conclusive; and the question whether the liability of the defendants is joint or several may still depend upon the express agreement of the parties, or upon their intention as gathered from all the circumstances of the case. The phrase "each to pay his share of the expenses" is therefore equivocal and misleading.

Held; that taken in connection with the refusal of the presiding justice to give the requested instruction, it necessarily had the effect to withdraw from the jury all consideration of the evidence tending to show a several contract.

Also; that the defendant is entitled to have the jury pass upon the evidence introduced and touching the issue raised by the pleadings in connection with the circumstances and situation of the parties and the nature of the services rendered by the plaintiff, under more explicit instructions respecting the legal effect of a payment by each defendant of "his proportional share" of the plaintiff's charges.

Exceptions by defendant from the Superior Court for Cumberland County. Sustained.

The case is stated in the opinion.

Wilford G. Chapman and Fred V. Matthews, for plaintiff.

Clarence W. Peabody, for defendant.

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

WHITEHOUSE, J. This was an action of assumpsit on an account annexed for professional services and disbursements in the matter of Williams Table & Lumber Company, bankrupts.

The plaintiff declared on a joint promise of the three parties defendant. The defendant Williams Manufacturing Company pleaded the general issue, and under this plea denied the joint promise and claimed that the plaintiff's remedy was by actions against the three defendants severally.

The Dixon-Paddock Lumber Company and H. Lovell & Sons were beyond the jurisdiction of the court, and no service was made on either of them. The plaintiff accordingly discontinued as to each of those defendants and continued as to Williams Manufacturing Company alone.

The jury found a verdict for the plaintiff and assessed damages at $530.47. The case comes to this court on exceptions.

It was not in controversy that the plaintiff rendered certain professional services as an attorney at law in the prosecution of the claims of these three defendants, amounting respectively to $1331, $862, and $3060, against the Williams Table and Lumber Company. It appears that the plaintiff caused proceedings in bankruptcy to be instituted against the company, and an examination of its affairs to be made for the purpose of avoiding certain preferences alleged to have been given by the company. The plaintiff contended at the trial that these services were rendered for the common benefit of all the defendants, and that his employment for that purpose was the result of a joint undertaking on their part, whereby they became jointly bound for each other and each became liable to pay to the plaintiff the whole amount of his account for services thus rendered.

On the other hand, it was contended in behalf of the defense that although the plaintiff's services necessarily inured to the benefit of all the defendants, the employment was by virtue of a several contract with a distinct understanding that each was to pay only his proportional share of the expense, and neither was to become liable for the other.

With respect to this issue there was evidence tending to support the contentions of both parties, and the presiding judge instructed the jury, inter alia, as follows:

"If the contracts which were made with these three defendants were not alike, were not identical, the joint nature of the contract would be destroyed, and it would become a contract of another kind, and the plaintiff would be obliged to pursue his remedy against each one severally. But if these three defendants employed the plaintiff to attend to the several accounts, and to take measures for expunging the claims of preferred creditors or any other procedure connected with the bankruptcy proceedings, for their common benefit, each to pay his share of the expenses,—then I instruct you as matter of law that they would be joint contractors."

"Some question has been raised as to the understanding or meaning or legal effect of the term 'each to pay his share of the expenses.' And yet, if there were no arrangement as to each paying his share of

the expenses, the law would imply such payment as between the joint contractors, under the law of contribution."

At the close of the charge the counsel for the defendant called the judge's attention to that part of it relating to the legal effect of an agreement to share expenses, and requested that the following instruction be given to the jury:

"If the plaintiff proves that he made identical terms with the three parties defendant and it appears that the agreement was that the three parties defendant were each to pay one-third only of the plaintiff's bill, or to share it in any other proportion, it was not a joint agreement and the plaintiff cannot maintain this action." This the court declined to give.

To the instruction thus given to the jury by the presiding judge, and to his refusal to give the requested instruction, the defendant presents exceptions.

The principles of law governing joint and several contracts are elementary and familiar, but with respect to oral contracts, it is often a question of some difficulty to determine whether the particular liability is joint or several. It is undoubtedly a general rule that if two or more persons agree to perform a particular act, in the absence of express words creating a several liability, they will be presumed to bind themselves jointly for the performance of the entire duty, and so become sureties for one another for the thing contracted to be done. 2 Chitty on Cont. (11 ed.) 1353. "Words of express joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right."

"Whether the liability is joint or several, or such that it is either joint or several at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express, and, where they are not express, upon the intention of the parties as gathered from all the circumstances of the case." 1 Parsons on Cont. ch. 11, § 1. It follows that where an implied promise raised by law imposes a liability upon two or more, the liability is joint only. Am. & Eng. Enc. of Law (2nd

ed.) Vol. 7, p. 104; but a contract is never implied by law in place of one which the parties actually make for themselves.

The instruction complained of declares "as a matter of law" that the defendants would be joint contractors if the plaintiff's services were "for their common benefit, each to pay his share of the expenses."

If the services were rendered for the common benefit of all the defendants, and it was the express agreement of the parties that each of the defendants was to pay only his proportional share of the expenses, so that neither would become surety for the other, they would not be joint contractors. But if, as elsewhere stated in the charge, "there was no arrangement as to each paying his share of the expenses, the law would imply such payment as between the joint contractors under the law of contribution," although each of such joint contractors would also be liable to the plaintiff in the first instance to pay the whole amount, with the right to seek contribution from the others. Thus each of the defendants might be liable "to pay his share" either as a joint contractor under the law of contribution, or as a several contractor, under the express agreement of the parties. The fact that the services were rendered for their common benefit is not conclusive, and the question whether the liability of the defendants is joint or several may still depend upon the express agreement of the parties, or upon their intention as gathered from all the circumstances of the case. The phrase "each to pay his share of the expenses" was therefore equivocal and misleading, and the instruction excepted to must be deemed an incomplete and inaccurate statement of the law. Taken in connection with the refusal of the presiding judge to give the requested instruction, it necessarily had the effect to exclude from the minds of the jury all consideration of the evidence tending to show a several contract by which each of the defendants became bound to pay to the plaintiff a proportional share of the expense and no more.

But the plaintiff insists that even if the instruction complained of was not sufficiently explicit as a general statement of the law, the exceptions ought not to be sustained because there was no evidence to warrant the jury in finding an agreement or mutual understanding

for such a several contract between the parties, and the defendant company was therefore not prejudiced by the error.

Mr. Edwards, the former business manager of the defendant Williams Manufacturing Company, first employed the plaintiff, and then appears to have exerted some influence to induce the other defendants to retain the plaintiff for the same purpose. In his testimony as a witness for the plaintiff, he states that he and the plaintiff talked with Mr. Lovell, one of the other defendants, and told him that they "would divide the expenses up together;" and also that they "thought the expense would be less divided up among three parties than it would be for one to go in alone." He further testified that Mr. Lovell agreed that "he would pay his share of it and we would pay our share of it," and repeatedly states in his testimony that Lovell agreed that each was to pay his proportional part, and when asked in that connection if Lovell's account was not nearly twice as large as that of the Williams Manufacturing Company, his answer is "that would be the proportion." Similar testimony is also given by Edwards in regard to his conversation with Mr. Paddock, the other defendant, in which the latter also agreed to retain the plaintiff as his attorney. He further states that he tried to get the plaintiff to say that he would favor the Williams Manufacturing Company as to their share of the expense, because he had secured the retainers for the plaintiff. But he also says "there was to be one bill," that it was a "joint account," and he didn't understand that it would make any difference whether the word "share or proportion was used" or not.

In his deposition, Mr. Paddock states that the plaintiff said "he expected to represent Mr. Lovell as well as the Williams Manufacturing Company, and that by each of us paying our share of his expenses, the expense would be lighter than if each of us hired a separate attorney, and that he was willing to take the claims if the three of us would pay his expenses, for five per cent of the amount he succeeded in collecting."

Mr. Lovell, the other defendant, says in his deposition that the plaintiff told him "that in any case all the expenses would be paid out of the estate, and there would be nothing for him to pay."

It further appears that the plaintiff afterwards wrote a letter to the defendants H. Lovell and Sons requesting a payment of $150 "on account of this case," stating that Mr. Edwards had already advanced him something over $175; and about the same time also addressed a similar letter to the Dixon-Paddock Lumber Company, the other defendant, requesting a payment of $75 on account. It is claimed on the part of the defense, that these demands upon the different defendants for the payment of unequal amounts indicate that at that time the plaintiff considered the agreement a several one and was dividing his charges among the three defendants in unequal proportions.

It may be conceded that this evidence does not conclusively prove the existence of a several liability only on the part of the defendants. It may be susceptible of a construction in harmony with the plaintiff's contention. It is true, also, that the testimony given by Lovell and Paddock in their depositions, tending to show that the plaintiff made different agreements with the several defendants, appears to have been discredited by the jury, for they found in favor of the plaintiff under an instruction that the action could not be maintained unless the agreements with the several defendants were identical. But it is the opinion of the court that the defendant company was entitled to have this evidence considered by the jury, in connection with the circumstances and situation of the parties and the nature of the services rendered by the plaintiff, under more explicit instructions respecting the legal effect of a payment by each defendant of "his proportional share" of the plaintiff's charges.

Exceptions sustained.

WATERVILLE TRUST COMPANY *vs.* CHARLES E. LIBBY.

Waldo. Opinion December 10, 1903.

Bills and Notes. Consideration. Accommodation Paper.

To an action upon a joint and several promissory note signed by the defendant and several other makers, payable to the plaintiff or its order, the defense was that there was no consideration for the note and that it was given as an accommodation for the payee, the plaintiff. The case was submitted to the law court upon a report of the evidence, taken by the presiding justice in the court below, and the parties stipulated that the law court be invested with jury powers and to draw all legal inferences that a jury might, and was to render such decision as the legal rights of the parties might require.

The history of the transactions of which this note was the outcome is lengthy and full of detail and, being stated in the opinion, need not be repeated here.

Held; that there was a full consideration for the note; that it was not given as an accommodation to the payee; and that an action thereon can be maintained against any one of the joint and several promissors.

On report. Judgment for plaintiff.

The case is stated in the opinion.

C. F. Johnson, for plaintiff.

R. W. Rogers and Enoch Foster, for defendant.

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

WISWELL, C. J. This is an action upon a joint and several promissory note signed by the defendant and several other makers. The note was dated January 18, 1900, was for $10,000, payable to the plaintiff or its order, and became due on the twenty-sixth day of February, A. D. 1900. The defense is that there was no consideration for the note and that it was given as an accommodation for the payee, the plaintiff. The case comes to the law court upon a report of the evidence.

The history of the transactions of which this note was the outcome, is very lengthy and full of detail, but the following is a sufficient statement of the facts involved to show the contentions of the parties and the reasons for the decision of the court: For some years prior to his death, which occurred upon Oct. 12, 1899, Mr. Isaac C. Libby was the president of the Waterville Trust Company, treasurer of the Lewiston, Brunswick and Bath Street Railway, and acted as treasurer of an association of individuals known as the Lewiston, Brunswick and Bath Syndicate, which association constructed a portion of the road of the street railway company and remained in possession and in operation of the road until March 1, 1899, both of which corporations and the association are more or less intimately connected with the facts involved in the case.

Sometime in August, 1899, Mr Libby, as president of the Waterville Trust Company, bought for that institution, and with its funds, two notes, each for $10,000, made by Frank O. Squire & Company, payable to and indorsed by John P. Squire & Company and also indorsed by Squire & Company, one of which notes matured upon February 26, 1899. On or about Oct. 7, 1899, the Trust Company became in need of funds and found it necessary to re-discount some of its bills receivable; at that time Mr. Libby was quite sick but was still able to attend to business to some extent and, according to the impression of the treasurer of the Trust Company, drove to the bank on the forenoon of that day, but did not get out of his carriage. However that may be, and there may be some doubt concerning it, in the afternoon of the same day the treasurer of the Trust Company went to Mr. Libby's residence and had an interview with him in regard to obtaining the funds for the Trust Company, by re-discounting $30,000 worth of its notes, made up by the two Squire notes and two other notes of $5000 each. The Trust Company's correspondent in Portland had agreed to discount one of the Squire notes, and its correspondent in Boston had agreed to discount the two $5000 notes. Some little difficulty was experienced in getting the second Squire note re-discounted, although apparently not at all by reason of any question as to the worth of this note. Either Mr. Libby or some one else telephoned to a Savings Bank in Waterville to see

if that bank would take the note, but was unsuccessful in this attempt. Finally an arrangement was made whereby Mr. Libby borrowed the sum of $10,000 of a Waterville Savings Bank upon his own note and collateral, deposited that sum to his credit in the Trust Company, and gave the latter his check for $10,000, less the unearned discount on the Squire note and took that note.

Shortly afterwards Mr. Libby directed his confidential clerk to place that note among the assets of the Lewiston, Brunswick and Bath Street Railway in order to make good any deficiency that there might be in his accounts as treasurer of this latter corporation. The Squire note was negotiable without the indorsement of the Trust Company, and was taken by Mr. Libby without its indorsement and placed among the assets of the railway company without his indorsement. A few days later, on the twelfth of the same month, Mr. Libby died, and within a week or ten days thereafter Mr. S. A. Nye was elected treasurer of the corporation to fill the vacancy thereby caused; a committee was also appointed, of which Mr. Heath of Augusta was chairman, to audit the accounts of the late treasurer and to see if the funds belonging to the corporation were on hand. Their auditing began early in November, 1899, and was as of the first day of that month; upon the completion of their work the committee found that there should be in the treasury in cash something over $57,000; when called upon by the committee to produce this amount, or evidences of it, the new treasurer and the clerk of the deceased treasurer, in the presence of the defendant, presented to the committee bank books showing balances in three banks, to the credit of the corporation, amounting to something over $47,000, precisely $10,000 less than the amount that should have been on hand in cash; at the same time, this Squire note was also produced as a part of the funds of the corporation, so that with this latter note, counted as cash to its face value, the exact amount called for was produced. But the committee, through its chairman, refused to accept this note as cash and as a part of the funds of the corporation, and told the defendant, a son of the deceased treasurer, and who either then had been, or was to be, appointed administrator, with his brother, that this note must be taken up and the cash put in its place. There is

some controversy as to just what reply was made by the defendant at that time, but all of the witnesses agree that Mr. Libby at least said that there should be no trouble about this note, which was still supposed to be perfectly good.

Several conferences took place between Mr. Heath and the defendant in regard to this matter, the former always insisting that this note should be replaced with cash. But nothing was done in that direction until January 18, 1900, when there was a meeting at Waterville between Mr. Heath and the members of the so-called, Lewiston, Brunswick and Bath Syndicate. Up to that time there had never been a final settlement between the street railway company and the syndicate. The former was indebted to the members of the latter in a considerable sum, which, at a previous meeting of the corporation had been determined upon, as well as the method of making a settlement of the same by the issuance and delivery of stock in the street railway corporation to the members of the syndicate. Mr. Heath, acting as counsel for the corporation, had made all of the necessary preliminary arrangements, including obtaining authority to issue new and additional stock, and, on that day, met the members of the syndicate in Waterville for the purpose of completing the settlement in accordance with the arrangement previously made.

Many of the witnesses thought and testified that there was a meeting of the directors of the street railway corporation upon that day, but Mr. Heath, clerk of the corporation and also its counsel, says that there was no meeting of the directors of the corporation upon that occasion, and his means of information upon that subject appear to be better than those of the other witnesses. It is, perhaps, not surprising that there should be some confusion in the minds of these witnesses in regard to this subject, since the members of the syndicate were the active directors of the street railway corporation. At this meeting, which, in accordance with the testimony of Mr. Heath, was for the purpose of effecting a final settlement between the members of the syndicate and the corporation, Mr. Heath representing the corporation and being authorized to carry out the previously arranged settlement, it appeared that the Squire note had not been taken up by the representatives of the Libby estate, but was still held by Mr. Nye, the

new treasurer, as a part of the funds or assets of the corporation. When this fact became known to Mr. Heath, who previously had had reason to believe that the note had been replaced with cash, and had so reported to the corporation, he refused to proceed further in the settlement until this matter was arranged and until the sum of $10,000 in cash was paid into the treasury of the corporation, to make good the deficiency in the accounts of the late treasurer.

Previous to this, on December 23, 1899, all of the parties upon the Squire note having failed and made an assignment on the fifteenth of that month, the executive committee of the directors of the Trust Company passed this vote: "At a meeting of the directors of the Waterville Trust Company it was voted to assume any loss that might be sustained on the $10,000 note of Frank O. Squire & Co., dated August 26, 1899, on six months time, indorsed John P. Squire & Co. and Squire & Co., that our late president, I. C. Libby took out of the bank and placed therein the proceeds expressly and solely on account for and in the interests of the bank as an accommodation."

After more or less negotiation and conference between Mr. Heath, representing the street railway company, and the representatives of the Libby estate, and their counsel, which was also participated in by the treasurer of the corporation and various members of the so-called syndicate, an arrangement was made whereby Mr. Nye, the treasurer, some of the other members of the syndicate, the defendant and his brother and co-administrator, Arthur P. Libby, made and signed the note in suit running to the Waterville Trust Company for $10,000; thereupon they had this note discounted by the Trust Company, Mr. Arthur P. Libby paying the discount, and received that sum of the Trust Company which was placed to the credit of the street railway corporation, thereby making good in the treasury of that corporation the amount of money required. At the same time the makers of this note received from the treasurer the Squire note and left it with the Trust Company as collateral for the note in suit. Both the principal note and the collateral note matured upon the same day. This sum having been placed to the credit of the corporation, the parties proceeded to carry out the terms of the settlement.

The defendant claims that he was induced to sign this note by reason of the vote of the executive committee of the directors of the Trust Company, above quoted, and also by reason of representations that were made at the time of giving the note by some of the gentlemen who were members of the syndicate and who were also members of the executive committee of the Trust Company; that the Squire note all the time belonged to the Trust Company, and that any loss thereon fell upon the Trust Company and had been assumed by it, and that the note in suit was only given as a temporary expedient in order that the bank might have something to show for the money borrowed until the maturity of the Squire note, and was therefore simply an accommodation for the Trust Company.

We think that the decision of this case depends upon the determination of the question as to whether or not Mr. Isaac C. Libby, on October 7, bought this Squire note of the Trust Company, taking it without the indorsement of the latter, or whether the transaction was a loan by him to the Trust Company, the Squire note being taken as evidence of that loan and as security for it. Because, notwithstanding the vote of the executive committee, it is evident that neither this committee nor the directors of the Trust Company had the power or authority to gratuitously and needlessly assume for the bank a liability which did not previously exist. If the Squire note was sold to Mr. Libby on October 7, without the indorsement of the Trust Company, and without any contingent liability upon the part of that company, then the directors, after the failure of the maker and indorsers of this note, could not assume for the Trust Company a liability which did not previously exist. The attempted voluntary assumption of such a liability or loss, under these circumstances, would be precisely equivalent to making a gift from the funds of the institution to the person upon whom the loss in fact fell, which, it is needless to say, is beyond the power of the directors of a financial institution. These principles are so fundamental and well settled that they do not need the support of authorities; a discussion, however, of the subject may be found in Morse on Banks and Banking, section 127. But if, upon the other hand, this note was simply taken by Mr. Libby as evidence of and collateral for a loan made by

him to the Trust Company, then the vote relied upon was authorized, and, in fact, the latter would have to assume any loss that might occur on the Squire note without such a vote.

Nor is it important to determine as to what statements or representations were made by the directors of the Trust Company at the time the note in suit was given, because at that time these gentlemen were not assembled in a meeting of the board of directors or executive committee of the bank, and were not even acting in the capacity of directors, but they were present as members of the syndicate attending to business matters which concerned their individual interests and were acting solely in their own behalf.

A careful consideration of all of the testimony and of all of the circumstances bearing on this transaction satisfies us that on October 7, 1899, Mr. Libby bought, and thereafter became the owner of, the Squire note. The treasurer of the Trust Company so testifies; he says that he suggested indorsing it but that Mr. Libby replied that he did not care for the bank's indorsement, saying that the note was perfectly good and that by taking it without indorsement it would lessen the amount of bills re-discounted which would show upon the bank's books. This testimony is uncontradicted, except that the clerk of Mr. Libby thinks he was present during the transaction and heard no such conversation. Mr. Libby paid to the Trust Company the precise amount of the then present worth of the note; he received for himself out of the transaction the unearned discount on the note, amounting to $191.66. If he had intended to make a loan to the Trust Company for the purpose of temporarily relieving it while in need of funds, it does not seem to us that it would have been natural for him to have done this. Again, after the transaction, he treated the note in all respects as if it were his own property and not as collateral received as security for a loan; he instructed his clerk to place it among the cash assets of the street railway corporation in order to make good a shortage of cash of exactly that amount in his account as treasurer; this was done and was thereafter held by him as treasurer, and by his clerk for him, during the few days thereafter that he lived. After the election of the new treasurer the note was turned over to him, with the knowledge of the defendant, and

held by him until January 18, although as he claims, it was taken by him temporarily with the promise or understanding that it should be taken up by the Libby estate, but however, this may be, it is immaterial, because it is clear that the new treasurer had no authority to accept this note as a portion of the cash required in the treasury.

The only argument against this conclusion is the alleged unreasonableness of the proposition that Mr. Libby should purchase this note with funds that he was obliged to borrow at the time, and without the chance of profit to himself. But in answer to this, it must be remembered that he was the president of the Trust Company, and on that account largely interested in its welfare, that he himself had purchased this note for his company only a short time before, and that all concerned supposed the note was of undoubted value and would be paid at its maturity in the month of February following.

Our conclusion being, for the reasons given, that Mr. Libby bought the Squire note without requiring the indorsement and consequent contingent liability of the Trust Company, it follows, that on the 18th day of January, when the note in suit was given, the Libby estate was indebted to the corporation to the amount of $10,000, and the estate owned the Squire note which had been temporarily placed in the treasury of the corporation as security for that indebtedness. Consequently, when the defendant and others gave the note in suit to the Trust Company, and obtained thereon the full amount of the note, less the discount, which was used for the purpose of paying the indebtedness due from the Libby estate to the railway corporation, the makers of the note received and the Trust Company parted with a full and ample consideration for the note, and the Libby estate paid its indebtedness to the corporation, payment of which could have been undoubtedly enforced by the corporation if it had not been thus satisfied.

We have seen that the vote of the executive committee of the Trust Company, under the facts found by the court, does not afford a defense to this action, because that vote was unauthorized and void. Nor can the defendant successfully defend upon the ground that he signed the note in suit relying upon this vote, and that the plaintiff is

now estopped to deny its validity or the authority of the executive committee to pass it. Because he was, as he says, a member of that committee, he was in possession of at least as much knowledge in regard to the transaction as were any of the members of the committee; in fact, two of the members of the committee testified that the vote was passed because of the representations of the defendant's co-administrator, and that it was through inadvertence that the Squire note was not indorsed when taken by Mr. Libby. The defendant is presumed to have known that the passage of this vote was beyond the power and authority of the executive committee, if the note was bought by his father.

We, therefore, find that there was a full consideration for the note, that it was not given as an accommodation to the payee, and that an action thereon can be maintained against any one of the joint and several promissors.

Judgment for plaintiff for $10,000 and interest from Feb. 26, 1900.

JENNIE A. MUNRO, in Equity, *vs.* SOPHIA M. BARTON, and another.

Knox. Opinion December 10, 1903.

Mortgage, Right to redeem barred. *Adverse possession. Limitations.*

If a mortgagee is permitted to take and hold possession of the mortgaged premises for twenty years after the debt becomes payable to the exclusion of the mortgagor and in denial of his rights, without accounting and without admitting that he holds only as mortgagee, the mortgagor's right of redemption is barred and the mortgagee's title becomes absolute.

It is obviously the adverse character of the possession, however, and not the mere fact of possession by the mortgagee for twenty years that will operate to convert the mortgage into an absolute one. Twenty years' possession by the mortgagee after condition broken may raise a presumption of foreclosure, but it is by no means conclusive. It is the nature of the mortgagee's occupancy which determines the question of the mortgagor's right to redeem. To constitute a bar to such right it must appear that the mortgagee's possession is unequivocally adverse to the mortgagor, or to those claiming under him.

Held; that the possession of the defendants, and those under whom they claim, has been marked by all the characteristics of adverse possession and has been so open, notorious, exclusive and uninterrupted for more than forty years, that the plaintiffs and their predecessors in title as well as all others interested, must be presumed to know that the occupation was not in subordination to the title of the mortgagor, but in the assertion of an absolute title by the defendants in themselves.

See *Munro* v. *Barton,* 95 Maine, 262.

On report. Bill dismissed.

This was a bill in equity brought by the plaintiff to redeem certain land, located in the town of Vinalhaven, from the defendants. The bill was so amended, by agreement, at nisi prius, after the decision in 95 Maine, 262, as to account for the one-eighth of the premises not claimed by the plaintiff, and by joining Watson V. Barton, the husband of the defendant, who holds, in one acre of the described premises, the same rights which his wife holds in the remainder.

Both plaintiff and defendants claimed title under William Brown. The title of William Brown was derived from Thomas Brown, by deed of December 26, 1835, which was recorded in the registry of

deeds for the County of Hancock, upon December 28, 1835. William Brown mortgaged the premises to Timothy Fernald, to secure the sum of $65.00, payable in one year, with interest. This mortgage was also recorded in the Hancock registry. After a controversy had arisen between the plaintiff and defendants, on September 27, 1894, it was recorded in the Waldo registry. This mortgage was on February 14, 1845, assigned to Reuben Leadbetter, by assignment recorded in the Waldo registry on Jany. 16, 1846. Reuben Leadbetter attempted to begin a foreclosure of the mortgage, by peaceable entry in the presence of two witnesses, on the 9th day of January, 1846, the certificate of the same being recorded in the Waldo registry, on the 16th of Jany. 1846. Upon the same date as the assignment, Timothy Fernald made a warranty deed of the premises to said Leadbetter. Reuben Leadbetter made a warranty deed of the premises on January 10, 1853, to Dennis Conway. The defendants claimed through mesne conveyances from Dennis Conway. The plaintiff claimed through conveyances from the heirs of William Brown, under a deed from her father, William H. Brown, one of the heirs of William Brown, who had, prior to the conveyance to the plaintiff, received conveyance of the interest of all the other heirs except the one-eighth interest. The plaintiff claimed a right to redeem from the mortgage. The defendants set up a foreclosure of the mortgage, and further set up a right by adverse possession for a period of more than twenty years.

The case appears in the opinion.

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

J. E. Moore, for defendants.

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

WHITEHOUSE, J. This is a bill in equity brought to redeem a mortgage of certain real estate situated in the town of Vinalhaven, given by William Brown to Timothy Fernald December 28, 1835, and recorded in the registry of Hancock County, which then comprised the town of Vinalhaven. The original bill was dated March

12, 1895, and the subpœna served on the defendant Sophia M. Barton, February 25, 1896. By agreement of the parties the bill was amended, after it was filed in court, by inserting an allegation respecting the ownership of the one undivided-eighth part of the mortgaged premises not represented by the plaintiff, and also by making the defendant's husband, Watson V. Barton, who holds title to one acre of the premises described, a party to this bill. The cause was reported for the consideration of the law court on bill, answer and proof. In her bill the plaintiff offered to pay what should be found due upon the mortgage, but there was "neither allegation nor proof of any prior tender of payment or performance, nor of any demand upon the mortgagee, or persons claiming under him for a true account of the sum due upon the mortgage and a neglect or refusal on his or their part to render such account" as required by statute. Nor were there any averments in the bill showing that a tender could not be made, or that the defendant in any way by her default had prevented the plaintiff from performing or tendering performance of the condition of the mortgage. Under these circumstances, it was held by the court that the bill could not be maintained (95 Maine, 262) and the cause was thereupon remanded for any amendment to the bill respecting "tender or demand and refusal to account" which the facts might warrant. An amendment setting forth a demand and refusal to account has been duly filed, and the cause is now before the court a second time on report for final decision upon the merits of the cause.

At the date of the mortgage in question the premises conveyed consisted of thirty acres of unproductive land, only a small patch being under cultivation, and a slab-roofed cabin or "shanty" upon it about fourteen feet square. William Brown acquired title to the place for $65.00 by deed bearing date December 26, 1835, and both parties derive title from him. Wm. H. Brown, one of the four children of Wm. Brown, acquired title to five-eighths of it by purchase from the other heirs and then made a voluntary conveyance of his entire seven-eighths to this plaintiff, his daughter, who then bore the name of Jennie A. Tolman. The defendant derives title through several mesne conveyances from the mortgagee of William Brown. It has been seen that William Brown's mortgage to Timothy Fernald

was dated December 28, 1835, only two days after the date of Brown's deed of purchase, and was given to secure the payment of $65.00 and interest in one year from that time. This appears to have been the entire consideration of the deed to Brown and the mortgage was doubtless given as a part of the same transaction for the purpose of raising the money to purchase the place. Timothy Fernald, the mortgagee, assigned the mortgage to Reuben Leadbetter by an assignment bearing date February 14, 1845, but not acknowledged until December 30, 1845, and recorded January 16, 1846. On the same day (February 14, 1845) Fernald gave to Leadbetter a warranty deed of the place in consideration of $50.00. He also commenced proceedings for a foreclosure of the mortgage by making peaceable entry upon the premises in the presence of two witnesses January 9, 1846, and recording a certificate of the fact in Waldo County, to which Vinalhaven had been set off in 1838. January 10, 1853, Leadbetter conveyed the property to Dennis Conway by warranty deed for the same consideration of $50.00. December 31, 1873, Dennis Conway conveyed one acre of the lot to Hannah S. Brown, who conveyed the same to the defendant Watson V. Barton, November 26, 1892. August 13, 1875, Dennis Conway gave his son, Rufus Y. Conway, a warranty deed of the residue of the place in consideration of $300. September 18, 1885, Rufus Y. Conway conveyed by warranty deed to Lane and Libby, and May 12, 1886, Lane and Libby conveyed to the defendant Sophia M. Barton; each of the two deeds last named being for the consideration of $300.

In their answer the defendants, in the first place, interpose the alleged foreclosure as an insuperable obstacle to the maintenance of the plaintiff's bill to redeem the property from the mortgage; and secondly, if by reason of the fact that the certificate of entry was recorded in Waldo County instead of Hancock, or for any other cause, the court should hold the proceedings for foreclosure invalid and ineffectual for the purpose, the defendants insist that the plaintiff's right to redeem is conclusively barred by the adverse possession of the premises on the part of the defendants and their predecessors in title, not only for more than twenty years, but for more than forty years prior to the date of the plaintiff's bill to redeem.

Subsequently the defendants also filed a plea of res judicata because of a former judgment in favor of the defendant Sophia M. Barton in the real action brought by this plaintiff to recover possession of the same premises.

In *McPherson* v. *Hayward*, 81 Maine, 336, the court say: "No question of laches arises under a bill to redeem a mortgage. The duration of the mortgagor's right to redeem is clearly defined by law, and one the court cannot abridge, or enlarge by a single day. The right continues indefinitely, until barred by some process of foreclosure, or by twenty years' adverse possession of the land by the mortgagee." But it is undoubtedly a settled rule in this State that if the mortgagee is permitted to take and hold possession of the mortgaged premises for twenty years after the debt becomes payable to the exclusion of the mortgagor and in denial of his rights without accounting and without admitting that he holds only as mortgagee, the mortgagor's right of redemption is barred and the mortgagee's title becomes absolute. *Roberts* v. *Littlefield*, 48 Maine, 61; *McPherson* v. *Hayward*, 81 Maine, 329; *Frisbee* v. *Frisbee*, 86 Maine, 444. It is obviously the adverse character of the possession, however, and not the mere fact of possession by the mortgagee for twenty years that will operate to convert the mortgage title into an absolute one. Twenty years' possession by the mortgagee after condition broken may raise a presumption of foreclosure, but it is by no means conclusive. It is the nature of the mortgagee's occupancy which determines the question of the mortgagor's right to redeem. To constitute a bar to such right it must appear that the mortgagor's possession is unequivocally adverse to the mortgagor, or to those claiming under him. 2 Jones on Mort. 1144—1156; *McPherson* v. *Hayward*, 81 Maine, supra. "The general rule in equity," says Judge Story, "is that twenty years' exclusive possession by a mortgagee is a bar to the equity of redemption. The exceptions are where there have been during that period acts done, or solemn acknowledgments made by the mortgagee, recognizing the title as a mere mortgage." *Dexter* v. *Arnold*, 3 Sumn. 152.

In the case at bar it is not in controversy that the mortgagor William Brown, having made default with respect to the payment of

both the principal and interest of the mortgage debt, left the place in March, 1842, and took up his residence in Rockland. It is not in controversy that neither he nor any of his heirs ever afterward had the personal occupation of these premises. There is testimony from William H. Brown, son of the mortgagor, and father of the nominal plaintiff, that the place was afterward occupied a short time by his uncle, but the defendant's evidence shows that after Wm. Brown left in 1842, the place remained unoccupied until December 22, 1845, when it is admitted Dennis Conway entered into actual occupation of it. The plaintiff contends that Conway's possession commenced under an arrangement with Wm. Brown, and introduces the testimony of Wm. H. Brown purporting to show that in 1845, when he was ten years old, he heard his father say to Dennis Conway that he could have the place until he wanted it himself if he would keep the taxes paid on it. This witness also testifies that he heard another conversation in 1854 between his father and Conway in which the latter stated that he had kept the taxes paid on the place and inquired if his father wanted it. He further states that he had a personal interview with Conway in 1875 in which Conway referred to his occupation of the place and said his father had been very kind to him in allowing him "to live on the place for just keeping the taxes paid." Another brother, Samuel P. Brown, seeks to corroborate Wm. H. Brown as to the conversation with Conway in 1875, and Samuel Pease claims to have heard the conversation between Wm. H. and Conway in 1875. Oscar Rokes and Harriet Rokes also testify that they heard Conway say in 1871, or 1872, that he went on to the place to have the use of it for paying the taxes.

Under such circumstances the plaintiff contends that, although Dennis Conway may subsequently have asserted title in himself by virtue of his warranty deed from Leadbetter in 1853, his possession having originated under an express arrangement with the mortgagor could not become adverse to him without distinct notice to him of his denial of the mortgagor's title and assertion of absolute title in himself. And such is undoubtedly the law. *McPherson* v. *Hayward*, 81 Maine, supra; *Quint* v. *Little*, 4 Maine, 495; 2 Jones on Mort. 1152.

But the defendant denies that Dennis Conway ever occupied the place under William Brown, and insists that the plaintiff's testimony tending to show any such arrangement by the oral admissions of Conway is so utterly inconsistent with the record evidence, with the undisputed conduct of all the parties during the forty years prior to the filing of this bill, and is so overborne by the whole history of the case, that it should be rejected as incredible and unreliable, and wholly insufficient to lay the foundation for any decree respecting the title to real estate.

At the time Dennis Conway took possession of the place December 22, 1845, the mortgage debt with accrued interest amounted to more than $100, being double the estimated value of the property at that time, as shown by the consideration of $50.00 in the deeds from Fernald to Leadbetter and Leadbetter to Conway. William Brown evidently did not consider it worth redemption and when he left it he undoubtedly abandoned the idea of ever redeeming it. It was manifestly so understood by the parties, for it appears that Fernald, the mortgagee, gave Leadbetter a warranty deed of it February 14, 1845, ten months before Conway moved on to the place, and that for more than forty years thereafter no occupant of the premises was ever requested to account or ever did account to William Brown or any of his heirs on that mortgage; and that after the attempted foreclosure in January, 1846, no reference whatever was ever made to the mortgage as an existing incumbrance by any of the parties during all that time. In 1845 Reuben Leadbetter was extensively engaged in the fishing business and Dennis Conway was working in his employment at certain seasons of the year. Immediately after Conway took possession Leadbetter had the assignment of the mortgage to him duly acknowledged and recorded, and also commenced the foreclosure for the obvious purpose of being prepared to convey an unquestioned title. From the time he took possession of this place, Conway's occupancy was "open, notorious, exclusive and comporting with the ordinary management and improvement of a farm by the owner." He did in fact pay the taxes, and between 1846 and 1853, he made an addition to the house larger than the original "shanty," erected a small but substantial barn, cleared up two or three acres of the land

and built fences around the lot. It is inconceivable that he would have made such expensive and permanent improvements if he was then occupying under a temporary arrangement with William Brown. He received his warranty deed in 1853, and repeatedly stated to different parties that he had "cleared his place and got his deed from Leadbetter;" the plain inference being that he had an arrangement with Leadbetter to purchase the place, had made permanent improvements upon it with that understanding, and had finally succeeded in paying for it according to agreement. It is incredible that in 1854, after thus receiving a warranty deed of the place, Conway should have made the admissions imputed to him by Wm. H. Brown showing that he held under the elder Brown by paying the taxes. Brown admits that in 1853, after the sale to Conway, he heard Fernald say to his father that he would send back the old mortgage, "but there was no need as there was no deed or note back of it." Brown appears to have been contented with this view of it.

Again, in 1860, Dennis Conway filed a homestead certificate dated November 30th, and recorded in the registry of Knox County, where William Brown still resided, declaring himself to be the owner of these premises. In 1871 he gave Moses Webster a lease of the place for eight years with an option to purchase and in that event Conway was to give a "good and sufficient warranty deed." Thus Dennis Conway continued to occupy and improve the premises until 1875 when he gave his son Rufus Y. a warranty deed of the place for the stated consideration of $300, and died in August of that year. Up to this time neither Wm. Brown nor any of his heirs had made any protest against these conveyances or any inquiry whatever in regard to this property. The testimony of Wm. H. Brown and others that in 1871 and 1875 Dennis Conway still admitted that he had occupied by the gracious permission of Wm. Brown is thus hopelessly discredited by these undisputed facts.

Rufus Y. Conway occupied and held possession of the premises until 1885 when he sold and gave a warranty deed of the place to Lane and Libby, and the following year Lane and Libby conveyed by warranty deed to the defendant who has been in possession to the present time. Since the defendant's occupancy began, a granite

quarry has been opened upon the premises and a large wharf constructed at an expense of $1600. The greatly increased value and importance imparted to the property by these new developments doubtless stimulated inquiry on the part of the heirs of Wm. Brown in relation to the title and gave rise to this controversy. But it was not until 1892 that any active measures were taken, and then Wm. H. Brown asked to see Conway's deed, and stated that his mother "didn't sign the mortgage and he was going to claim a third for her." The idea that a right of redemption still existed had not then been suggested to his mind.

Under these circumstances, the observations of Judge Story in *Dexter* v. *Arnold*, 3 Sumn. supra, a case in which the facts were strikingly analogous to those at bar, are equally applicable here: "One question which has been argued is, whether any naked, verbal admissions, or parol acknowledgments in conversations, are sufficient to establish the fact that the mortgagee has treated the conveyance as a mortgage within twenty years. Such admissions and acknowledgments are certainly open to the strong objection, that they are easily fabricated, and difficult, if not impossible, to be disproved in many cases, and that they have a tendency to shake the security of all titles under mortgages, even after a very long, exclusive possession by the mortgagee; nay, even after the possession of a half-century . . . . For, admitting that parol evidence is admissible, I am of opinion that the parol evidence of the confessions and conversations of the mortgagee, testified to by the witnesses, is wholly unsatisfactory, too loose, and too equivocal, and too infirm in its reach and bearing and circumstances, to justify any decree in favor of a redemption."

It is, accordingly, the opinion of the court in the case at bar that the weight of reliable evidence shows that Dennis Conway entered into occupation of the premises under an arrangement with Reuben Leadbetter and not with Wm. Brown; and that the possession of the defendants, and those under whom they claim, has been marked by all the characteristics of adverse possession and has been so open, notorious, exclusive and uninterrupted for more than forty years, that William Brown and his heirs, as well as all others interested, must be presumed to know that the occupation was not in subordi-

nation to the title of the mortgagor, but in the assertion of an absolute title in themselves.

This conclusion renders it unnecessary to consider the effect of the former judgment in the action at law, the validity of the proceedings for foreclosure, or the question of demand and refusal to account. The mortgagor's right to redeem is barred by the adverse possession of the defendants and their predecessors in title continued for more than forty years prior to the commencement of this bill, and the entry must be,

Bill dismissed with costs.

JAMES CARROLL *vs.* JOSEPH MARCOUX.

Androscoggin. Opinion December 11, 1903.

Bite of Dog, Trespasser. *Due Care. Action. R. S. (1903), c. 4, § 52. Stat. 1895, c. 115.*

1. By force of the statute 1895, c. 115, R. S. (1903), c. 4, § 52, c. 3, § 53, an injury to person or property by a dog is a trespass by the owner or keeper of the dog, whatever the dog's disposition, or the care exercised by its owner or keeper.
2. The fact that a person injured by a dog was at the time a trespasser upon the premises of its owner, or keeper, does not of itself exempt the latter from his statutory liability for the injury.
3. The fact that an entry upon the premises of the owner, or keeper, of a dog was wilful and wanton does not of itself exempt him from the statutory liability for the attack of his dog upon the person so entering. The wilfulness or wantonness of an act is not in the outward visible aspect of the act, but only in the mind of the actor; and hence cannot be a provocation to the dog.

Exceptions by plaintiff. Sustained.

[EXCEPTIONS.]

This was an action of trespass brought under the Stat. of 1895, c. 115, R. S. (1903), c. 4, § 52, which provides: "When a dog does damage to a person or his property, his owner or keeper and also the

parent, guardian, master or mistress of any minor who owns or keeps such dog, forfeits to the person injured, the amount of the damage done, to be recovered by action of trespass." Verdict for defendant.

The evidence showed that the plaintiff was a peddler; that he called in the day time at the house of the defendant and entered without permission; that the defendant's wife and young children were in the house alone; that the defendant's dog, a common hound, was lying behind the stove when the plaintiff entered; that upon the abrupt and sudden entrance, as claimed by the defendant, the dog seized the plaintiff by the leg and bit him as set out in the plaintiff's declaration.

The presiding justice in the course of his charge to the jury gave the following instructions, to which exceptions were seasonably taken:

"Now, if you find on the other hand that this plaintiff was mistaken in his version of the story, that this woman, the defendant's wife, is correct in her statement as to how he entered the house, then I submit to you the further question of whether the entry of that house by the plaintiff without her permission, without her knowledge, if not against her consent, was a wilful and wanton entry. It is said in law that a man's house is his castle, and I state to you as a matter of law that under ordinary circumstances (of course friendly calls, if I called to your house or you to mine would not come in the category that makes men trespassers), but if a stranger, an entire stranger attempts to enter my house or your house without our permission I say as a matter of law he has no right to enter; and, that I have, or you have, or any other person, has a right to resist such entry with sufficient force to prevent it. Now, applying this principle to the case at bar, if this plaintiff entered this house as the defendant's wife says he did, rapped and walked in, a strange house, a house whose inmates he says he never before knew, was such entry wanton and wilful? Now what does wilful mean? It means intentional, an act done intentionally, an act done knowingly and stubbornly and of stubborn purpose as Bouvier in his Law Dictionary says.

Now, then, I submit to you, whether if this woman's statement is true the plaintiff in this case entered wilfully, whether he entered intentionally, knowingly and of stubborn purpose, intending to get into that house. If he did he entered wilfully, and was it a wanton

entrance? Wantonly, says Bouvier, is recklessly, without regard to propriety or the rights of others. Was this entry of this house, if this woman states the manner of entry correctly, recklessly done and without regard to propriety or the rights of the inmates of the house? If it was, it was done wantonly, and if it was done in both these ways, it was done wilfully and wantonly; and gentlemen, if you find as matter of fact that this wilful and wanton entry of the house provoked the dog to bite this plaintiff, then the defendant is not guilty.

To these rulings and instructions and refusals to instruct the plaintiff excepted.

M. F. O'Brien and M. McCarthy, for plaintiff.

A trespasser, whether he has entered upon the land or into the buildings of another, (unless he be a criminal wrong-doer) must be requested to depart from the premises, before force however slight can be applied to eject him; and that the force when necessary, must be reasonable, appropriate in kind, and suitable in degree to accomplish the object for which it is applied. *Johnson* v. *Patterson*, 14 Conn. 1; *Com.* v. *Clark*, 2 Met. 23; *Abt* v. *Burgheim*, 80 Ill. 94; *State* v. *Woodward*, 50 N. H. 527; *Com.* v. *Dougherty*, 107 Mass. 243; *Com.* v. *Power*, 7 Met. 596.

The degree of injury which the owner or occupant of a house is not justified in inflicting on a trespasser cannot by any construction of law be justified when inflicted by the owner or occupant's dog. What cannot be justified when done directly cannot be justified when done indirectly. *Johnson* v. *Patterson*, 14 Conn. 1; *Woolf* v. *Chalker*, 31 Conn. 122; *Loomis* v. *Terry*, 17 Wend. 496; *Hussey* v. *King*, 83 Maine, 568.

If a trespasser is injured by the attack of a dog, the owner or keeper of the dog is liable for such injury. *Woolf* v. *Chalker*, 31 Conn. 122; *Marble* v. *Ross*, 124 Mass. 44; *Meibus* v. *Dodge*, 38 Wis. 300; *Loomis* v. *Terry*, 17 Wend. 496; *Riley* v. *Harris*, 177 Mass. 163; *Glidden* v. *Moore*, 14 Neb. 84, 45 Am. Rep. 98; *Conway* v. *Grant*, 30 Am. St. Rep. 147. (88 Geo. 157).

The owner of a wild animal (and the law in this State is the same in regard to a dog), cannot be relieved from liability by any act of the person injured, unless it be one from which it can be affirmed

that he caused the injury himself, with a full knowledge of the probable consequences. *Muller* v. *McKesson*, 73 N. Y. 195, and quoted in *Hussey* v. *King*, 83 Maine, 568. See also *May* v. *Burdett*, 58 Eng. C. L. 99.

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

The jury found the entry to be as the defendant's wife said it was, under the rule given by the presiding justice to be wanton and wilful; and found that the wanton and wilful entry of the plaintiff provoked the dog to bite him. We have the curious spectacle of a man breaking into the house of another, provoking a dog lawfully therein to bite him, and then suing the owner of the dog for damages. By what principle of either law or justice can a man, who receives an injury solely through his own wanton and wilful act, ask another to pay for it?

In the exhaustive opinion of *Hussey* v. *King*, 83 Maine, p. 576, this court said: "It should be noticed, however, that we only decide that, in such actions, as this, the plaintiff need not allege and prove in the first instance his own care. Whether the plaintiff's want of care can be successfully shown in defense or whether only the plaintiff's wilful provocation of the animal will bar this action we do not decide, as that question is not presented by these exceptions." It is held in *Keightlinger* v. *Egan*, 65 Ill. p. 235, "If a person provokes or causes a dog to bite him by kicking or other aggressive acts, and not from any mischievous propensity of the dog, no action can be maintained by the party bitten."

In *Muller* v. *McKesson*, 73 N. Y. p. 201, the court say: "If a person with full knowledge of the evil propensities of an animal wantonly excites him or voluntarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said in a legal sense that the keeping of the animal which is the gravamen of the offense produced the injury. Citing: *Coggswell* v. *Baldwin*, 15 Vt. p. 404; *Wheeler* v. *Brant*, 23 Barb. p. 324; *Blackman* v. *Simmons*, 3 Car. and P. 138; *Brock* v. *Copeland*, I. Esp. p. 203; *Bird* v. *Holbrook*, 4 Bing. p. 628.

On page 202 of *Muller* v. *McKesson*, 73 N. Y. supra, the court

say: "To enable an owner of such an animal to interpose this defense (negligence of plaintiff) acts should be proved . . . . which would establish that the person injured voluntarily brought the calamity upon himself."

In the same case on page 204 the court say: "I think in view of all the authorities, that the rule of liability before indicated is a reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself." The case of *Coggswell* v. *Baldwin*, 15 Vt. p. 402, cited above was for a cow hooking a horse and the court say: "If the injury, in such a case, is received by the negligence of the owner of the animal injured he will not be entitled to recover." The court must assume as the jury found: First, that the plaintiff entered the house of the defendant wantonly and wilfully. Second, that it was the wanton and wilful entry solely by the plaintiff of the defendant's house that caused the injury. The dog had a right to live, the defendant had a right to keep him. Neither the defendant or his dog was to blame for the dog biting the plaintiff, but the injury resulted solely to the plaintiff through his own wilful and wanton act. The decisions are unanimous in holding that in such cases the plaintiff cannot recover.

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

EMERY, J. Upon reading in the bill of exceptions that the defendant's dog was provoked by the wilful and wanton entrance of the plaintiff, a peddler, into the defendant's house without permission and thereupon bit him, the first and natural impulse, especially of one who likes dogs and dislikes peddlers, probably would be to say that the plaintiff was rightly served and had no cause of action. But the law does not always accord with natural impulses. Indeed its purpose often is to restrain and control them. The plaintiff's right in this case is not to be determined by passionate impulses however natural, but by the passionless rules of positive law.

At common law the owner or keeper of a dog or a domestic animal was liable for damages done by the animal only in case the animal

had a vicious or mischievous disposition known to the owner or keeper. We have a statute, however, which makes the owner or keeper of a dog liable for damage done by it without regard to the disposition of the dog, or the owner or keeper's knowledge, or his care or want of care. "When a dog does damage to a person . . . . his owner or keeper forfeits to the person injured the amount of the damage done, to be recovered in an action of trespass." Public Laws of 1895, c. 115. By this statute the damage done by a dog is made a trespass, since a trespass action is prescribed as the remedy. A damage to the person by a dog is a trespass to the person, as much so as an assault and battery. *Hussey* v. *King*, 83 Maine, 568; *Pressey* v. *Wirth*, 3 Allen, 191. Evidence of the character or disposition of the dog is not admissible. *Kelly* v. *Alderson*, 37 Atl. Rep. 12 (R. I.). The fact that the dog did the damage merely in play, in exuberance of good nature, is immaterial. The owner is nevertheless liable. *Hathaway* v. *Tinkham*, 148 Mass. 85. The plaintiff's action is upon this statute.

In considering the defense set up in avoidance of this statute, the following circumstances should be noted: the entry was in the day time; it does not appear that the plaintiff was forbidden to enter, or that his entry was made with any ulterior wrong intent, or noisily, or with threats or alarming demonstrations, or in any other manner than quietly though abruptly and suddenly; it does not appear that any of the human inmates were at all alarmed, or disturbed, or even annoyed by the entry; it does not appear that the plaintiff made any attack upon or demonstration toward the dog, or came in contact with it or was aware of its presence; it does not appear that the dog was a watch-dog set to guard the house, but it rather appears that it was only a common hound, or hunting dog, lying behind the stove; and it does not appear that the plaintiff was requested to leave or that he gave offense to any other inmate.

Under these circumstances a similar attack upon the plaintiff by any human inmate of the house would have been a trespass for which the plaintiff could have recovered. Though himself a trespasser, he was not thereby outlawed and force could not have been lawfully used upon him until he had refused to leave, and then only

such force as would have been necessary to remove him. If protected by the law against a sudden attack without warning by any human inmate despite his trespass, was he not also protected by the law as embodied in the above statute against the sudden and precipitate bite of the dog? Again, under the above circumstances had the entry been by permission, express or implied, then, however much it provoked the dog, the defendant would not have been exempted from liability under the statute for its attack. We assume the correctness of this proposition to be too plain for argument.

Does the fact that the plaintiff's entry was without permission discharge the defendant from what would otherwise have been his statutory liability? We think not. It was the visible, physical aspect of the entry, not the want of permission for it, that provoked the dog. We cannot attribute to the dog the faculty of determining whether the entry was a trespass or not, and of inflicting or withholding his bite accordingly. It is immaterial that the dog did not see any permission given. Had it been given days before in the dog's absence, or simply inferable from the custom of the neighborhood or the intimacy of the parties, the legal effect would have been the same as if expressly and audibly given in the dog's presence.

We do not find any case holding that mere trespass, an entry without permission upon the real estate of the owner of a dog without any other provocation to the dog, exempts the owner from liability. We find several holding the contrary. Since by the statute the liability of the owner or keeper of a dog of the most peaceful disposition, kept with the utmost care, is made equal to the common law liability of the owner or keeper of an animal with a known vicious or mischievous disposition, cases at common law as to such liability are applicable to cases under the statute. In *Smith* v. *Pelah*, 2 Stra. 1264, the plaintiff accidentally trod upon the dog at the owner's own door. Held, that the owner was liable. In *Pieot* v. *Moller*, 3 E. D. Smith, 576 (N. Y.) it was held that the fact that the injured person was trespassing upon the owner's premises at the time the injury from the dog was received is immaterial. In *Loomis* v. *Terry*, 17 Wend. 496, 31 Am. Dec. 306, the person injured by the dog was at the time trespassing on the owner's premises; but it was held that that

fact did not exempt the owner from liability. *Woolf* v. *Chalker*, 31 Conn. 121, 81 Am. Dec. 175, a case much and approvingly quoted, was similar to the case at bar. The plaintiff, a peddler, entered a house without permission and upon so entering was attacked by a dog. The owner was nevertheless held liable. In *Sherfey* v. *Bartley*, 4 Sneed, 58, 67 Am. Dec. 597, the court below was held to have rightly refused a requested instruction that if, at the time of the injury to him by the dog, the plaintiff was trespassing upon the owner's premises the owner was not liable. In *Marble* v. *Ross*, 124 Mass. 44, the plaintiff while in the defendant's pasture was attacked by the defendant's stag kept in that pasture. The court below was held to have rightfully refused a requested instruction that if the plaintiff was trespassing in the pasture at the time of the attack, he could not recover. In *Meibus* v. *Dodge*, 38 Wis. 300, 20 Am. Rep. 6, the defendant had left his dog in his sleigh to guard it. The dog bit a child who came to the sleigh and meddled with the whip lying therein. Held that the defendant was liable. In *Peck* v. *Williams*, 61 L. R. A. 351, (R. I.) the plaintiff suddenly and without right climbed into the defendant's cart, and was bitten by the defendant's dog then lawfully in the cart. Held that the defendant was liable. In *Plumley* v. *Birge*, 124 Mass. 57, the plaintiff, a boy of thirteen, struck the dog and was thereupon bitten. A verdict for the plaintiff was sustained. In *Sanders* v. *O'Callaghan*, 82 N. W. Rep. 969, (Iowa) the court, citing some of the above cases, held to be incorrect the proposition that one going upon the premises of another without permission and without inquiring whether dogs are kept there or not is guilty of contributory negligence.

Does the circumstance that the plaintiff's entry was wilful and wanton discharge the defendant from his otherwise statutory liability? What we have said above as to the effect of the plaintiff's entry being without permission applies, we think, equally well to this question. The words "wilful and wanton," even as they were used and defined by the presiding justice, do not at all color or affect the visible, physical aspect of the entry. The wilfulness and wantonness were wholly in the plaintiff's mind. It was still only the visible, physical entry, not the plaintiff's thoughts or state of mind, which provoked the dog.

The most quiet entry, one that would not attract the attention of such a dog at all, may yet be both wilful and wanton to an extreme degree. A most turbulent and disturbing entry, one calculated to excite and provoke the most amiable dog, may be neither wilful nor wanton.

Our decision, therefore, and all that we do decide, is that the mere fact that the plaintiff wilfully and wantonly entered upon the defendant's premises without permission (such entry being the sole provocation of the dog's attack) does not alone outlaw the plaintiff from the protection of the statute cited.

Whether the plaintiff, as contended by the defendant, was so rude, noisy, or threatening in his manner of entry, as to thereby provoke the dog is a matter of fact not stated in the bill of exceptions. Whether the rude, noisy, or threatening character of the entry, if proved, or even its abruptness and suddenness as stated showed the plaintiff to be so far in fault as to bar his right of recovery, is a question not presented here. The presiding justice ruled that the fact, (if so found) that the entry was wilful and wanton and without permission, was of itself alone a bar. This ruling being adjudged incorrect, the exceptions must be sustained.

Exceptions sustained.

LUTHER H. SOPER *vs.* LAWRENCE BROTHERS COMPANY.

Kennebec. Opinion December 11, 1903.

Adverse Possession, Wild lands at common and statute law. *Limitations. Actions.* Co-tenants. *Constitutional Law*, Statutes regulating future actions. *R. S.* (*1903*), *c. 10*, §§ *153*, *156*. *Stat. 1821*, *c. 62*. *Stat. 1895*, *c. 162*.

In an action of trover to recover for a quantity of logs cut by the defendant company on Township No. 3 Range 6, it appeared that the plaintiff had a record title to one-third of the township, while the defendant and its licensors, holding under recorded warranty deeds of the whole township, claimed that they had the "right of entry and seizin in the whole," by reason of more than twenty years of "such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine" and of the performance of the other conditions required by the provisions of chapter 162 of the public laws of 1895; and hence further claimed that no action could be maintained to recover such land after January, 1, 1900, the time limited in said act.

Held; that section one of that statute recognizing the practical distinction between the acts constituting possession and enjoyment of wild lands, and those accepted as proof of the possession of cultivated lands, was designed to extend the same relative protection to possessory titles to the former, as the law has hitherto afforded to the latter.

Held; that the special verdict of the jury, finding that all of the conditions specified in section one of the act, applicable to the facts in this case, were fulfilled by the defendant company and its licensors, and their respective predecessors in title, was clearly warranted by the evidence in the case.

Held; that the provision of section four of that act, declaring that the "act shall not apply to actions between co-tenants, must be considered in connection with the language of section one, and be construed with reference to the object to be accomplished.

Held; that inasmuch as the defendant and its licensors derived title from those who held a recorded warranty deed of the whole town, and claimed and occupied as exclusive owners and not as tenants in common with another, and inasmuch as the defendant and its licensors, and their respective predecessors, all held under recorded warranty deeds, were at no time holding in submission to a record title in another, but in assertion of an absolute title in themselves and as exclusive owners of an entire estate, the defendant corporation cannot, upon the facts of this case, be deemed

a tenant in common with the plaintiff; and the action is not one "between co-tenants," within the meaning and contemplation of section four of the act in question.

Held; that as to all pre-existing titles, the statute of 1895 is a statute of limitations and of repose, and inasmuch as the reasonable term of five years is allowed for the prosecution of existing claims after the passage of the act, the statute does not appear to be in contravention of any provision of the State or Federal constitutions.

Motion and exceptions by plaintiff. Overruled.

Trover to recover for the conversion of logs cut by the defendant on Township 3, Range 6, Bingham's Purchase, West Kennebec River, in Somerset County.

The case appears in the opinion.

Taber D. Bailey, for plaintiff.

Counsel argued:—

First. There is no adverse possession at common law shown on the land in controversy.

Second. There being no adverse possession, upon the record title introduced in this case, the plaintiffs and the defendants are co-tenants, and so chapter 162 of the Laws of 1895 does not apply to this case, as statutes of limitation shall not be applied to cases not clearly within their provisions, and this statute expressly excepts co-tenants.

Third. If the court should construe this statute to apply to this case, it cannot affect the plaintiff's rights to recover in this action, because it is not a limitation law but is unconstitutional for the following reasons:

(a) It compels a person in the enjoyment of all his rights to institute proceedings against an adverse claimant to retain those rights, therefore imposing a grievous and expensive burden upon him.

(b) It impairs, disturbs, and destroys vested rights by acting retrospectively on titles in existence when it was passed, by changing the principles and the nature of those facts, by means of which those titles had existed, and been preserved in safety.

(c) It takes away the seisin in lands from one man and transfers it to another without compensation and thereby directly transfers his property rights to that other; or if not directly, his property rights

are subjected to the "government of principles in a court of justice, which must necessarily produce that effect."

(d) It takes away the right of "possessing and protecting property according to the standing laws of the state in force at the time of a person acquiring property and during the time of his continuing to possess property," because the period of twenty years does not end on the date of the passage of the act but it may end any time before that date, and during the interval between the end of the twenty years and the passage of the act the true owner may have been doing the very acts named as constituting the basis for the running of the statute.

(e) It attempts to arbitrarily change the nature of estates by making a person a co-tenant with another against the latter's consent.

(f) By making a man in the possession and enjoyment of his land bring suit to recover that land before he can assert his rights in court as a defense to any injury done his property, it infringes his rights to have justice administered "freely and without purchase, completely and without denial, promptly and without delay."

(g) It is unconstitutional, under the Fourteenth Amendment of the Federal Constitution, because it takes away property without "due process of law."

Fourth. There are no equities in the case which the court can consider.

Counsel cited: (1.) *Little* v. *Megquier*, 2 Maine, 176; *Fleming* v. *Paper Company*, 93 Maine, 110; *Hudson* v. *Coe*, 79 Maine, 83; *Chandler* v. *Wilson*, 77 Maine, 76; *Slater* v. *Jepherson*, 6 Cush. 129; *Cook* v. *Babcock*, 11 Cush. 129; *Jackson* v. *Woodruff*, 1 Cowen, 276; *Thompson* v. *Burhaus*, 61 N. Y. 52; *Thompson* v. *Burhaus*, 79 N. Y. 93; *Chandler* v. *Spear*, 22 Vt. 405, 406. (2.) Am. & Eng. Enc. of Law, 2nd ed. Vol. 17, p. 682; *Duncan* v. *Sylvester*, 24 Maine, 482; *Souter* v *Atwood*, 34 Maine, 153; *Staniford* v. *Fullerton*, 18 Maine, 229; *Souter* v. *Porter*, 27 Maine, 417; *Cogswell* v. *Reed*, 12 Maine, 300; *Nichols* v. *Smith*, 22 Pick. 316; *Brown* v. *Bailey*, 1 Met. 254; *Marshall* v. *Trumbull*, 28 Conn. 185; *Mattox* v. *Hightshire*, 39 Ind. 95; *Shepardson* v. *Rowland*, 28 Wis.

108; *Robinett* v. *Preston's Heirs*, 2 Rob. (Va.) 278; *Gates* v. *Salmon*, 35 Cal. 588; *Lessee of White* v. *Sayre*, 2 Ohio, 112; *Dennison* v. *Foster*, 9 Ohio, 126; *State* v. *Barrett*, 15 Cal. 370; *Sutter* v. *San Francisco*, 36 Cal. 115; *Harlan* v. *Langham*, 69 Pa. St. 238; *Markoe* v. *Wakeman*, 107 Ill. 263; *Thomas* v. *Pickering*, 13 Maine, 337; *Webster* v. *Atkinson*, 4 N. H. 24; *Adams* v. *Frothingham*, 3 Mass. 352; *Jackson* v. *Livingston*, 7 Wend. 136; *Donworth* v. *Sawyer*, 94 Maine, 242; *Jackson* v. *Blodgett*, 16 Johns. 178; *Goodlittle* v. *Bailey*, Cowp. 600; *Osman* v. *Sheafe*, 3 Lev. 372; Am. & Eng. Enc. of Law, 1st ed. Vol. 23, p. 324; *Campbell* v. *Thompson*, 16 Maine, 117; *Merchants Bank* v. *Cook*, 4 Pick, 411; *Snell* v. *Bridgewater Mfg. Co.*, 24 Pick. 299; *Western Union Telegraph Co.* v. *Scircle*, 103 Ind. 229; *Buckner* v. *Real Estate Bank*, 4 Ark. 441; *Hillhouse* v. *Chester*, 3 Day, (Conn.) 211; *State* v. *Engle*, 21 N. J. L. 347; Am. & Eng. Enc. of Law, Vol. 1, pp. 801–806; *Minot* v. *Brooks*, 16 N. H. 378; *Farrar* v. *Eastman*, 10 Maine, 195; *Blood* v. *Wood*, 1 Met. 525; *Great Falls Mfg. Co.* v. *Worster*, 15 N. H. 458; *Willison* v. *Watkins*, 3 Pet. 51; *Dwelley* v. *Dwelley*, 46 Maine, 377; *Wing* v. *Hussey*, 71 Maine, 185; *Hazell* v. *Shelby*, 11 Ill. 9, 10; *Pease* v. *Howard*, 14 Johns. 439; *Jordan* v. *Robinson*, 15. Maine, 167; *Bass* v. *Bass*, 6 Pick. 362; *Smith* v. *Lockwood*, 7. Wend. 241; *Beddell* v. *Janney*, 9 Ill. 207, 209; *Bennett* v. *Davis* 90 Maine, 102; *Prop'rs of Kennebec Purchase* v. *Laboree*, 2 Greenl, 286; *Bates* v. *Norcross*, 14 Pick. 224; *Preston* v. *Wright*, 81 Maine, 306; *Millet* v. *Mullen*, 95 Maine, 400; *Little* v. *Megquier*, 2 Greenl 176; *Ewing* v. *Burnett*, 11 Pet. 54; *Fletcher* v. *Fuller*, 120 U. S. 534; *Groesbeck* v. *Seeley*, 13 Mich. 329; *Case* v. *Dean*, 16 Mich. 12; *Baker* v. *Kelly*, 11 Minn. 358; *Williams* v. *Kirkland*, 13 Wall. 306; *Elbridge* v. *Kuehl*, 27 Iowa, 160, 173; *Monk* v. *Corbin*, 58 Iowa, 503; *Moingana Coal Co.* v. *Blair*, 51 Iowa, 447; *Dingley* v. v. *Paxton*, 60 Miss. 1038; *Harding* v. *Butts*, 18 Ill. 502; *Wahn* v. *Shearman*, 8 Serg. & R. 357; *Farrar* v. *Clark*, 85 Ind. 449; *Hill* v. *Kricke*, 11 Wis. 442; *Leffingwell* v. *Warren*, 2 Black, 599; *Rowan* v. *Runnels*, 5 How. 134; *Douglass* v. *Pike*, 101 U. S. 677; *Raymond* v. *Longley*, 14 How. 76, 77; *Smith* v. *Sherry*, 54 Wis. 114; *Stearns* v. *Gittings*, 23 Ill. 387; *Lewis* v. *Webb*, 3 Greenl. 335;

Given v. *Marr*, 27 Maine, 220; *Coffin* v. *Rich*, 45 Maine, 515; *Atkinson* v. *Dunlap*, 50 Maine, 117; *Adams* v. *Palmer*, 51 Maine, 493; *Austin* v. *Stevens*, 24 Maine, 520; *Webster* v. *Cooper*, 14 How. 488; *Thistle* v. *Frostbury Coal Co.*, 10 Md. 147; Cooley, Const. Lim. pp. 68, 444; *Slater* v. *Rawson*, 6 Met. 439; *Lathrop* v. *Mills*, 19 Cal. 513; *Arrowsmith* v. *Burlingim*, 4 McLean, 489; S. C. No. 563, Federal Cases; *Millett* v. *Mullen*, 95 Maine, 400; *Larrabee* v. *Lumbert*, 36 Maine, 444; *Williams* v. *Johnson*, 30 Md. 500; *Neponsett Meadow Co.* v. *Frank L. Tileston*, 130 Mass. 191; *Briggs* v. *Johnson*, 71 Maine, 235; *Baker* v. *Kelly*, 11 Minn. 480; *Adams* v. *Palmer*, 51 Maine, 489; *Groesbeck* v. *Seeley*, 13 Mich. 329; *White* v. *Flynn*, 23 Ind. 46; *Abbott* v. *Lindenbower*, 42 Mo. 162; *Corbin* v. *Hill*, 21 Iowa, 70; *Dunn* v. *Snell*, 74 Maine, 27; *Lathrop* v. *Mills*, 19 Cal. 513.

Orville D. Baker and A. K. Butler, for defendant.

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

WHITEHOUSE, J. This is an action of trover to recover the value of a large quantity of logs alleged to have been cut by the defendant company on Township No. 3, Range 6, west of the Kennebec River in Somerset County. The case comes to this court on the plaintiff's motion to set aside a verdict in favor of the defendant, and on exceptions to the ruling of the presiding judge.

The defendant company admitted that it had cut logs on the township in question within six years prior to the date of the writ, and claimed that it had a legal right so to do by reason of its ownership in fee of the south half of the town, and by virtue of permits from the owners of the north half. It was also contended in behalf of the defense that the plaintiff's action was barred by the statute of limitations enacted in 1895 entitled "An act to make State Tax Sales more effectual." Public Laws of 1895, c. 162; R. S. (1903), c. 10, §§ 153 and 156.

It was admitted that Township No. 3, Range 6, in question pertained to the "Bingham Purchase," and that the title to the whole of it was at one time in William Bingham. The plaintiff claimed to

own 29-72 of the township in common and undivided, and deriving title from the Commonwealth of Massachusetts introduced deeds conveying to him several fractional interests showing in the aggregate a record title to about one-third of the town.

The defendant derived title to the south half of the town from A. and P. Coburn through several mesne conveyances, all deeds of warranty duly recorded. October 1, 1872, A. and P. Coburn conveyed the entire township to A. and W. Sprague by deed of warranty recorded October 8, 1872. September 1, 1873, A. and W. Sprague conveyed the whole township to the Coburn Land Company by deed of warranty recorded September 19, 1873, and as a part of the same transaction the Coburn Land Company reconveyed the township to A. and P. Coburn by deed of mortgage with covenants of warranty which was recorded October 31, 1873. This mortgage was duly foreclosed the following year, and thus by this series of recorded deeds of warranty, A. and P. Coburn claimed to have acquired full title to the entire township, and in 1880 Abner Coburn, acting for himself and the heirs of his brother Philander, conveyed the south half of the town to Wildes and Snow by deed of warranty duly recorded August 16, 1880, in consideration of $33,000. October 27, 1885, the south half was conveyed by Wildes and Snow to Lawrence Brothers and by Lawrence Brothers to the defendant company March 13, 1893, both by deeds of warranty duly recorded. The Coburns and their heirs and devisees still retain the title acquired by them to the north half of the town.

In rebuttal the plaintiff introduced further evidence tending to show that at the time A. and P. Coburn conveyed the whole town to A. and W. Sprague in 1872, by deed of warranty, they only had a recorded title to about one-fourth of it.

Thus while this action of trover was brought primarily to recover damages for the conversion of the logs described in the writ, the decision of the cause necessarily involves the question of title to the township from which the logs were taken.

I. Section one of c. 162, Pub. Laws of 1895, to which reference has been made, reads as follows: "When the state has taxed wild land, and the state treasurer has deeded it, or part of it, for non-pay-

ment of tax, by deed purporting to convey the interest of the state by forfeiture for such non-payment and his records shows that the grantee, his heirs or assigns, has paid the state and county taxes thereon, or on his acres or interest therein as stated in the deed, continuously for the twenty years subsequent to such deed; and when a person claims under a recorded deed describing wild land taxed by the state, and the state treasurer's record shows that he has, by himself or by his predecessors under such deed, paid the state and county taxes thereon, or on his acres or interest therein as stated in the deed, continuously for twenty years subsequent to recording such deed; and whenever, in either case, it appears that the person claiming under such a deed, and those under whom he claims, have, during such period, held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine, and it further appears that during such period, no former owner, or person claiming under him, has paid any such tax, or any assessment by the county commissioners, or done any other act indicative of ownership, no action shall be maintained by a former owner, or those claiming under him, to recover such land, or to avoid such deed, unless commenced within said twenty years, or before January one, nineteen hundred. Such payment shall give such grantee or person claiming as aforesaid, his heirs or assigns, a right of entry and seizin in the whole, or such part, in common and undivided, of the whole tract as the deed states, or as the number of acres in the deed is to the number of acres assessed."

But section four of the act declares that "This act shall not apply to actions between co-tenants, nor to actions now pending in court, nor to those commenced before January one, nineteen hundred."

It satisfactorily appears from the testimony that all of the conditions specified in section one, applicable to the facts of this case, were fulfilled by the defendant and its predecessors in title respecting the south half, and by the defendant's licensors and their predecessors as to the north half of the township in question. They claimed under recorded deeds describing wild lands; the record of the state treasurer shows that they paid the taxes; they held for more than twenty years such exclusive, peaceable, continuous and adverse pos-

session of the township as comports with the ordinary management of the wild lands in Maine, and during that time no former owner or person claiming under him, paid any tax or assessment or did any other act indicative of ownership. The verdict of the jury establishing these facts was clearly warranted by the evidence.

But the plaintiff contended that as there was no adverse possession of the township at common law during this period and as he only claimed to own a fractional part of it, the Coburn heirs and the defendant company must be tenants in common with him and hence by the express terms of section four, the act of 1895 did not apply to this case.

The presiding justice overruled this contention "because the Coburn Land Company in 1873 had a deed which was put upon record on the 19th of September, 1873, not of a fractional interest, but of the whole town, and they have claimed, not as co-tenants with somebody else, but they have claimed to be the exclusive owners of the whole town up to the time that in 1880 they divided it and sold the whole of the south half of the town. And the Lawrence Brothers and their predecessors the Wildes, did not claim, did not have a deed of a fractional interest, undivided interest; they were not in possession certainly claiming to be tenants in common with anybody else, because their deed was of the whole of the south half, and they claim, it is said, to be the owners of the whole of the south half. Now if they had a deed of a fractional interest, undivided interest of the south half, or if the deed to the Coburns in the first instance, or the Coburn Land Company had been of an undivided interest in it, then the contention of the learned counsel for the plaintiff would be applicable, and this statute would not affect his client's right to maintain an action."

It is the opinion of the court that this ruling was correct. It gives to the statute a construction manifestly in harmony with the intention of the legislature. It had been repeatedly held by this court that title to wild lands could not be acquired by adverse possession by merely taking a deed of a township or tract of timber land, running lines around it, keeping off trespassers and making occasional lumbering operations upon it for a period of twenty years.

The exercise of such acts of ownership had not been deemed sufficient or effectual to establish title by disseizin of the true owner. *Chandler* v. *Wilson*, 77 Maine, 76; *Hudson* v. *Coe*, 79 Maine, 83, 1 Am. St. Rep. 288. Thus while title to farming land might be acquired by twenty years of such "adverse" possession as comports with the ordinary management of that kind of land by the owner, title to wild lands could not be acquired by twenty years of the qualified possession above described, although it was ordinarily the only kind of occupancy of which wild lands are capable. It was the obvious purpose of that portion of the statute of 1895, applicable to this case, to extend the same relative protection to possessory titles to wild lands that all other lands enjoyed under the law. It declares that "when a person claims under a recorded deed describing wild lands etc." and has "held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine," no action shall be maintained to recover the land if all the other requirements of the act are fulfilled.

The provision of section four that the "act shall not apply to actions between co-tenants" must be considered in connection with the language of section one and construed with reference to the object to be accomplished. If the acts enumerated are performed by one who "claims by virtue of a recorded deed to be the owner of the entire tract, and one who has maintained such qualified possession for twenty years in assertion of an exclusive title to the whole tract," the statute applies; but if the same acts are done by one who has a recorded deed of only a fractional part, and during the period of twenty years has only claimed as a tenant in common with another and all his acts of ownership have been admittedly done as a co-tenant, and not as an exclusive owner, the statute does not apply. It thus becomes a question of fact in each case whether the acts of occupation were done in subordination to the record title or in repudiation of it. If they were done as a disseizor in defiance of the true owner, the statute applies notwithstanding the plaintiff may have discovered a defect in the defendant's record title, and may show title in himself as co-tenant. Bracton's rule is still an apt direction: "Quaerendum est a judice quo animo hoc fecerit." Coke, Litt. 153 b; 8 Mod.

Rep. 55; *Martin* v. *M. C. R. R. Co.*, 83 Maine, 103. The intention guides the entry and fixes its character. Even one tenant in common may disseize another. As stated by this court in *Richardson* v. *Richardson*, 72 Maine, 409: "One tenant in common may disseize another of the whole or of a part of the common estate. It is true that prima facie the possession of the defendant would be held to be in accordance with his title. He would be rightfully in possession as a tenant in common, and that would be held to be the character and extent of his occupancy, in the absence of evidence to indicate the contrary. But here, according to the plaintiff's own account, when her title accrued, and from that time to the date of the writ, the defendant by his lessee was in actual possession of the quarry, under claim of title adverse to the plaintiff, denying her title and holding her out. The evidence shows a state of facts which amounts to a disseizin, even as between tenants in common."

In *Bigelow* v. *Jones*, 10 Pick. 162 and 163, the court say: "But it appears in the present case, that Baldwin, under whom the defendant claims, entered under a deed purporting to convey the whole estate. He entered claiming the whole, and until the levy after mentioned, held the actual possession of the whole, under such deed and claim, nor has the plaintiff ever entered to regain his seizin as co-tenant." "When it is considered that Baldwin did not enter and hold as a tenant in common, but under a deed conveying the whole, that the whole was levied on as the property of Baldwin and seizin delivered of the whole, we think the defendant is to be taken and deemed a stranger, and that these acts amount to a disseizin of the plaintiff, in the same manner as if he had been sole seized."

In *Bradstreet* v. *Huntington*, 5 Pet. 402, 442, one tenant in common undertook to convey the whole premises and the grantee entered into actual possession intending to claim the whole. The court say: "There was no tenancy in common, because Potter entered in fact in his own right, under a deed conveying a fee-simple in the entirety. . . . . He entered under that deed as a sole, exclusive, absolute owner in fee; this is altogether inconsistent with an entry to the use of himself and another." *Willison* v. *Watkins*, 3 Pet. 53.

So too in *Clapp* v. *Bromagham*, 9 Cowen, 531, the court say:

"These parties, it is said, stood in the relation of tenants in common to each other; and the possession of one of them was, in judgment of law, the possession of all of them; and in support of the position, it is said, that the title of the defendant was derived from the same source with that claimed by the petitioners; and it was contended that the defendant entered under the title vested in Peter, as tenant in common with the petitioners; and that his position could not be adverse to them, but enured to their benefit. But is it true that the defendant's entry was as tenant in common? There is no color for the suggestion. On the contrary, the bill of exception clearly shows that he entered as purchaser of the whole, and held as tenant in severalty, claiming to be the sole and exclusive owner; that his title was, from its commencement, adverse to the petitioners; he never held in common with them, nor acknowledged any right in them or any of the heirs of Wm. Bromagham the ancestor; he purchased of Peter as being the sole proprietor, and who at the time claimed to be, and was supposed to be the exclusive and absolute owner of the farm; and he has from that time to the commencement of this suit continually claimed and held the premises in exclusion of all others, and has the sole seizin." See also *Parker* v. *Proprietors*, 3 Met. 91, 101, 37 Am. Dec. 121; *Watson* v. *Jeffrey*, 39 N. J. Eq. 626; *Foulke* v. *Bond*, 41 N. J. Law, 534; *Prescott* v. *Nevers*, 4 Mason, 326.

But no citation of authorities is required to establish the proposition that one who enters under a warranty deed of the entire premises is never presumed to be a tenant in common but a tenant in severalty. By the express terms of his deed he acquires not an undivided interest, but the entire estate. In the case of wild lands possession under such a deed is by the terms of the statute in question, "such as comports with the ordinary management of wild lands in Maine," and if continued for twenty years bars the right of action.

The statute does not apply to "actions between co-tenants." It is competent for the plaintiff to prove that during all the years in question he claimed title only to an undivided share of the land and thus sustained the relation of a co-tenant. It is equally competent for the defendant to prove that during the same period he was not a

tenant in common with any one, but was claiming and occupying the entire estate. With respect to both plaintiff and defendant the character and quality of the possession must be determined by the acts of ownership and by the intention as disclosed by all the circumstances.

In the case at bar it has been seen that the defendant and its predecessors claimed and occupied the entire south half of the township in question under recorded warranty deeds, and cut a portion of the logs sued for on the north half of the town under permits from the Coburns, who also claimed and held that part of the town under recorded warranty deeds. The purchasers of the south half paid $33,000 for the land, and they and the defendant expended $35,000 more in permanent improvements for the purpose of taking off the lumber. It was not in controversy that this was done in good faith and in full confidence that they had acquired under these deeds an absolute and exclusive title to the whole of the land purchased. It was not in controversy that the Coburns on the north half, and the defendant and its predecessors on the south half exercised various acts of ownership on the several tracts by cutting timber and permitting operations, by leasing portions of the land for the erection and maintenance of permanent sporting camps and by employing agents to protect the township against fires; and it was admitted that for nearly thirty years prior to the date of the writ, they had paid all state and county taxes assessed upon the town, as shown by the state treasurer's records. It was not claimed that during any part of this period, either the plaintiff, or any of his predecessors in title, had paid any tax whatever to the county or to the state, or had done any act whatever indicative of ownership. During all this period the defendant and its predecessors were at no time holding in submission to a record title in another, but in assertion of an absolute title in themselves; they were at no time holding as tenants in common with another, but as exclusive owners of an entire estate. The action is not "between co-tenants" within the meaning and contemplation of the statute in question. The act was obviously designed to operate as a statute of repose through the confirmation of ancient titles; but the construction contended for by the plaintiff

would tend to defeat and not to effectuate this beneficent purpose. A persistent search for technical defects in ancient titles of wild lands is quite likely to be rewarded with success; and if one who has for half a century been in the exclusive possession of a township, exercising all the acts and enjoying all the rights of ownership, claiming the entire tract under a recorded warranty deed, must be deemed, contrary to all his acts and intentions, to be a tenant in common with the purchaser of an abandoned title to a fractional interest in the town, the consequence would be continued agitation, and the statute would cease to be one of repose.

II. The second part of the argument of the learned counsel for the plaintiff is devoted to the discussion of the proposition that the act in question violates both the State and Federal Constitution and is therefore inoperative and void.

The power of the judicial department of the government to prevent the enforcement of a legislative enactment by declaring it unconstitutional and void is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. The constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt. *State* v. *Rogers*, 95 Maine, 94; *State* v. *Lubee*, 93 Maine, 418; Cooley's Const. Lim. (6th ed.) 217. "Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section and yet be perfectly distinct and separable so that the first may stand though the last fall." Cooley's Const. Lim. 210.

In this case the attention of the court is called in limine, to the fact that a statute of the same effect as the third section of this act was declared unconstitutional in *Bennett* v. *Davis*, 90 Maine, 102. But section three is wholly independent of the other sections of the act. It requires the party claiming under a tax sale to pay to the

clerk the amount of the tax before the trial of an action involving the validity of the sale. It is neither connected in meaning nor co-operative in purpose with the other provisions of the act, but is so clearly distinct and separable that its validity or invalidity is entirely immaterial in the consideration of those provisions of the act involved in the case at bar.

But the constitutional objection to which a large part of the argument of plaintiff's counsel is devoted is that the statute "compels a person in the enjoyment of all his rights to institute proceedings against an adverse claimant to retain those rights, therefore imposing a grievous and expensive burden upon him."

In presenting this objection he quotes a passage from Cooley's Const. Lim. p. 455, that "one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified, to test the validity of a claim which the latter asserts but takes no steps to legally enforce," and cites numerous authorities in support of the statement.

There is no occasion to question the soundness of this doctrine. It is sufficient to observe that it does not appear to be applicable to the provisions of the statute here in question or to the facts of this case. It would be applicable to a case precisely the reverse of the one at bar.

It has been seen that here all the provisions of the statute are designed and adapted to protect and not to extinguish the rights of one who is in the possession and enjoyment of his property. As already stated, the legislature deemed it just to recognize the practical distinction between the acts constituting the occupation and enjoyment of wild lands and those accepted as proof of the possession of cultivated lands. The statute protects no one unless for twenty years he has not only paid all the taxes upon the land, but during all that time has also had such "exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine," and unless it further appears that no former owner, during all that time, has paid any such taxes "or done any other act indicative of ownership."

It has also been seen that with reference to the contending parties in the case at bar, the facts enumerated in the statute have all been established by the findings of the jury. It has been found that the defendant and his predecessors in title had for more than twenty years been in the exclusive and adverse possession of the township, and that the plaintiff for more than twenty years had done no act indicative of ownership and had not been in the occupation or enjoyment of the property.

The second objection raised by the plaintiff is that the statute "impairs, disturbs and destroys vested rights by acting retrospectively on titles in existence when it was passed, by changing the principles and nature of those facts by means of which those titles had existed and been preserved in safety."

In support of this proposition the counsel cites *Proprietors of Kennebec Purchase* v. *Laboree*, 2 Maine, 275, 286, 11 Am. Dec. 79, and the objection appears to be stated in the language of the opinion in that case. The doctrine there laid down is undoubtedly sound law as applied to the facts of that case and to the statute there brought in question. But the provisions of the statute then under consideration were so radically different from those at bar that the decision in that case is not an authority to sustain the plaintiff's contention here. On the contrary, the great principle there enunciated, upon which the validity of every such statute of limitations must depend, is a conclusive answer to the leading objections relied upon by the plaintiff in the case at bar. It has been seen that by the express terms of the fourth section of the statute of 1895, the act does not apply "to actions now pending in court nor to those commenced before January 1, 1900." It is not only not retrospective, but is distinctly made prospective only in its operation, and the reasonable period of five years after the date of the enactment is allowed during which all controversies respecting such titles might be adjusted according to "the principles and the nature of those facts by means of which those titles had existed" before the passage of the act. On the other hand the sixth section of the statute of 1821 considered by the court in the *Laboree case* above cited, was made applicable in express terms to any "action which has been or may hereafter be brought" etc. In

the opinion the court say: The whole section was declared by the court to have been enacted "for the purpose of abolishing the distinction between a possession under a claim of title on record, and a possession without any such claim or pretence of title." Although this statute, like that of 1895, undoubtedly had the effect to change "the principles and the nature of those facts by which titles had before been acquired," the court unhesitatingly declare that so far as the act was prospective in its operation it was not liable to any constitutional objection, and that in all cases the legislature had authority to enact such statutes of limitations, provided a reasonable time after the passage of the act was allowed for the prosecution of existing claims. As the statute of 1821 allowed no time whatever for the prosecution of such claims after the passage of the act, it was held unconstitutional so far as it was retrospective in its operation. "The authority of the legislature to pass statutes of limitations" say the court, "in the form in which they are usually enacted will not be denied. Such statutes have been considered salutary in their consequences. With respect to personal actions they serve to render people attentive to the early adjustment of demands, and prevent the disturbance of settlements which have been made but of which the proof may have been lost. . . . The limitation of real actions is equally salutary; and the community has doubtless derived much advantage from those laws which have gradually reduced the time after which the owners should be barred of their actions. But all such laws have allowed a reasonable time within which they might prosecute their claims and make their entries. A sense of right and justice seems to have dictated this provision."

This allowance of a reasonable time for the prosecution of claims after the passage of an act of limitation made to take effect upon existing rights, is the settled principle by which the constitutionality of all such acts is tested. "It is essential" says Judge Cooley, "that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action;" though what shall be considered a reasonable time must be settled by the judgment of the legislature. And the courts will not inquire into the wisdom of its decision in establishing the period of legal bar

unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. Cooley's Const. Lim. 450, and cases cited. See also Wood on Lim. of Action, section 11, and cases cited.

So in *Terry* v. *Anderson*, 95 U. S. 632, the court say: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins* v. *Barney*, 5 Pet. 457; *Jackson* v. *Lamphire*, 3 id. 280; *Sohn* v. *Waterson*, 17 Wall. 596; *Christmas* v. *Russell*, 5 id. 290; *Sturges* v. *Crowninshield*, 4 Wheat. 122. And it is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain. . . . .

In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable."

As to all pre-existing titles the statute of 1895 involved in the case at bar is unquestionably a statute of limitations, and it declares in explicit terms that it shall not apply to pending actions nor to those commenced before January 1, 1900, thus allowing nearly five years for the prosecution of existing claims after the passage of the act.

It is not in question that this was a reasonable time. The plaintiff's writ bears date September 18, 1902, and his action is accordingly subject to the operation of the first section of the statute of 1895 hereinbefore quoted.

This conclusion that the statute is to be construed as a statute of limitation and of repose, supported as it is by an entire unanimity of judicial authority both State and Federal, affords a sufficient answer to all of the above constitutional objections specified in the argument

of counsel, and renders it unnecessary to give them further consideration in detail.

It is accordingly the opinion of the court that the statute of 1895, as above construed, is not in contravention of any provision of the State or Federal constitution.

Motion and exceptions overruled.

STATE OF MAINE *vs.* EDOUARD SEGUIN.

Androscoggin. Opinion December 15, 1903.

False Pretenses. Indictment. Pleading, "grant, bargain and sell" not proven by a mortgage. *Evidence,* Variation. *Practice. R. S. (1883), c. 126, § 1, c. 134, § 26.*

1. Under a statute which makes it an offense to "sell, convey, mortgage or pledge" to another, personal property, on which there is an existing mortgage, or to which the offender has no title, without giving notice thereof, an indictment charged that the respondent did "grant, bargain and sell" certain personal property: *Held;* that proof of a "mortgage" by the respondent is insufficient to sustain the allegation.
2. Questions of law arising upon an indictment which charges a felony may be considered by the law court upon report under R. S. (1883), c. 134, § 26, when the parties agree and consent thereto.

On report. Indictment for cheating by false pretenses.

Indictment nol prossed.

The case appears in the opinion.

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

The statute makes no distinction in the use of the words; they are evidently used conjointly to cover every contingency; the statute making a technical discrimination in the use of the words impossible, the pleader should not be required to attempt it; the indictment alleges that the respondent did grant, bargain and sell the encumbered property to Penley without notice; those are the precise words

used in the instrument introduced in evidence; those words clearly import an act within the meaning and definition of the statute, and whether that act was accompanied by a condition subsequent is absolutely immaterial and need not be noticed in the indictment.

Counsel cited: *Flanders* v. *Barstow*, 18 Maine, 358; *Stewart* v. *Hanson*, 35 Maine, 506, 509; *Com.* v. *Fogerty*, 8 Gray, 489, 491, 69 Am. Dec. 264; *State* v. *Casey*, 45 Maine, 435; *Jones* v. *Smith*, 79 Maine, 446, 450.

R. W. Crockett, for defendant.

Strict construction of penal statutes is to be had. Variances: *State* v. *Hussey*, 60 Maine, 410, 11 Am. Rep. 209; *State* v. *Gove*, 34 N. H. 511; *Com.* v. *Brown*, 15 Gray, 189.

When the language of a statute is clear and plain, the court has no authority to give a construction different from its natural and obvious meaning. *Clark* v. *Maine S. L. R. R. Co.*, 81 Maine, 477; *Lyon* v. *Lyon*, 88 Maine, 395, p. 404.

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

SAVAGE, J. This case comes up on report, under the provisions of R. S. (1883), c. 134, § 26. Although no objection to this method of procedure has been made by counsel, yet inasmuch as the legality or propriety of so proceeding, at least in cases of felony, has sometimes been questioned, we think it proper to say that we hold the case to be properly before us, under the statute.

The respondent was indicted for a violation of R. S. (1883), c. 126, § 1, which so far as it affects this case is as follows:—"Whoever knowingly, and with intent to defraud, sells, conveys, mortgages or pledges to another, personal property on which there is an existing mortgage, or to which he has no title, without notice to the purchaser, of such mortgage, or of such want of title, is guilty of cheating by false pretenses." The indictment charges, among other things, that the respondent "did . . . then and there grant, bargain and sell said building unto the said H. E. Penley." In support of this charge the state introduced evidence to show that the

respondent mortgaged the building, which was personal property, to H. E. Penley. The respondent claiming that there was a variance between the allegation and the proof, the case was reported to this court with the stipulation that if the indictment is sustainable, the case is to stand for trial; otherwise a nolle prosequi is to be entered.

The only question presented is whether under a statute which makes it an offense to "sell, convey, mortgage or pledge" personal property, under certain conditions, and when the indictment charges that the respondent did "grant, bargain and sell," proof of a mortgage is sufficient to sustain the allegation. We think it is not.

It is argued by the attorney for the State that a mortgage is a sale, a sale on condition; that it is a transfer of the legal title, and that while there may be a technical distinction between the words "sells" and "mortgages" when compared with each other alone, it is impossible to make any such distinction when these words are classed with the word "conveys" in the statute, a word whose significance embraces both sales and mortgages. But we think this reasoning is too refined to be applied to the admissibility of proof in a criminal case. We think the words in the statute should be taken in their ordinary signification. It is unnecessary to consider what proof would have supported an allegation that the respondent "conveyed," had the word "conveys" been used alone in the statute, both because there is no allegation in this indictment that the respondent "conveyed," and because the word "conveys" is not used alone in the statute. The statute uses four terms, "sells, conveys, mortgages or pledges," and it appears to use them distinctively. It is one offense to sell; it is another offense to mortgage. There is more than a technical distinction between a sale in its ordinary sense and a mortgage. One is absolute, the other is conditional. In common parlance, a sale is one thing, a mortgage is another. The statute marks this distinction by specifying the various ways of fraudulently transferring title, and by specifying them in the alternative. The proof must follow the allegation, which it does not in this case.

Moreover, it is a general rule of criminal pleading that the allegation must be specific and accurate so as to acquaint the accused with the precise nature of the charge against him, that he may be pre-

pared to meet it. It would be going far to say that an allegation of a "sale" would prepare the respondent to meet a "mortgage." The entry must be,

Nolle prosequi.

LUCINDA E. LIBBY, In Equity, *vs.* CLARENCE E. FROST, and others.

Somerset. Opinion December 15, 1903.

Trusts, Acceptance,—Right of election by cestui. *Waiver. Estoppel.*

Where a beneficiary has a cestui que interest in a certain lot of land and consents to its exchange for another lot, he has the option to charge either lot with the trust; and having elected to look to the latter one therefor, he thereby waives and releases his claim to the former. *Held;* that having made his election with full knowledge of the facts, he is bound by it and is estopped to assert a claim upon the former lot.

To perfect a trust, it must be accepted by the cestui que trust, when knowledge of its existence is received by the beneficiary. In absence of evidence to the contrary acceptance is presumed where it is for the benefit of the cestui, but this presumption may be overcome.

Held; that the plaintiff not only did not accept the trust, in this case, but repudiated it.

On report. Bill in equity charging a trust. Dismissed.

Bill in equity, in which the plaintiff charged that a trust in her favor existed upon a certain parcel of land known as the Lancey lot, in Pittsfield, Somerset County, the legal title to which was held by the defendant Frost.

The allegation of the trust and the plaintiff's prayer in her bill are as follows:—

"But this complainant says that the trust created in said real estate by her said father, Samson Hart on Dec. 3, 1888, in her favor, the payment of which was made a charge upon said real estate, and duly recorded on Feby. 1, 1889, as hereinbefore stated, was made by her said father in part performance of the parental duty he owed to her, his only child and daughter, upon valid consideration; and, upon

the due execution, delivery, and recording of the same, became in her a vested right of which all persons were charged with due notice; and that said vested right could not afterwards be discharged, or annulled, or in any manner affected, by any act of her said father, if, indeed, he designed or intended to discharge or annul it, which she by no means admits, but denies; nor could the same be discharged or destroyed by any act of said Bickford, or of said Walkers, or of said defendant, Frost; all of whom had full notice and knowledge of said trust, and of her vested right thereunder and thereto.

"She therefore respectfully prays that said Clarence E. Frost may be required to make full and specific answer upon his oath to all the allegations in this bill of complaint, so far as his knowledge, information and belief may enable him to answer the same; that said trust may, by the decree of this court, be declared, and said real estate in the hands of the said defendants be charged therewith; that the said defendants be ordered and required by said decree to pay to said complainant said sum of six hundred dollars and the interest due thereon since said Sept. 28, 1898, within such time as the court shall order; and, that in default thereof, so much of said real estate may be sold at public auction by the sheriff of the county, or by a master in chancery to be appointed by said court, as will be sufficient to raise and satisfy said sum and interest, or that said complainant may have such further, or such other relief as to the court shall seem equitable, adequate, proper and just."

D. D. Stewart, for plaintiff.

J. W. Manson, for defendants.

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

STROUT, J. The plaintiff is the child and only living heir of Samson Hart and his wife Hannah Hart. Samson died June 28, 1898, and Hannah died November 3, 1880. In August, 1881, Samson married Mary Ann Bickford, a widow with two children. December 3, 1888, Samson Hart held the legal title to four parcels of land, one of which was conveyed to him by Isaac H. Lancey,

April 19, 1886, hereafter to be designated as the Lancey lot. On December 3, 1888, he conveyed all these parcels of land to Eugene Bickford, a son of his second wife. The consideration for the deed was the bond of Bickford to maintain Samson and his wife for life, pay their funeral expenses, erect grave stones, and pay Samson twenty dollars a year, if he required, and his wife ten dollars a year after decease of Samson. The bond contained other provisions not material here. This bond was secured by mortgage from Bickford to Samson, of all the land conveyed to Bickford. The condition in the mortgage, in addition to securing the bond, provided that Bickford "should pay Lucinda Libby (this plaintiff) six hundred dollars in three months after said Hart's decease."

In this bill plaintiff claims that this provision created a trust in her favor, which is charged upon the lands mortgaged. She seeks only to have it charged upon the Lancey lot, and makes no claim upon the other three lots. The defendant Frost now holds the title to the Lancey lot.

January 15, 1890, Bickford exchanged the Lancey lot with Cora E. Walker for a lot of hers. Both lots being regarded of equal value, the exchange was even. It was effected by deed from Bickford to Walker of the Lancey lot, and a deed from Walker to him of what will hereafter be called the Walker lot. Samson Hart and his wife at the same time released to Walker their interest in the Lancey lot under the Bickford mortgage, and took a mortgage from Bickford on the Walker lot to secure the performance of his bond for maintenance.

February 28, 1890, this plaintiff brought a bill in equity against Samson Hart, Angie A. Grant, the daughter of his second wife, and Eugene Bickford, brother to Angie. Samson in January, 1888, had conveyed to Angie Grant a lot of land known as the Heagan lot. In her bill she claimed that all five parcels of land were purchased with money of her mother, Hannah, and that her father held them all in trust for Hannah, and upon her death, in trust for this plaintiff. She alleged in her bill that Samson and Bickford had exchanged the Lancey lot for the Walker lot; that the exchange was "an even one," and that the trust in her favor "instantly attached" to the Walker

lot. In her prayer she asked that Samson and Bickford "may be adjudged and declared . . . . to hold the Harvey Robinson lot, the Miller Richardson lot, the McMaster and Nelson lot, and the Walker house and lot, in trust" for her, and that they be required to convey the same to her. That suit was tried before Judge WALTON, as referee, and culminated in a final decree of the court.

If she had a cestui que trust interest in the Lancey lot, when it was exchanged for the Walker lot, she had the option to charge the Lancey lot or the Walker lot with the trust. She elected to look to the Walker lot, of the value of about two thousand dollars, and thereby waived and released her claim on the Lancey lot. Having made her election, with full knowledge of the facts, she is bound by it, and is estopped to assert a claim upon the Lancey lot. Perry on Trusts, §§ 835 & 836; *Oliver* v. *Piatt*, 3 How. 401; *Buford* v. *Adair*, 43 W. Va. 214; *May* v. *LeClaire*, 11 Wall. 236; *Proctor* v. *Rand*, 94 Maine, 313. She cannot now repudiate that election and revive her claim against the Lancey lot. Neither of these defendants ever had any interest in the Walker lot, nor does the plaintiff proceed against it in this bill. It follows that the bill cannot be sustained.

Although these considerations dispose of the present suit, it may be of service to examine another question that may arise, as to any claim upon the Walker lot. Whether the provision in the condition clause of Bickford's mortgage to Samson Hart, was sufficient to create a trust for this plaintiff chargeable upon all the four lots in that mortgage, which admits of doubt, it is not necessary to consider. It is well settled, that to perfect such a trust, it must be accepted by the cestui que trust, when knowlege of its existence is received by the beneficiary. In the absence of evidence to the contrary, acceptance is presumed, where it is for the benefit of the cestui, but this presumption may be overcome. Perry on Trusts, § 98; *Moses* v. *Murgatroyd*, 1 Johns. Ch. 119, 7 Am. Dec. 478; *Shepherd* v. *McEvers*, 4 Johns. Ch. 136, 8 Am. Dec. 561; *Hosford* v. *Merwin*, 5 Barb. 51; *Wetzel* v. *Chapin*, 3 Bradf. 391.

It is very clear in this case that the plaintiff not only did not accept the trust as to the six hundred dollars, but repudiated it. In her

first bill in equity she claims that all the lands in which her father Samson held the legal title, belonged in equity to her mother, and that as her sole heir she was entitled to the entire estate. If that claim was true in fact, her father could not charge any trust upon the land. Her claim of the entire title was absolutely inconsistent with any trust for six hundred dollars charged upon the same land. Such claim deliberately made and insisted upon on the trial of that case was a full renunciation of the trust now claimed, and ended her right thereto. It is too late, now, for her to recall that renunciation, and accept the alleged trust of six hundred dollars. In that suit, she obtained the Heagan place, and as to all the other lands the award of the referee and decree of this court, were against her.

Bill dismissed with costs.

CHARLES W. BROWN, and another,

vs.

ABILENE T. STARBIRD, and another.

Piscataquis. Opinion December 15, 1903.

Assumpsit. Account Annexed. Pleading, Amendment, No promise by defendant.

1. In an action of assumpsit upon an account annexed, the items were so phrased as to show that they represented various elements of damages resulting from an alleged breach of contract, or contracts. The plaintiff offered an amendment, which was allowed, by adding a new count in which it was alleged that the plaintiffs "entered into a written contract with the defendants" which contract was there set out in full. Breaches were alleged and damages claimed. No promise on the part of the defendants was directly and positively asserted. *Held;* that the amendment was itself faulty and demurrable, and that it should not have been allowed.
2. In such a case, an amendment may properly be allowed in the form of a count upon the special contract, alleging breaches and claiming damages therefor. But such new count must be limited in its terms so as to include only such breaches as were embraced in the items in the account annexed. In this case the amendment was not so limited.

Exceptions by defendants. Sustained.

The case is stated in the opinion.

J. S. Williams and W. E. Parsons, for plaintiffs.

J. B. Peaks and C. W. Hayes, for defendants.

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

SAVAGE, J. The plaintiffs brought an action of assumpsit upon an account annexed. The most of the items in the account are so phrased as to show that they represent various elements of damages resulting from an alleged breach of a contract, or contracts. The declaration was faulty, for it is a settled law that damages for the breach of performance of a contract are not recoverable under such a count.

Accordingly the plaintiffs prayed to amend by adding a new count, which, against the defendant's objection, was allowed, and an exception to the allowance was taken. The new count alleged that the plaintiffs on a day named "entered into a written contract with the defendants, a copy of which is hereto annexed, to which the said plaintiffs were ready and willing at all times to fulfill in each and every part thereof, by them to be performed, but the said defendants notwithstanding their agreement and contract so entered into, did not perform and fulfill the conditions of their said contract, and to perform the labor therein required and agreed upon by them to be performed, but broke the same, and by reason of said breach and failure of the said defendants to perform said contract, said plaintiffs were put to great trouble and expense at hauling spool bars named in said contract, and by doing other labor and obligations in said contract by said defendants to be performed &c." Then follows the written contract.

The defendants contend that this new count was improperly allowed, because it is itself faulty and demurrable, first, in that it does not allege any promise made by the defendants to the plaintiffs. In support of this position the defendants rely upon *Bean* v. *Ayers,* 67 Maine, 482. In that case the only allegation of a promise on the

part of the defendant was in these words, "and thereupon the said defendants executed under their hands and delivered to the plaintiff an agreement in words and figures as follows." Then followed the writing ipsissimis verbis. The court held the declaration bad, saying: "The weakness in the declaration is that, although an action of assumpsit, no promise is directly and positively asserted therein, but it is stated argumentatively, and only inferentially, if at all. The plaintiff declares that the defendants executed under their hands and delivered to him an agreement. He does not say that they made any promises in accordance with such agreement. . . . . The contract itself should have been averred, and not merely the written evidence of the contract."

The language in the declaration in this case is however somewhat different. It is that "the plaintiffs entered into a written contract with the defendants," a copy of which is referred to. But even if this were a sufficient allegation that the plaintiffs promised, it is only, at the most, inferentially averred that the defendants promised. The want of a direct averment that they promised cannot be supplied by the terms of the contract itself. *Bean* v. *Ayers*, supra. The point is well taken.

There is at least one other fault in the new declaration which should be noticed. The original account annexed as already stated, set forth items of damages for a breach of a contract. It would undoubtedly have been proper to allow an amendment in the form of a count upon the special contract, and alleging breaches, and claiming damages therefor. Such a count if so limited in its terms as to include only such breaches as were embraced in the items in the account annexed would not introduce a new cause of action. But this new count is not limited. Under it, claims of damages may be set up for breaches which are in no way referred to in the account annexed. It enlarges the alleged cause of action, and thereby to that extent sets up a new and larger cause of action.

Exceptions sustained.

SACO WATER POWER COMPANY *vs.* INHABITANTS OF BUXTON.

York. Opinion December 16, 1903.

Taxes, Assessment of mill privilege. Appeal for overvaluation. *Evidence*, Record not to be contradicted. *R. S.* (*1883*), *c. 6*, § *168*. *Stat. 1895*, *c. 122*.

In an appeal from an assessment of taxes, brought under the provisions of chapter 122 of the Public Laws of 1895, it appeared that the assessment complained of described the property assessed as "the mill privilege at Salmon Falls." The property consisted of land on the shore of a stream, and an unused dam across the stream. *Held;*

1. That by the terms of the assessment neither the water, nor the power created by the dam was assessed.
2. That so far as the value of the land was enhanced by the existence of the water and the means of creating the power, it was properly to be considered in the valuation of the land.
3. That upon the evidence submitted, the court cannot say that the valuation of the mill privilege by the assessors was excessive.
4. Testimony of assessors is not admissible to contradict their records.

On report. Appeal denied.

Petition for abatement of taxes, assessed in 1902, brought under the provisions of the Stat. 1895, c. 122, R. S. 1883, c. 6, § 122, authorizing appeals to the Supreme Judicial Court.

The case is stated in the opinion.

H. Fairfield and L. R. Moore, for plaintiff.

This was an erroneous valuation for the purpose of taxation. The water and power were not taxable. This is not a new question. It was settled in *Union W. P. Co.* v. *Auburn*, 90 Maine, 60. There the court says, "Water power until applied to mills is potential, not actual, in the sense that it is property subject to taxation. When applied to the mills it becomes a part of the property, thereby giving them value, the proper subject of taxation. It then becomes the

main element of value, not as water, not as power, but as an integral part of the mills themselves.

Water as an element is not property any more than air. When used, its potential power becomes actual by operating upon real property, i. e. the mill, and thereby giving it value, and that value is the basis for the purposes of taxation."

Nothing but the land and one-half the dam should have been taxed.

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

We ask the careful attention of the court to the case of *Lowell* v. *Co. Com.*, 152 Mass. 382, 383, wherein the statute of Massachusetts passed in 1861, are referred to, and that this statute of Massachusetts divides up the different kinds of property under mill and water power, when it comes to the subject of taxation. But the court will notice at the bottom of page 382, that it is there stated there is no law, "that the water power which is parcel of or is appurtenant to land, and is used in connection therewith, shall not be valued and taxed with the land."

The court in that case refers to the case of *Boston Mfg. Co.* v. *Newton,* 22 Pick. 22 and *Lowell* v. *Co. Com.*, 6 Allen, 131, and several other decisions decided before the statute of 1861 and wherein it was held simply that water power could not be taxed independently of the land, and in no decision is it held that it cannot be taxed when it is an incident to the land as in the present case, either before the statutes of 1861 in Massachusetts or subsequent thereto.

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

SAVAGE, J. This is an appeal from the assessment of taxes on the property of the Saco Water Power Company in Buxton, and is brought under the provisions of chapter 122 of the Public Laws of 1895. The assessment complained of was made in 1902 and describes the property assessed as the "mill privilege at Salmon Falls." The property consisted of about an acre of land by a river, and a dam. The dam created a head of water, but there was no mill there,

and the power was not used. The appellant contends that the valuation made by the assessors improperly included elements not assessable, as for instance the water in the stream, or the water power created by the dam; and further that the valuation was excessive from any legal standpoint. The contention is that the assessors could only assess the land for what it was worth as land, independent of its being a parcel of a mill privilege, and the dam for what it was worth as a structure. We are unable to concur in this view.

The property assessed here was a "mill privilege." It was the land and the dam, but it was the land and the dam situated as they were, with the capacity to hold the water of the stream and create power. By the terms of the assessment, the power was not assessed, and the water was not assessed. The "privilege" was assessed. Its value might be greatly enhanced by the existence of the water, and the means of creating the power.

The appellant relies upon *Union Water Power Co.* v. *Auburn*, 90 Maine, 60, 60 Am. St. Rep. 240, 37 L. R. A. 651. But that case is clearly distinguishable from the case at bar. There the assessors assessed "dam and water rights." The "water rights" were a distinctive element of assessment. They were assessed for what they were supposed to be worth as property, and not regarded as merely a condition which gave the dam an enhanced value. And the court in considering the assessment, treated it as an assessment of "water power" as such, and so held that it was illegal. Here the "mill privilege" only was assessed, and by no fair construction can it be regarded as an assessment of water power as property. Besides, here the water power was not appurtenant to mills in other towns, as was held to be the case in *Union Water Power Co.* v. *Auburn*, supra, but it is incident to land and a dam where there are no mills.

Suppose there were no dam. Could it be successfully contended that the land was to be assessed only for its value as land for farming, or for any other use to which it might be put disconnected from the stream? Is land upon which there is a valuable unimproved water privilege, where no power is being developed, to be assessed only for the value of the land without the privilege? May it not be the chief value of the land that it had a privilege upon it? And

does the fact that an unused dam has been built upon the privilege make it any other than an unused privilege, and assessable for its value as a privilege? We think not. We think that in so far as this land was made more valuable by the stream and fall, so far these were properly to be considered in the valuation of the land.

But it is also contended that the testimony of the assessors in this case shows that as matter of fact they did include water power as an assessable element of property, in fixing the amount of its value, however they may have expressed themselves in their record, that is, that the amount was swollen by a consideration of water power as property. It is true that some answers given by the assessors might lead to that conclusion, but upon a careful examination of the whole record, we think it is evident that they assessed the "privilege" consisting of land and dam, and estimated that its value was increased by the existence of the stream and water fall, and that the property was not otherwise assessed. Besides the testimony of the assessors cannot be permitted to contradict their record.

Upon the evidence submitted we cannot say that the valuation of the mill privilege was excessive.

Appeal denied. Assessment affirmed.

WINSLOW H. COOK *vs.* JOSEPH W. LITTLEFIELD.

Androscoggin. Opinion December 16, 1903.

Contracts, Reference to Plans. *Evidence*, Independent Contracts. *Exceptions*, Harmless testimony.

When a written contract refers to a plan that is not annexed or otherwise identified and two plans are offered in evidence, it is for the jury to determine which one is the plan thus referred to.

Exceptions do not lie to the admission of harmless testimony, nor when they fail to show that the excepting party has been aggrieved, nor when the testimony does not contradict a written contract between the parties.

An independent verbal contract relating to its subject matter, but not inconsistent with it, may be shown.

Held; that the case is not obnoxious to the objection of an attempt to vary a written contract by parol evidence of a different understanding at the time it was made.

Exceptions by plaintiff. Overruled.

Assumpsit on account annexed and money counts, to recover for labor and materials furnished to the defendant by the plaintiff in the erection of a set of buildings. There was a written contract, referring to a plan, but not designating the plan by any designating mark. At the trial of the case, the plaintiff offered one plan in two parts, which he claimed as the one referred to in the contract; and the defendant offered a different plan, which he claimed to be the one referred to.

It was claimed by the plaintiff that according to the plan offered by him as the true one, certain work done by him was extra, for which he should recover. And, on the other hand, the defendant insisted that the plan offered by him was the true one, and that according to this plan, the several items claimed as extras by the plaintiff were included in the contract, and that the plaintiff should not be allowed for them as extras.

The defendant further claimed that under the plan offered by him, certain work required by said plan was left undone by the plaintiff, and was afterwards done by the defendant at his own expense, for which he claimed allowance as against the plaintiff's demand.

The verdict was for the defendant and the plaintiff took exceptions to the admission of certain testimony introduced by the defendant.

S. M. Farnum, Jr.; H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for plaintiff.

Here was a written contract. If the subject matter of the question was covered by the contract, clearly the witness could not give parol testimony as to the contract; it would be immaterial. If not covered by the contract, it was manifestly improper.

The writing must speak, and cannot be varied, explained or modified by contemporaneous parol evidence. *Sylvester* v. *Staples,* 44 Maine, 496; *McLellan* v. *Cumberland Bank,* 24 Maine, 566; *Madden* v. *Tucker,* 46 Maine, 367; *Stevens* v. *Haskell,* 70 Maine, 202; *Knowlton Car Co.* v. *Cook,* 70 Maine, 143; *Chadwick* v. *Perkins,* 3 Maine, 399; *Allen* v. *Kingsbury,* 16 Pick. 235; *Goddard* v. *Cutts,* 11 Maine, 440; *Marshall* v. *Baker,* 19 Maine, 402.

Even if something had been inadvertently omitted from the contract, this omission cannot be remedied by such testimony. The principle has often been stated by our court.

"No rule of law is better settled by law, or more easily sustained upon principle, than that where parties have thus committed their bargain to writing, that writing must govern. They will not be permitted to introduce contemporaneous parol evidence that they meant something else, or that other conditions, stipulations, or requirements were inadvertently omitted, or agreed to be incorporated into the contract." *Millett* v. *Marston,* 62 Maine, 477; *Williams* v. *Robinson,* 73 Maine, 186, and cases cited.

The answer to the question objected to, in this case, gives a contract covering the whole second story of the building in question, a portion which did not appear at all on the defendant's plan, although shown fully on plaintiff's plan.

The same objections apply to the second question to the same witness.

H. E. Coolidge and W. H. Newell, for defendant.

A verbal contract was entered into between the plaintiff and defendant by which the plaintiff was to build a house for the defendant. Later an outline of this agreement was made and signed by the parties, in which details were almost entirely omitted. It was not therein stated whether the house was to be a one story or a two story house, nor were the rooms of the second story shown; the piazza was named but nothing said as to its trimmings or adornment; nothing was said as to the doors or finishing of the stable except that there were to be two box stalls; in other words there was a complete and entire verbal agreement, a part only of which was reduced to writing. Mr. Cook, the plaintiff, built a two story house as far as he went.

Plaintiff must have, at least, agreed upon this outside the contract so-called, and if that much was agreed upon there certainly was an agreement as to the rooms, as they were not in the contract even mentioned. The arrangement of the rooms could be proved by parol, showing as it does the whole contract.

Neal v. *Flint*, 88 Maine, 72; *Bradstreet* v. *Rich*, 72 Maine, p. 236; *Thomas* v. *Loose*, 114 Pa. St. 35.

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

STROUT, J. Exceptions to the admission of certain testimony.

Plaintiff contracted with defendant to build a set of buildings for him. The contract was reduced to writing, but from it it is impossible to ascertain whether the house was to be one or more stories, nor how many or what size the rooms were to be, nor the details of finish. It referred to a plan, which thereby became a part of the contract, and if the two would clearly show how the contract was to be executed, parol proof of previous talk or agreement would be inadmissible. The written contract and plan would govern. But there was a dispute as to the plan. The plaintiff offered one, and the defendant another and different one. It was for the jury to say which was the plan referred to in the contract. The jury apparently adopted

the plan offered by the defendant. Even that plan fails to show in detail all that should be done, or was necessary to be done to complete the house and barn. It is evident that the parties contemplated something more than is disclosed by the written contract and the plan. In this condition of the evidence, defendant was allowed to show by the testimony of Nellie Littlefield as follows:—

Q. "What, if any, difference was there to be between the rooms of the upper and lower stories, if you know?

A. The difference in the upper story was simply that there was to be no bath room up stairs. The rooms up stairs were to be the same as the rooms down stairs, except the room over my dining room was to be made for a kitchen, and the room over the kitchen up stairs was to be for a sleeping room."

It does not appear by the exceptions that the actual finish of the rooms did not correspond with this statement, nor if it did not, that the result was not satisfactory to the defendant. Nothing in the exceptions shows that the defendant was in any manner aggrieved by the admission of the testimony, which did not contradict the written contract. Apparently the testimony was harmless. This exception, therefore, cannot be sustained.

Miss Littlefield further testified that in the negotiation and agreement for the construction of the house, that plaintiff "was to put a balustrade around the bottom (of the piazza) and he left a few of the top pieces, the rail,—I do not know what you call them,—that go on the piazza. They were up there when he left the house. He was to put a frieze at the top. I also spoke to Mr. Cook about the entrance, where we come in from the entrance of the piazza, what we could have, and we spoke about having a circular work for that, but that wasn't put in,—it was only just simply the plain frieze that was put in, but Mr. Cook agreed to put the balustrade in. He also agreed to put in the lattice work."

The plan indicated a piazza, and it would fairly be implied that it was to be finished in a workmanlike manner. The plaintiff apparently so understood it, as he furnished a rail and some top pieces adapted for a balustrade. The talk the witness had with Cook about circular work, etc., is of no moment, as the witness does not say

there was any agreement about them. She says he agreed to put in the lattice work, but does not say it was not put in.

The testimony of the carpenter Shea, was in answer to the question, "What was left undone to complete it (the building) according to the plan?" This question to an experienced carpenter was clearly admissible. It confined him to the plan, and what that called for, and he stated what was not done which the plan required. We see no objection to this question, nor to the answer to it.

An independent verbal contract, relating to its subject matter, but not inconsistent with it, may be shown. It does not impair or vary the written contract. Miss Littlefield does not state when the agreement as to balustrade and lattice was made. For aught that appears, it may have been made after the written contract was executed. If so, it was clearly admissible. But if made at that time, as an independent arrangement, it is not inconsistent with the written agreement, and seems in fact consistent with defendant's plan, which shows a piazza, which by necessary implication was to be complete and finished, and which was so understood by the plaintiff, as he furnished a rail for it.

The case is not obnoxious to the objection of an attempt to vary a written contract by parol evidence of a different understanding at the time it was made. *Gould* v. *Boston Excelsior Co.*, 91 Maine, 214, 64 Am. St. Rep. 221.

Exceptions overruled.

ANTHONY E. McDONOUGH, Admr.

vs.

GRAND TRUNK RAILWAY COMPANY.

Androscoggin. Opinion December 16, 1903.

Negligence. Evidence, Burden of proof upon Admr. under Stat. 1891, c. 124. *Contributory Negligence,* In freight yard. *Railroad. R. S. (1903), c. 89, § 9. Stat. 1891, c. 124.*

Action on the case, under R. S. 1903, c. 89, § 9, for personal injuries received on Feby. 11, 1900, by the plaintiff's intestate, Thomas F. Ryle, in the defendant's freight yard, and resulting in his immediate death.

After the plaintiff had introduced his testimony the presiding justice on the defendant's motion ordered a non-suit, and the plaintiff was allowed his exceptions to this order.

PER CURIAM. 1. Evidence drawn out by cross-examination of the plaintiff's witnesses, as well as that contained in a deposition read by the plaintiff though taken by the defendant, is part of the plaintiff's evidence and if uncontradicted is to be taken as true on a motion for an order of nonsuit.

2. In an action upon the statute of 1891, chap. 124, the administrator must affirmatively prove that the deceased was free from contributory negligence, the same as in an action by the deceased himself had he survived.

3. When such evidence shows that a railroad switchman, eighteen years of age and of experience in switching cars in railroad yards, saw that an old-fashioned draw-bar (then allowable) on a freight car was loose and out of order and was expressly notified by his foreman, that it was loose and held by a chain and that he should look out for it when undertaking to couple it to another car, and notwithstanding such knowledge and caution he placed himself in such a position that

he must necessarily be injured through the defect in the draw-bar, the evidence fails to show that he was free from contributory negligence.

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

C. A. and L. L. Hight, for defendant.

Exceptions overruled.

MARGARET E. COWAN *vs.* INHABITANTS OF BUCKSPORT.

Hancock. Opinion December 16, 1903.

Evidence, Exceptions to admission. Grounds of objection to be stated at trial.
Way, Injury from defect. Notice of claim and description of defect.
Pleading, Variance.

1. A party objecting to the admission of evidence offered in the trial of a cause must state at the time the ground of his objection, and upon exceptions to a ruling admitting the evidence, he is confined to the ground stated.
2. Where the written notice of an injury received upon a highway, required by the statute R. S. (1883), c. 18, § 53, is offered in evidence and is objected to on the ground of the insufficiency of its contents, no other ground being stated, that ground only can be considered at the hearing on the exceptions.
3. *Held;* that the written notice in this case contains enough to satisfy the statute and the exceptions must be overruled.
4. The location of the defect was stated in the written notice, as, "at the corner of Main and Hincks Streets in front of the dwelling-house of Calvin O. Page." The evidence was of a defect on Main Street twenty or thirty feet from Hincks Street, but in front of the dwelling-house of Calvin O. Page. The evidence sufficiently corresponded with the notice.
5. A witness described the defect as a rock raised some eight inches above the surface in the traveled part of Main Street about eighteen or twenty feet from Hincks Street, and testified that he told the road commissioner of the town, "there was a rock there." This was evidence from which the jury could rightfully infer that the road commissioner had notice of the defect described.

6 In the plaintiff's declaration the only allegation of notice was notice to the municipal officers. The only evidence of notice was notice to the road commissioner. No objection of variance was made at the trial, however, and hence it cannot avail the defendant on his motion for a new trial, since an amendment to the declaration can be allowed to conform to the evidence.

7. Where it was assumed at the trial that the written notice which was actually given was given within the statutory time, fourteen days, and there was no evidence that it was not and no objection to lack of positive evidence as to time was made at the trial, *held;* that the objection comes too late after verdict.

Motion and exceptions by defendant. Overruled.

Case for injuries sustained by the plaintiff through a defective street in Bucksport, and in which the jury gave a verdict of $900 to the plaintiff.

The facts appear in the opinion.

T. B. Towle; T. H. Smith; W. R. Pattangall, for plaintiff.

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

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

EMERY, J. There was evidence sufficient to warrant the jury in finding that while the plaintiff was riding in a pung with all due care upon a highway, which the defendant town was bound to keep in repair, the pung came in contact with a stone or rock which constituted a defect in the highway, by which collision she was injured. The only matters now relied on by the defendant town after verdict, as barring the plaintiff's right of recovery, are those relating to the notices required by the statute upon which the action is based.

I. Exception is taken to the admission in evidence of the written notice given after the injury, upon the ground of its insufficiency. No other ground of exception was stated at the time and hence the exception only raises the question whether the written notice contained all that the statute requires. We think it does. In it are set forth "her claim for damages," and are specified "the nature of her injuries and the nature and location of the defect which caused the injury." The exceptions therefore must be overruled.

II. Upon a motion for a new trial, the defendant claims that the evidence showed the matters contained in the notice to have been incorrectly stated, particularly as to the location of the defect. That location is stated in the notice to have been "at the corner of Main and Hincks Streets in front of the dwelling-house occupied by Calvin O. Page." The evidence showed it to have been on Main Street from twenty to thirty feet from Hincks Street. It was, however, in front of the dwelling-house of Calvin O. Page, and no other similar defect was shown to have existed at the corner of the two streets. We think the notice sufficiently indicated the location of the defect proved. The evidence also substantially supports the other statements in the notice.

III. It is further claimed there was not sufficient evidence that any statutory officer of the town had actual notice of the defect twenty-four hours before the injury. A witness, Mr. Chandler, described the defect as a rock raised some eight or ten inches above the surface in the traveled part of Main Street about 18 or 20 feet from Hincks Street. Being asked whether he ever gave notice of the rock to any official of Bucksport, he answered "I told Mr. Snowman there was a rock there." This was more than twenty-four hours before the injury and Mr. Snowman was then road commissioner of Bucksport. We think this sufficiently imports that actual notice was given Mr. Snowman that there was a rock in the traveled part of Main Street about 18 or 20 feet from Hincks Street, and hence that he had actual notice of the rock which caused the injury. It was not necessary that he be told the rock was a defect in the street. Notice of the thing which constitutes the defect is notice of the defect.

This testimony of Mr. Chandler, as to the notice to Snowman, was flatly contradicted by Snowman and other witnesses for the defense, but it was for the jury to decide who was correct.

IV. Another point urged by the defendant is that in her declaration the plaintiff alleged that the municipal officers of the town had the previous notice of the defect and that, at the most, she has only proved notice to the road commissioner, an officer not named in the

declaration. In other words, the town claims there was a variance between the allegation and the proof.

This point, however, should have been made at the trial by objection to the admission of the evidence of the notice to Snowman, and again by requesting an instruction that there was no evidence of notice to any of the officers named in the declaration. The objection now urged, for the first time, does not go to the merits of the case itself, even upon the matter of notice, as there was evidence of sufficient notice to satisfy the statute. Had the point been made at the trial, the declaration could have been amended to correspond with the evidence even after verdict. The law court, also, upon a motion for a new trial can authorize an amendment to cure a variance, and so sustain a verdict otherwise sustainable.

V. Lastly, the point is made that there was no evidence that the subsequent written notice first above described was given within fourteen days after the injury, as required by the statute. There was no direct, explicit evidence of the time of giving the notice, but the plaintiff claims that it was sufficiently admitted to have been within the statutory time of fourteen days. At the close of the evidence for the plaintiff her counsel said: "We offer a copy of the fourteen days notice. I understand that, without admitting that it is a complete notice, it is admitted that the town officers received a copy like this one we offer." The defendant's counsel said: "I understand that the town officers received a copy of that notice. I object to the notice, to the sufficiency of it." The copy was admitted, the exception noted, and the plaintiff's case closed.

It is clear that the notice was given, and we have above held that it was sufficient in its statements. There was no evidence or suggestion at the trial that the notice was not received within the fourteen days. Must the verdict now be set aside, and the parties and the court subjected to the burden of another trial of the case, because it was not more explicitly or precisely stated in the colloquy over the notice that it was received within fourteen days? We think not. We think the point now made is within the category of points to be made at the trial, or to be considered as waived. It was not made at the

trial and no intimation was given that it would be made. Had it been made at the trial and sustained, the plaintiff would either have supplied the evidence or submitted to an adverse verdict. If not sustained, the defendant could have excepted and thus regularly and seasonably brought the question here. The point, not having been made at the trial, cannot be sustained here, even if it be otherwise sustainable.

The plaintiff may amend her declaration as herein indicated without terms, and when so amended the certificate of decision will be,

Exceptions and motion overruled.

LAURA T. LOMBARD *vs.* FLAVEL A. CHAPLIN.

Cumberland. Opinion December 16, 1903.

Evidence, Admissions by party's letter. Cross-examination based on it makes entire letter admissible. *Waiver.*

It is a principle well settled that the admissions of a party when given in evidence must be taken together, as well what makes in his favor as against him.

Held; that when a part of a cross-examination is confined, either by accident or design, almost wholly to the contents of a letter written by the defendant, in some instances to the exact language and in every other to the substance, upon request or offer by the defendant, the whole letter should be submitted to the jury.

In an action for the recovery of damages for injuries received by the plaintiff through the alleged negligence of the defendant in running and operating his automobile so carelessly as to frighten the horse which the plaintiff was driving, causing him to run away, thereby injuring the plaintiff, it appeared from the development of the evidence in the case that the defendant had written a letter to the husband of the plaintiff. This letter was in the possession of the plaintiff's counsel and used by him in connection with his cross-examination of the defendant. *Held;* that the exclusion of the whole letter, when offered later by the defendant, is a matter of exception.

Also; that counsel must be deemed to have put in evidence part of a letter whenever he has, in his examination, so referred to it and its contents that the jury must necessarily come to the conclusion that they are listening to testimony concerning the contents of a particular letter.

On motion and exceptions by defendant. Exceptions sustained. Motion not considered.

Case for personal injuries which the plaintiff alleged she sustained while driving upon a public street, April 22, 1902, in the City of Portland, by reason of the defendant's negligence in the operation of his automobile. The jury rendered a verdict for the plaintiff and assessed the damages at six hundred dollars. After the verdict the defendant, besides the usual motion for a new trial, excepted to the rulings of the presiding justice in refusing to admit in evidence, upon defendant's request, a certain letter in the plaintiff's possession. The letter was written by the defendant to the plaintiff's husband and from it the defendant claimed that plaintiff's counsel had cross-examined him in such a manner as to get a part of it before the jury, to his prejudice.

The exceptions appear in the opinion.

Frank H. Haskell and Enoch Foster, for plaintiff.

The letter was never at any time offered in evidence by the plaintiff. It was not even inspected by the defending attorney, nor did he ask to inspect it. During that cross-examination not a word of the letter was read, either to the presiding justice, the jury, or the witness. He was not asked a single question about the letter, and the examining attorney distinctly disclaimed during the course of the examination any reference to the letter in asking his questions. He propounded to him certain statements of fact and received from him appropriate answers, at no time asking him what was in the letter. Had he by the least inference asked him what he had written in that letter, the proper course and practice would have been to object to the answer and ask that the letter go in as evidence instead of the defendant's own testimony. We fail to understand upon what principle of law the defendant can waive his rights to object to what he seems to have regarded as an improper question and require us to put in evidence a self-serving (not self-disserving) letter written to a third party. Wharton on Evidence, Vol. 2, par. 1101, and cases

there cited. *Carter* v. *Clark*, 92 Maine, 225; *Wright* v. *Boston*, 126 Mass. 161.

This letter was merely used as a memorandum, the same as any ordinary memorandum could be used to elicit certain facts to prove which, if they had not been admitted by the defendant, the letter would have been competent evidence as we understand for the purpose of contradicting his testimony. *Lewis* v. *Hodgdon*, 17 Maine, 267.

Certain questions of fact were asked the witness in that cross-examination in a leading way, all of which were perfectly proper and all of which he admitted to be facts; and we submit that a verbal admission against the party's own interest can be used as primary evidence of the writing against him. 1 Greenleaf on Evidence, §§ 96, 97. *State* v. *Stoyell*, 70 Maine, 360; *Smith* v. *Palmer*, 6 Cush. 513; *Loomis* v. *Wadhams*, 8 Gray, 557.

Wm. C. Eaton, for defendant.

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

SPEAR, J. This is an action in which the plaintiff seeks to recover damages of the defendant for alleged negligence on his part in running and operating the automobile, in which he was riding, so carelessly that the horse which the plaintiff was driving became frightened and ran away, throwing the plaintiff from her carriage and causing her to be injured. The case comes up on motion and exceptions by the defendant, but, as the exceptions must be sustained, it becomes unnecessary to consider the motion.

It appeared from the development of the evidence in the case that the defendant had written a letter to Dr. Lombard, husband of the plaintiff. This letter was in the possession of the plaintiff's counsel and used by him in connection with his cross-examination of the defendant, and the question is, was it such a use as made the exclusion of the whole letter, when offered later by the defendant, a matter of exception?

The plaintiff's counsel, during the cross-examination of the defendant, passed the letter to the defendant with the following inquiries: Q. Will you look and see if you recognize that letter? A. That is my signature. Q. Is that your signature? A. Yes. Q. Is that written by you or dictated by you? A. It was. Q. I will identify it. The letter was then marked by the stenographer, "Exhibit No. 2 Plaintiff." After putting several other interrogatories to the defendant, plaintiff's counsel then asked this question, which is quoted as an introduction to the important questions which follow relating to the letter. Q. That was over two hundred feet away and the horse was running directly towards you? A. I said that was my idea of the way she was running. Q. When did you say that? A. I just said it. Q. Did you ever say it to anybody before to-night? A. I don't remember. Q. *Did you write* it to Dr. Lombard? A. What? Q. That the horse was running furiously towards you? A. I think I did. *You have it in your hand.* I think I did. I have said it was *my signature on the letter.* Q. I am not asking you anything about your letter. I am asking what you said or *wrote to him.*

After a long cross-examination, confined, either by accident or design, almost wholly to the contents of the letter, in several instances to the exact language, and in every other to the substance, counsel for the defendant, on the ground that a part had been put in evidence, requested that the whole letter should be submitted to the jury. In opposing this request, plaintiff's counsel said, "I have not offered it in evidence and I have only used it for such purposes as I saw fit in propounding my questions." Later when the defendant's attorney formally offered the letter, counsel for plaintiff again said, "I admit I had the letter in my hand, and I had other papers, and I read what I pleased, anything to refresh my memory." All of the above contention and everything else said and done with respect to the admissiblity of this letter took place in the presence of the jury. While counsel for the plaintiff denied that he had read a word from the letter, and, from his own standpoint of what constitutes the reading of extracts from a letter, undoubtedly felt justified in making the statement, the real question is, were extracts, as a matter of

fact, read or quoted, in the questions put to the defendant, so as to impress the minds of the jury that parts of the letter were being put in evidence? A few quotations from the testimony will fully justify an affirmative answer upon this point. The letter had been acknowledged by the defendant, and identified and marked as an exhibit by the stenographer. After this had been done, plaintiff's counsel, with the letter in his hand, asked the defendant directly. "Q. Did you write it to Dr. Lombard?" Defendant inquired "What?" Supply what is implied in his inquiry and it will read, "Did I write *what?*" Counsel answered, "That the horse was running furiously towards you?" Supply what is implied in this answer and it will read, "Did you write to Dr. Lombard that the horse was running furiously towards you?" The defendant replied, "I think I did. You have it in your hand. I think I did."

There is neither evidence nor pretense that there was any other written communication from the defendant to Dr. Lombard than the letter. This being true, the above cross-examination by plaintiff's counsel purports upon its face to be a direct inquiry as to what the defendant wrote Dr. Lombard in the letter held by counsel in his hand, there being no other letter or writing upon which the inquiry could be based. While the language put into the defendant's letter by the inquiry was not an exact quotation, yet if counsel varied the language of the letter when apparently putting it to the defendant as a quotation, and it was admitted by the defendant as such, then the greater is the reason for admitting the entire contents of the letter, not only for the purpose of explaining or modifying a correct quotation with reference to its context, but of stating in exact terms a garbled one.

The true principle is this, that counsel has put in part of a letter whenever he has in his examination so referred to it and its contents that the jury must necessarily come to the conclusion that they are listening to testimony concerning the contents of a particular letter. Applying this principle to the case at bar and it becomes manifestly clear, that the jury could have but come to the conclusion that extract after extract from the letter was being put in evidence by way of interrogatories put to the defendant on cross-examination.

Did the putting in evidence a part of the letter, as above shown, entitle the defendant to the right to put in the whole letter? We think it did. It is claimed that the whole letter is inadmissible, even if a part of it had been put in evidence, as it was a self-serving, not self-disserving, statement made to a third party. If the writer of the letter was a witness only, it is true that the letter could be used only to contradict him and impeach his credibility, and not for the purpose of proving or disproving any fact material to the issue involved. But when the writer is also a party, this rule does not apply, for every statement in his letter, to whomsoever written, may be taken as an admission to prove or disprove any fact relevant to the issue.

In the former case, where the writer is a witness only, his letter would be admissible only to contradict his present testimony. But in the latter case, where the writer is also a party, his statement may be used to contradict his present testimony, or as an admission of fact if material to the issue. In the case at bar, the extracts from the defendant's letter could not have been used to contradict his present testimony, for no such contradiction appeared or was claimed; hence they must necessarily have been used as admissions of fact on the part of the defendant. Considering this letter then as an admission previously made by the defendant, did counsel for the plaintiff, by introducing a part of it, thereby give the defendant the right to introduce the balance? We think he did. This court in *Storer* v. *Gowen*, 18 Maine, 176, have held that, "It is a principle well settled that the admissions of a party, when given in evidence, must be taken together as well what makes in his favor as against him. Both are equally evidence to the jury, who will give every part of the testimony such credence as it may appear to deserve." *Hammatt* v. *Emerson*, 27 Maine, 308, 336, 46 Am. Dec. 598. In an early decision in Mass. *Whitwell* v. *Wyer*, 11 Mass. 91, this is the language of the court: "Where you rely upon a confession you must take it all together." And the same court says in *O'Brien* v. *Cheney*, 5 Cush. 148: "The general principle for which the defendant contends, namely, that, when the admission of a part is offered in evidence, he is entitled to have the whole of what he said on the subject, at that interview, stated as a part of the evidence, is correct and is not denied." See

also *Adam* v. *Eames*, 107 Mass. 276; *Dole* v. *Wooldredge*, 142 Mass. 161.

In regard to the admission of the defendant, the court say in *Mattocks* v. *Lyman*, 18 Vt. 102: "That the whole declaration of the party made at one time, as well that in his favor as that which is against him, must be received and weighed." And in *Moore* v. *Wright*, 90 Ill. 473, the court holds that, "Where a party's admissions are called for, the party calling for the same is bound to take all the other party said upon the occasion concerning the matter in dispute, whether it makes for or against him." It is unnecessary to make further citations. The above, we think, is a fair statement of the practice both in this country and England with respect to the admissibility of admissions as testimony.

The plaintiff contends that, even if a part of the letter was in evidence, by way of cross-examination, the defendant waived his right to put in the balance, by failing to object to the method of putting in the contents of a written communication, and not calling for the best evidence, the writing itself. It is true that the defendant waived all objection to the manner of putting in the evidence, but this is the extent to which he has waived any rights in the matter. It seems to us unimportant and immaterial how a part of the contents of a letter are put into the case, so far as the right to have the balance put in is concerned. And we hardly see how the plaintiff, when he had been permitted by the waiver of the defendant to put in secondary evidence of the contents of a part of a writing, the primary evidence of which, the writing itself, he had in his possession, can complain, if the defendant demands the admission of the balance of the writing. The plaintiff was alone responsible for putting in evidence a part of the letter. He alone chose the manner of doing it. He had the letter in his hand as the best evidence. He could have used it. He chose however to use secondary evidence. The defendant's rights should not be impaired by the voluntary act of the plaintiff's counsel over which he had no control. The whole letter, after the use made of it in cross-examination, should have been admitted in evidence. It is not for us to say what would have been the effect of the letter upon the verdict. It might and it might not have had any. But that was

a question for the jury and not for the court. They were entitled to consider the contents of the whole letter, whatever its weight.

Says Greenleaf on Evidence: "Unless the whole is received and considered, the true meaning and import of the part, which is good evidence against him, cannot be ascertained. But though the whole of what he said at the time, and relating to the same subject, must be given in evidence, yet it does not follow that all parts of the statement are to be considered as equally worthy of credit; but it is for the jury to consider under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him." 1 Greenl. Ev. § 201. The same view is sustained in *Barry* v. *Davis*, 33 Mich. 515, where it is said: "The court excluded, on objection, a portion of each conversation, and the part excluded was not only connected with the rest in sense, and proper to be read with it by the jury to enable them to get a fair and true estimate upon it, but what was so excluded related somewhat specifically to the vital question between the parties. I can find no substantial support to this ruling. Whether, in case the evidence had been let in, the jurors' judgments would have been changed in any way in regard to the merits, cannot be known. But, I discover no legal objection to it, and seeing in the nature of it something that the jury would have lawful right to consider as entitled to some weight in the scale, there seems to be no room for saying the rejection of it was not prejudicial error. For this, I think the judgment must be reversed."

In Maine the whole of an oral admission is admissible, although it may contain a reference to matters entirely impertinent to the issue to be tried, if so connected that it cannot be separated from the whole.

It was so held in *Lord* v. *Moore*, 37 Maine, 217, 218, where it is said: "Declarations of the defendant, relating to matter in no wise connected with the subject matter then before the jury, could not properly be admitted in evidence. But when the declarations of a party which refer to other matters, are by him so intermingled and connected with other declarations which are pertinent to the issue to be tried, that they cannot be separated without modifying the signification of the pertinent matter, or to render its meaning obscure,

then the whole conversation becomes competent testimony, and should be admitted."

Exceptions sustained.

ORIN M. CRUMMETT, In Equity,

vs.

ARTHUR S. LITTLEFIELD, Admr.

Lincoln. Opinion December 16, 1903.

Equity, Bill to redeem mortgage. *Set-off. Pleading, Parties. R. S.* (*1903*), *c. 84, § 40.*

In a bill of equity to redeem a mortgage, the court has jurisdiction between the parties to determine the amount of tax liens outstanding on the mortgaged premises growing out of the original transaction, and which the mortgagee stipulated to pay.

The equitable right of set-off is not dependent upon the express provisions of statute, but is derived from the rules of the civil law and founded upon principles of natural equity and justice. In applying the doctrine, courts having general equity jurisdiction, exercise more extensive powers than those of the common law, and seek to give effect to the rule in all cases where the peculiar equities intervening between the parties clearly require it.

In his bill, in this case, the plaintiff averred that the amount due is not equal to the amount of the unpaid taxes; that a notice of foreclosure of the mortgage has been published and entered of record; that he demanded a true account of the sum due on the mortgage, but that the defendant neglected and refused to render such account; that he was ready and willing to pay the amount which may be found to be equitably due; and that the estate of the defendant's intestate, has been rendered insolvent.

The prayer of the bill is for an accounting of the sum equitably due for the principal and interest, the amount due for all taxes legally assessed upon the property; that such incumbrance may be offset against the mortgage debt and that the plaintiff be allowed to redeem upon the payment of the balance, if any.

As it would be neither just nor reasonable to compel the plaintiff, to pay the entire amount due on the mortgage debt and depend solely upon the estate of defendant's intestate for his protection against the outstanding tax titles, *held;* that equity unquestionably entitles the plaintiff to redeem his property by paying the balance of the mortgage debt after deducting the amount of any valid tax liens upon it.

The town and other claimants under tax deeds of the premises, if any, should be made parties defendant to this bill.

On report. Bill in equity, heard on demurrer.

Case remitted for amendment as to parties, according to the stipulation agreed on.

Bill to redeem a mortgage. The facts appear in the opinion.

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

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

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

WHITEHOUSE, J. In this bill in equity brought to redeem a mortgage on certain real estate in Somerville, the plaintiff contends that by virtue of the covenant against incumbrances contained in the deed of warranty of the premises given to him by the defendant's intestate, he is entitled to have the amount of certain tax liens outstanding on the mortgaged premises, deducted from the amount due on the mortgage, and to have a decree entered only for the balance.

May 7, 1894, the defendant's intestate, Hiram Bliss, Jr., conveyed to the plaintiff two parcels of land by a deed of warranty containing the following stipulation in the granting clause: "Said grantee is to pay all taxes on the piece first described, and the grantor those now due on the balance." It contained a covenant that the premises were "free from all incumbrances except any taxes that may be on the first described lot," etc. The plaintiff accordingly relies upon the covenant of warranty against incumbrances as to the second parcel of land.

As a part of the same transaction, the plaintiff reconveyed the premises to the defendant's intestate by deed of mortgage to secure $500 of the purchase money.

In his bill the plaintiff alleges that the covenant against incumbrances in his deed was broken when it was delivered, for the reason that taxes legally assessed upon the property by the town of Somerville for many years, "probably" amounting in the aggregate to $260, were then and still are due and unpaid; that the town of Somerville advertised and sold the property for taxes and gave tax deeds therefor, and prior to the date of the plaintiff's bill commenced an action against him to recover possession of the premises by virtue of such tax deeds.

The plaintiff also avers that he has paid $500 upon the principal of the mortgage indebtedness, and that the amount now due is not equal to the amount of the unpaid taxes; that in July, 1901, a notice of foreclosure of the mortgage was published and entered of record; that in June, 1902, he demanded of the defendant a true account of the sum due on the mortgage, less the amount of the unpaid taxes, but that the defendant neglected and refused to render such account; that the premises in question are of much greater value than the amount legally due on the mortgage; that he is ready and willing to pay the amount which may be found to be equitably due, and that the estate of the defendant's intestate has been rendered insolvent.

The plaintiff accordingly prays that an account may be taken of the sum equitably due for principal and interest on the mortgage; that an account may also be taken of the amount due for all taxes legally assessed upon the property to the date of his deed; and that thereupon the amount of such incumbrance be offset against the amount found due upon the mortgage, and the plaintiff be allowed to redeem upon the payment of the balance if any.

To this bill the defendant filed a general demurrer on the ground that the facts alleged do not justify any relief in equity, and also demurred specially because the town of Somerville is not made a party to the bill.

This cause comes to this court on report with the stipulation that if the demurrer is sustained upon the ground that the plaintiff is not entitled to have the amount of the taxes deducted from the mortgage debt, the bill is to be dismissed, but the plaintiff is to have the right to redeem by paying the amount of the debt to be fixed by the court

below. If the demurrer is sustained on other grounds, or is overruled, answer and replication may be filed and the amount due fixed below without appeal.

The equitable right of set-off is not dependent upon the express provisions of statute, but is derived from the rules of the civil law and founded upon principles of natural equity and justice. In applying the doctrine, courts having general equity jurisdiction exercise more extensive powers than those of the common law, and seek to give effect to the rule in all cases where the peculiar equities intervening between the parties clearly require it. Waterman on Set-Off, 426; *Holbrook* v. *Bliss*, 9 Allen, 77; Story's Eq. Jur. §§ 1434 and 1435; *Greene* v. *Darling*, 5 Mason, (1st Cir. Court) 201. "Courts of equity in matters of set-off usually follow the law, but in many cases where there is some intervening equity they will allow a set-off where a court of law would not. . . . . Insolvency of itself will often raise an equity which will justify the interference of the court, even when the party desiring the set-off is himself the petitioner." *Goodwin* v. *Kevey*, 49 Conn. 569.

"The doctrine of set-off," says Mr. Pomroy, "by which a defendant may recover judgment for debt against the plaintiff is wholly of statutory origin; and the doctrine of recoupment, by which the plaintiff's pecuniary recovery may be lessened, by means of a claim for damages in favor of the defendant, is a very recent innovation upon the common law methods of procedure. The modes of procedure in a court of equity have never been thus restricted. . . . . It may make any adjustments, admit any limitations and determine upon any cross demands and subordinate claims which complete justice done to the parties should require." 1 Pom. Eq. 175.

A question analogous to the one at bar was presented in *Harrington* v. *Bean*, 94 Maine, 208. In that case, as in this, the claim which the mortgagor asked to have allowed in reduction of the mortgage debt, was not a separate and independent claim, that could only be allowed as a set-off, if at all, but was one that arose directly out of the contract involved in the mortgage transaction, and necessarily reduced the value of the mortgage property. In that case the incumbrance was a right of flowage which materially lessened the value of

the land for which the mortgage deed was given. In a real action brought by the defendant to foreclose the mortgage, the plaintiff sought to have his damages arising from the breach of covenant against incumbrances determined and allowed in reduction of the mortgage debt. This was refused by the court on the ground that the existence of the incumbrance was only a partial failure of consideration, and therefore no defense at law to any part of the note. *Bean* v. *Harrington*, 88 Maine, 460. It is a satisfaction to remark, parenthetically, that this defect in our law was promptly remedied by chapter 322 of the Public Laws of 1897, R. S. (1903), c. 84, § 40. The plaintiff, Harrington, thereupon brought suit for covenant broken against the defendant and recovered judgment for $350. This judgment was not paid and the estate of Dexter the defendant's intestate was represented insolvent. The question then arose whether Harrington was entitled to have the judgment for damages allowed in reduction of the mortgage debt. In the proceeding in equity (94 Maine, 208, supra) for that purpose the court say: "That such a claim ought in equity and good conscience to be allowed on the mortgage debt should be self evident, and is abundantly supported by the decided cases." . . . .

"Again it now appears that the estate of Dexter has since been declared insolvent. In such case even equitable claims against the estate are admissible in set-off to claims made by the executor. R. S. (1883), c. 82, § 63; *Lyman* v. *Estes*, 1 Maine, 182; *Medomak Bank* v. *Curtis*, 24 Maine, 36; *Ellis* v. *Smith*, 38 Maine, 114."

"It cannot be that a court with full equity powers cannot reach the evident equity of this case and enforce it. The mortgagor has done no wrong, and is an innocent sufferer from a wrong done him by the mortgagee in the mortgage transaction. He only asks that the mortgage debt be chancered to that extent. We have no hesitation in saying that it should and can be done."

In *Johnson* v. *Gere*, 2 Johns. Ch. 546, the defendant gave a bond and mortgage to secure purchase money, and an action of ejectment was brought against him by one claiming a paramount title. The plaintiff brought suit on the bond. On application to the court of chancery, an injunction was granted staying the proceedings on the

bond and mortgage until the action of ejectment against the vendee was determined. The chancellor distinguished the case from those where there was only an allegation of an outstanding title, and no disturbance, prosecution or eviction. Here, he said "the party was actually prosecuted by an action of ejectment on the ground that the title derived from the defendant was defective. The defendant is entitled and it will be his duty to defend the ejectment suit, and until that suit is disposed of, he ought not to recover the remaining moneys due on the bond."

White v. *Stretch*, 22 N. J. Eq. 76, was a bill to foreclose a mortgage given to secure purchase money. The defendant's deed of the property to the plaintiff contained a covenant that the premises were free from "all assessments and incumbrances of what nature or kind soever." It was held that the cost of a sewer was an incumbrance existing at the date of the deed, and should be deducted from the amount of the mortgage debt. The proceedings relating to the construction of the sewer had been confirmed by the court at the date of the deed, and the amount of the assessment subsequently determined by the commissioners appointed for that purpose.

In *Dayton* v. *Dusenbury*, 25 N. J. Eq. 110, a writ to foreclose a purchase-money mortgage on lands, the contention of the defendant was, that there had been a breach of the covenant against incumbrances in the deed to him, because at the date of the conveyance the premises were subject to the lien of certain judgments against former owners of the property, and that the amount of these judgments should be set-off against the mortgage debt. The plaintiff replied that some of these outstanding judgments, being against a married woman, created no lien on the property. The court thereupon considered the question thus presented respecting the validity of the lien, and determined that all the judgments were valid liens; but it appearing that the aggregate amount of the judgments far exceeded the amount of the mortgage debt, the decree was that the suit for foreclosure be stayed until the premises were released from the lien of the judgments.

But the defendant suggests that in all these cases above cited in which the set-off or reduction was allowed, the amount of the damages arising from the outstanding liens and incumbrances had been made

certain by judicial determination, and that the cases are therefore distinguishable from the case at bar, in which it neither appears that the taxes were paid by the plaintiff before commencing his bill to redeem nor that the validity of the tax liens has ever been established by the courts.

But this objection was not deemed insuperable or even worthy of consideration by the New Jersey Court of Equity in *Union Nat'l Bank* v. *Pinner*, 25 N. J. Eq. 495. That case is exactly in point. In all essential respects it is precisely like the case at bar. There, as here, the contention was that when the mortgaged premises were conveyed they were subject to certain tax liens still outstanding, and that, by virtue of covenants against incumbrances contained in the deed of conveyance, the amount of the tax liens should be deducted from the amount due on the mortgages and a decree taken, if at all, only for the balance. In the opinion the court says: "I think the second point is well taken. . . . The rule of law is established in this State by the case of *White* v. *Stretch*, (22 N. J. Eq. 76), and the previous decisions in chancery therein referred to, that in a suit to foreclose a purchase-money mortgage, the mortgagor and grantee in the conveyance can claim deductions for incumbrances covenanted against in the deed from the mortgagee. It is altogether an equitable and reasonable rule, and must be enforced in the present case. The assignees hold the mortgages subject to this equity; and the master in ascertaining the amount due for principal and interest on the mortgages must ascertain, also, the unpaid taxes against the premises at the giving of the deed, and deduct them, with lawful interest thereon, from the amount of the mortgages."

It does not expressly appear in this last case, as it does in *Dayton* v. *Dusenbury*, supra, that any question was raised in regard to the validity or amount of the existing liens. If any question was raised in the last case in regard to the legality of the tax assessments or the validity and amount of the outstanding liens, it was included in the reference to the master and determined in that suit for foreclosure; as was done in *Dayton* v. *Dusenbury*, 2 Johns. Ch. supra.

In the case at bar, upon the allegations in the plaintiff's bill, the defendant's demurrer admits that the taxes claimed to have been

legally assessed upon the mortgaged premises for several years were unpaid at the time of the conveyance; that the property had been sold for non-payment of taxes, tax deeds given therefor, and an action commenced by the town of Somerville to recover possession of the premises by force of such tax deeds. But the question of the validity and amount of the outstanding liens has not been judicially determined. The estate of the defendant's intestate is insolvent, and may yield nothing whatever for the payment of debts of the fourth class. It would be neither just nor reasonable to compel the plaintiff to pay the entire amount due on the mortage debt and depend solely upon the estate of the defendant's intestate for his protection against the outstanding tax titles. If the defendant contests the validity of the tax titles and denies the existence of any incumbrance upon the property, it is his right and duty, by virtue of the covenants in the deed of his intestate, to defend the real action brought against the plaintiff to deprive him of the possession of his property. Until the question of the validity and amount of the tax liens has been determined by the court, either in the real action pending against the plaintiff or by direct inquiry in this bill for redemption, the amount which the plaintiff is equitably required to pay in order to redeem the premises cannot be duly ascertained. It is the constant aim of courts of equity to prevent circuity of action and avoid multiplicity of suits by adjusting as many claims and counter-claims as practicable in a single proceeding. Equity unquestionably entitles the plaintiff to redeem his property by paying the balance of the mortgage debt after deducting the amount of any valid tax liens upon it. The amount of such liens can and should be ascertained and allowed in reduction of the mortgage debt in this proceeding. Such an adjustment of the whole controversy in a single bill is in harmony with principles of equity jurisdiction and the rules of chancery practice in this State, and is authorized by numerous precedents in other states. If the plaintiff's bill is now dismissed on the ground that the amount of valid tax liens cannot be offset in the decision of this cause, the defendant's proceedings for foreclosure become perfected and the plaintiff's remedy barred. This would be clearly unjust and unnecessary. Courts of general equity jurisdiction are not thus restricted in their

modes of reaching and enforcing the manifest equity of a cause. No injustice is done to the estate of the defendant's intestate in requiring a simple performance of the covenants in his deeds.

But it is the opinion of the court that the town of Somerville and the other claimants under tax deeds of the premises, if any, should be made parties defendant to this bill. According to the stipulation in the report, if the demurrer is sustained on the gronnd that such claimants are not made parties, "answer and replication may be filed, and the amount due be fixed below without appeal with the right of amendment if necessary."

The demurrer is sustained solely on this ground, and the cause remanded for further proceedings in accordance with this opinion and the stipulation of the parties contained in the report.

Mandate accordingly.

TWIN VILLAGE WATER COMPANY, In Equity,

vs.

DAMARISCOTTA GAS LIGHT COMPANY.

Lincoln. Opinion December 17, 1903.

Corporations, Gas & Electric Companies. *Franchises*, Special Rights. Legislative Consent. *Stat. 1885, c. 378; 1895, c. 102. Priv. & Spec. Laws, 1893, c. 607.*

1. When a corporation, person or firm, is already authorized to do an electric lighting business in a town, another corporation, organized under chapter 102 of the Laws of 1895, cannot lawfully do a gas lighting business in the same town, until specially authorized by the legislature.
2. Nor is the result different, even if the electric light company has not done, and is not doing, business as such.
3. Under the provision of section 1, chapter 102, of the Public Laws of 1895, that no corporation organized thereunder "shall have authority, without special act of the legislature, to make, generate, sell, distribute or supply

gas or electricity, or both, for any purpose, in or to any city or town, in or to which another company, person or firm, are making, generating, selling, distributing or supplying, or are authorized to make, generate, sell, distribute or supply gas or electricity, or both, without the consent of such other company, person or firm," *it is held;* that authority in one company to supply either gas or electricity, or both, is prohibitive of the right of another company to supply either, unless by consent, or by special legislative authority.

4. Prior to 1895, no general franchise rights, such as franchises to dig up the streets, to lay pipes for gas, and to erect poles and string lines of wire for electricity, existed in any company or person, except by special authority of the legislature.

5. The permissive rights given by chapter 378 of the Public Laws of 1885, "regulating the erection of posts and lines for the purposes of electricity" were not such franchises.

6. Prior to 1895, the legislature reserved to itself the right, in each instance, to determine whether the public good demanded that such franchises should be granted at all to any one, and in case such franchises were already lawfully exercised in a given place or had previously been granted, to determine whether or not it would be for the public good to permit indiscriminate or destructive competition.

7. By chapter 102 of the Public Laws of 1895, the policy of the legislature was modified to this extent: In towns where no gas or electric company is supplying, or is authorized to supply, gas or electric light, new corporations, organized under that chapter, can supply either gas or electricity, or both, and use the streets therefor, by first obtaining the statutory permit from the municipal officers, and without special legislative authority. But in towns where a gas or electric company is supplying, or is authorized to supply, either or both kinds of light, another corporation, organized under the general law, cannot operate until the legislature has determined whether the public good requires it, and has authorized it, just as it did prior to 1895.

See *State of Maine by Information of Attorney General* v. *Twin Village Water Company*, ante, p. 214.

On report. Bill for injunction sustained.

This was a bill in equity brought by the Twin Village Water Company praying for both a preliminary and permanent injunction against the Damariscotta Gas Light Company, its servants and agents, to enjoin and prohibit it and them from making, generating, selling, distributing or supplying light for any purpose in or to said town of Damariscotta, to individuals or corporations therein, or to said town, and from using the streets, highways and public roads in said town therefor.

The case having come on to be heard on bill and answer and replication, the presiding justice reported the case to the law court to render such judgment thereon as the rights of the parties might require. It was agreed that all acts of the legislature referred to in the bill and answer, also any other private act in reference to the same, may be referred to by the court. The parties also stipulated that the testimony taken out in the case of the *State of Maine by Information* v. *Twin Village Water Company*, ante, p. 214, was to be regarded as evidence in this case.

Enoch Foster and O. H. Hersey; C. E. and A. S. Littlefield; K. M. Dunbar, for plaintiff.

The right of the plaintiff to furnish and distribute electricity in the towns of Newcastle, Damariscotta and Nobleboro, having once attached and vested under this charter, continues until there is a judicial judgment of forfeiture of this franchise. *Boston Glass Manf.* v. *Langdon*, 24 Pick. 49, 35 Am. Dec. 294.

The question here involved is not strictly as to the right of the plaintiff, but is a question as to the right of the defendant, and whether the defendant here has any authority to furnish light, and thus interfere with the right that it must be admitted is in the plaintiff until judicially declared forfeited. It is then really a question as to what rights have been conferred upon the defendant. The statute then under which the defendant claims a right to act is to have a strict construction against the defendant; for as claimed by the defendant it is granted a part of the public right by the act of the legislature under which it is organized, and that grant, by well fixed rules of interpretation, is to be construed in favor of the State against any conferring of the sovereign authority by way of implication.

While in one sense the final clause of section one may be thought to be a restriction, it is in reality only a defining of the powers obtained by an organization under this general law. It is, therefore, simply a definition of the grant of the State to a corporation organized thereunder, and must be construed against the corporation in favor of the State.

It is a canon of interpretation that the legislative purpose and the

object aimed at are to be borne in mind, and that language susceptible of more than one construction is to receive that which will bring it into harmony with such object and purpose rather than that which will tend to defeat it.

Statutes are to receive such a construction as must evidently have been intended by the legislature. To ascertain this we may look to the object in view; to the remedy intended to be afforded; and to the mischief intended to be remedied. *Winslow* v. *Kimball*, 25 Maine, 493.

Under proper regulations and restrictions the public is best served, the public duty best performed, in those matters which involve the exercise of some public franchise by one individual or one association if individuals. Public utilities are in their nature monopolies. The policy of our State has been to allow corporations whose purposes do not require the exercise of any part of the public right, to be organized by virtue of the general statute, but the legislature has retained in itself the right to determine in each individual case under the particular circumstances affecting that case, or corporation, whether any part of the general public franchise or right, should be conferred upon it.

Chapter 102 of the Public Laws of 1895 was enacted for the purpose of organizing companies for the distributing light. It had reference to this general class of corporations. Gas and electricity are mentioned because gas and electricity are the only systems of lighting adapted to general distribution through a central station. The scope of the statute is not gas and electricity as separate things, but its scope is light. If there is not a field for two electric light companies or for two gas companies, and whether there is or not, the legislature has clearly reserved for its own determination, there is ordinarily not a field for a gas company and an electric company.

The purpose of the proviso in this statute is to protect the company first occupying the field and furnishing light until in the judgment of the legislature there shall be necessity for more than one such corporation. A narrow construction saying that gas excludes gas, and electricity excludes electricity, would therefore by no means comport with the scope or accomplish the purpose of such laws.

H. M. Heath, C. L. Andrews and F. L. Dutton; Howard E. Hall, for defendant.

The statute clearly contemplates, as a matter of fair meaning, and also as a matter of English, three classes of corporations: (1) A corporation for the purpose of supplying gas; (2) a corporation for the purpose of supplying electricity; (3) a corporation for the purpose of supplying gas and electricity. These conclusions necessarily flow from the phrase in the opening sentence, "corporations for the purpose of . . . supplying gas or electricity, or both."

Great care is taken in the structure of each component part of the sentence to preserve the classifying expression "gas or electricity or both." The phrase "gas or electricity or both," the three constituent parts being connected by the word "or", demonstrates as a matter of English that the entire sentence can be split up into three different sentences, the word "or" being used entirely in the interest of compactness.

This construction is in harmony with the long established legislative policy prior to 1895 when the electric light became a commercial possibility. It is a matter of common knowledge that gas plants were in operation in Portland, Bangor, Lewiston, Biddeford, Augusta, Calais, Gardiner, Bath, Brunswick, Saco and perhaps other places. It is equally a matter of common knowledge that electric light charters were freely granted as a matter of course, and the question never raised that there was any breach of good faith upon the part of the State in allowing franchises for the new light. It has long been the legislative policy in Maine to protect capital invested in public franchises, in their nature quasi monopolies, so long as the public duties were fairly and reasonably performed. No such plea was asserted by the gas companies as the electric light charters were granted from time to time. It is a matter of common knowledge that such charters were freely granted with no thought that there was any competition to be protected.

The reason is plain. The different lights have different fields. Electricity is the light for out-of-door work, stores and large interiors; gas the residential and small room light, useful also for cooking and small heating. Each has its own field in the public service.

We respectfully submit that there is no good moral reason, and certainly no reason founded upon public policy, why any investment in electricity should be protected against any supposed incidental competition from a gas plant, or the reverse.

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

SAVAGE, J. The plaintiff corporation was chartered by special act of the legislature, Private and Special Laws of 1893, c. 607. It was authorized "to furnish water for the extinguishment of fires and for domestic, sanitary and municipal uses to the towns of Nobleboro, Newcastle and Damariscotta, and the inhabitants thereof, and to furnish electric lights for lighting streets in said towns, and to dispose of electric light and power to individuals and corporations." By section 11 of the incoporating act as subsequently amended, it was provided that "in case no portion of the works of this corporation shall have been put into operation within two years from the date of the approval of this act, the rights and privileges herein granted shall be null and void." The corporation, within the four years after the approval of the act, did put into operation a water system, but it has never operated an electric lighting plant, nor made any provisions therefor, except, as it claims, it built its pumping station of sufficient size, and installed boilers and engines of sufficient capacity, to operate an electric lighting plant, in addition to the requirements for pumping.

The defendant is a corporation organized, subsequently to the incorporation of the plaintiff, under the general laws of the State relating to the incorporation and control of gas and electric companies. Laws of 1895, ch. 102. The defendant is a gas company and it admits that in accordance with the purposes expressed in its articles of incorporation, it intends, unless enjoined, to make, generate, sell, distribute and supply light (gas) in and to the town of Damariscotta, and to persons and corporations therein.

The plaintiff claims, inasmuch as it was itself authorized, prior to the incorporation of the defendant, to make and supply electricity in

and to Damariscotta, that the defendant has no authority, in the absence of special legislative authority, to make and supply gas in the same town, and seeks an injunction.

The plaintiff relies upon the last sentence in section 1, ch. 102 of the Laws of 1895, under which chapter the defendant was incorporated. It reads as follows:—"But no corporation, organized hereunder, shall have authority, without special act of the legislature, to make, generate, sell, distribute or supply gas or electricity, or both, for any purpose, in or to any city or town, in or to which another company, person or firm, are making, generating, selling, distributing or supplying, or are authorized to make, generate, sell, distribute or supply gas or electricity, or both." And the only question presented for our consideration, is whether, when a corporation, person or firm is already authorized to do, but is not doing, an electric lighting business in a town, another corporation organized under chap. 102 of the Laws of 1895, can lawfully do a gas lighting business in the same town, unless specially authorized by the legislature. We think the question must be answered in the negative.

The learned counsel for the defendant contend that it should be determined from the language itself that "the legislature has said in terms that no corporation organized to supply gas can without special act of the legislature supply gas in any town where another company is authorized to supply gas;" nor can a company organized to supply electricity do so without like special authority, in a town where another company is authorized to supply electricity; nor can a company organized to supply gas and electricity, do so, without special authority in a town where another company is authorized to supply gas and electricity. It is argued that the use of the phrase "gas or electricity or both," the three constituent parts being connected by the word "or," demonstrates as a matter of English that the entire sentence can be split up into the three different sentences, the word "or" being used entirely in the interest of compactness. To express the contention more pointedly, it is that, by fair construction of the statute, authority to supply gas is prohibitive of another corporation's right to supply gas and gas alone; of electricity, is prohibitive of electricity alone, and of gas and electricity is prohibitive of both; and

conversely, authority to supply electricity is not prohibitive of gas, to be supplied by another.

If such were the intended meaning of the legislature the language chosen to express it was singulary unfortunate, even as an effort at compactness. It seems perfectly clear to us that the intended meaning is otherwise. Language could hardly make it clearer. To construct three sentences out of this one and oppose gas to gas, electricity to electricity, and both to both, and not otherwise, is something that the court cannot do. The legislature by amendment can. The act plainly says that no corporation organized under the general law shall supply gas in a town where another corporation is authorized to supply gas, or where it is authorized to supply electricity, or where it is authorized to supply both. And under the same conditions, such corporations cannot supply electricity or both gas and electricity. The defendant coporation is within the second alternative just expressed. It cannot lawfully supply gas in a town where the plaintiff is authorized to supply electricity.

It should be observed that corporations organized under the act of 1895 are quasi public corporations, and enjoy valuable public franchises. Besides the general franchise to do business they possess authority to dig up the streets, to lay pipes for gas, and to erect poles and string lines of wire for electricity, having first obtained permit from the municipal officers. Such franchises, of course, can be acquired only by authority of the legislature, either general or special. And no general rights, such as these franchises, existed prior to 1895, except the permissive rights given by chap. 378 of the Public Laws of 1885, "regulating the erection of posts and lines for the purposes of electricity." That act granted no franchises. Prior to 1895, it had seemingly been the policy of the legislature to keep the granting of such franchises within its own hands, to grant or withhold them as it deemed best, to determine whether the public good demanded that such franchises should be granted at all to any one, and in case such franchises were already lawfully exercised in a given place to determine whether or not it would be for the public good to permit indiscriminate and perhaps destructive competition.

Although the organization of many kinds of corporations had been

provided for by general laws, even of public service corporations like railroads, (with the approval of the railroad commissioners), still the legislature prior to 1895 reserved to itself the privilege of saying in each particular case whether the public good in a community which was served by a gas company, or by an electric light company, would be improved by granting a franchise to another gas company to dig up the streets for its pipes, or to an electric light company to further incumber the streets with its poles and wires; whether the first company had failed to exercise its franchise fairly and upon fair terms; whether the public good required its investments to be jeopardized, and whether, in fine, there was any such need of more or different light as would justify the granting of such franchises. And in the same manner it made its determinations, if another company was authorized to supply, but was not actually supplying, light.

As we construe the act of 1895, the former policy of the legislature was modified by that act to this extent. In towns where no gas or electric company is supplying or is authorized to supply gas or electric light, new corporations, organized under the general law, can supply either gas or electricity, or both, and use the streets therefor, by first obtaining the statutory permit from the municipal officers. But in towns where a gas or electric company is supplying, or is authorized to supply, either or both kinds of light, another corporation organized under the general law cannot operate until the legislature has determined whether the public good requires it, and has authorized it, precisely as was done prior to 1895.

The plaintiff corporation is authorized to supply electricity to and in Damariscotta. The defendant corporation cannot lawfully supply gas in the same territory, without special act of the legislature. If it should do so, in accordance with its admitted intention, it would be to the injury of the plaintiff's right. The temporary injunction already granted should be made perpetual, and a decree to that effect will be made below.

So ordered.

EASTMAN HATHORN, In Equity,

vs.

GEORGE W. ROBINSON, Executor, and another.

Somerset. Opinion December 18, 1903.

Attachment. Exemptions. Frat. Ben. Assoc. Trustee Process, Voluntary Appearance. *Poor Debtor,* Disclosure. *Trusts. R. S.* (*1883*), *c. 86, §§ 2, 4. Stat. 1897, c. 320, § 14; c. 330, § 9.*

The voluntary appearance, without the statutory service upon him, of one named as trustee in a trustee process does not attach the funds of the principal defendant in his hands.

At a debtor's disclosure before a commissioner, he disclosed having in his pocket money enough to satisfy the judgment. The creditor was entitled to have this money applied to his judgment unless, as claimed by the debtor, it was exempt from seizure upon execution. To obtain an adjudication of the question the parties arranged that the money should be placed in the hands of a third party and trustee writ made in which the creditor should be named as plaintiff, the debtor as defendant and the depository as trustee, and be entered in court, and all the parties appear without service and thus present the question whether the money was exempt. This was done and the court held the money was not exempt. *Hathorn* v. *Robinson,* 96 Maine, 33.

After the death of the principal defendant, the trustee still holding the funds declined to pay them to plaintiff. Thereupon the plaintiff filed this bill against the executor of the defendant and the trustee to determine the status of the fund in question. *It was held,* by a majority of the court:—

The money was not by these proceedings attached or put in the custody of the law, WISWELL, C. J., STROUT, POWERS, JJ., dissenting.

It having been decided that the money was not exempt from seizure, the creditor was entitled to receive it from the depository under the agreement of the parties.

The death of the debtor and the insolvency of his estate did not affect the right of the creditor to receive the money.

See *Hathorn* v. *Robinson and Trustee,* 96 Maine, 33.

Appeal in equity. Appeal sustained.

Bill in equity charging that the defendant Walton held a certain fund in trust under a written agreement.

The facts are stated in the opinion.

Harvey D. Eaton, for plaintiff.

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

The defendant Walton took the fund not under a general trust, but only for the purpose of holding it so that service might be made upon him in a trustee process and the fund thereby attached. *Franklin Bank* v. *Bachelder*, 23 Maine, p. 63; *Tyler* v. *Winslow*, 46 Maine, 348.

While the insolvency provisions of law relative to suits pending against estates, in one sense, are not strictly defenses, yet it is a fact, nevertheless, that had the money remained in Robinson's hands up to his death, Hathorn would certainly not have been able to hold it. Why should he now?

We say that Hathorn, as well as Robinson, agreed to submit to the determination of this court, under the statute provisions of a trustee process, the question as to whether that five hundred dollars was liable to attachment, and Hathorn was to use this trustee process, and its machinery, for the attainment of his purpose. By so doing he relinquished all rights he had under his disclosure proceedings and restricted himself to his remedy by trustee suit; that, on account of the death of John Robinson and the insolvency of his estate, such remedy appears now to be inadequate for his purposes, does not change the agreement as the parties then made it.

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

SPEAR, J. This is a bill in equity, and comes up on appeal, by the plaintiff. The facts and decree as found below, by the justice in the first instance, are as follows:

"I find that, on the 2nd day of February, 1900, the plaintiff was a judgment creditor of the defendant's testate, John Robinson; that at a disclosure hearing, upon said judgment, before a disclosure commissioner, on the same day, the said John Robinson disclosed that he had about seven hundred dollars in cash in his pocket, but which he claimed could not, under the statutes of this State, be attached or

seized, or in any way applied in payment of the judgment against his will; that the complainant asserted his right to have said money turned over to him, and applied in part satisfaction of said judgment; that thereupon the parties entered into the following written agreement:

"'Skowhegan, Maine, February 2, 1901.

"'It is hereby agreed by and between Eastman Hathorn of Athens and John Robinson of Madison that said Robinson shall deposit in the hands of his attorney S. J. Walton the sum of five hundred dollars which he received as insurance from the United Order of the Golden Cross of the World, a fraternal beneficiary organization, and said Hathorn is to bring suit through his attorney against said Robinson as principal defendant and said Walton as trustee of said fund, said arrangement is made for the purpose of testing said Hathorn's right to said fund and it is understood and agreed that all provisions of law shall be available in defense thereof the same as though said fund had remained in the hands of said Robinson.

"'This agreement grows out of a disclosure process and is to provide for a legal settlement of the questions arising in said process.

John Robinson.
Eastman Hathorn.'

"I further find in pursuance of said agreement, said Robinson did then and there deposit said five hundred dollars with said Walton; that thereupon the complainant caused a trustee process to issue, which declared on said judgment, and in which he was plaintiff, the said Robinson was defendant and the said Walton was named as trustee; that said Robinson and said Walton signed a written acknowledgment of service which was indorsed upon the writ, and that no other service of the writ was made, nor was it ever placed in the hands of an officer for service.

"I further find that after due proceedings had, first at nisi prius, and later in the law court upon the trustee's exceptions, it was ultimately decided by the law court that said Walton should be charged as trustee for the five hundred dollars less his costs, and the defendant's contentions in law were overruled, as appears by the opinion of the court in *Hathorn* v. *Robinson*, 96 Maine, page 33, and by the

mandate of the court therein; and that the order of the law court overruling the trustee's exceptions was received by the clerk of court in Somerset County, where the action was pending, on December 14, 1901.

"I further find that said John Robinson died, testate, on November 14, 1901; that at the December term, 1901, of the Probate Court in Somerset County his estate was duly represented and decreed insolvent, and commissioners were appointed according to law; and at the December term, 1901, of the Supreme Judicial Court in said county, in the said trustee action, the death of John Robinson and the insolvency of his estate was represented.

"Upon these findings of fact, which are all that I deem material in this case, I rule that the sum of five hundred dollars so placed in the hands of S. J. Walton, was not impressed by any general trust but that the purposes of the trust created by the written agreement herein before referred to were fully executed by the said proceedings in said trustee suit, and that said Walton is not now to be holden as trustee of said fund for the benefit of the complainant.

"It is therefore ordered, adjudged and decreed that the bill be dismissed, with a single bill of costs."

Does the above decree give the written agreement the interpretation to which, under all the circumstances of the case, it is entitled? We think not. We think the agreement went even further than the impressing the fund by a general trust for the benefit of the plaintiff. It placed the deposit in the hands of Mr. Walton as the contingent property of the plaintiff dependent upon the decision of the court; if for the plaintiff, it was the property of the plaintiff; if for the defendant, it went back to the defendant.

The defendant's counsel, in his brief, contends that the trustee took the money "only for the purpose of holding it so that service might be made upon him in a trustee process and the fund thereby attached." We cannot agree with him. The trustee process, instead of consummating the purposes of the agreement, was the means mutually adopted by the parties for determining its purposes. The procedure was simply an arrangement as the use of the word "arrangement" in the agreement clearly shows. The form of proc-

ess was of no consequence to the parties. They were seeking to reach a result. There was also nothing technical about the procedure. . The trustee was mutually agreed upon. The money to be attached was voluntarily placed in his hands. Service of the writ was accepted by both the defendant and trustee. The deposit was made for the express purpose of being applied to the payment of the plaintiff's judgment, if it was not exempt. Nothing else, as the case shows, was contemplated by the act of deposit. From these voluntary acts of the parties, it is clearly evident that the only purpose of the "arrangement" or procedure, was to enable the defendant to obtain the decision of the court upon his contention.

Up to this point all the formalities and technicalities necessary to authorize the entry of the case in court were waived by mutual consent, and it hardly seems probable that the parties understood or intended that the plaintiff, upon decision in his favor, should be obliged to pursue, to obtain possession of the money, "proceedings thereafter according to statute provisions." There was no reason why such proceedings should follow. The parties had no contention over the process. The charging the trustee with the money in his hands, was merely the legal formality required, by this particular process, to give effect to the decision of the court. We do not, therefore, think that the purposes of the trust, created by the written agreement, were fully executed by the process in the trustee suit, except that the opinion of the court, at the end of this process fixed the status of the fund. When that opinion was recorded, the contingency upon which the plaintiff's title was to vest or fail happened, and the defendant was thereby divested of, and the plaintiff vested with, the title to the deposit. No further acts on the part of the plaintiff or the defendant seemed, in any particular, to be necessary to accomplish this end.

The defendant's counsel contends that the clause "All provisions of law shall be available in defense the same as though said fund had remained in said Robinson's hands," secured to the defendant the statutory defenses available at every stage of trustee process. Technically the language of the clause precludes such a construction. For the purpose of defining the defenses contemplated, the clause

assumes that the money shall remain in the hands of the principal defendant, a case in which trustee process will not lie at all; but "the provisions of law available in defense" could not have been intended to apply to a case that could not exist, hence the defenses available at the various stages of trustee process could not have been intended by the clause. Such defense was not contemplated. The clause was clearly intended to protect the defendant against any prejudice by reason of surrendering his money to the hands of a third party, and to secure to him all the advantages of the defense raised by him, as if the suit had been directly against him without preference to trustee process. As the law looks to the substance and not the form, and does not require the observance of useless formalities, we think the plaintiff was not required to pursue the statute provisions of trustee process in order to maintain his lien on the property in the hands of the trustee, after the trustee was charged. In this case the rights of the plaintiff did not depend upon the attachment or lien, but upon the final decision of the court, the attachment being merely the "arrangement" agreed upon to obtain such decision. And it must have been so understood by the parties, because, as a matter of law, the plaintiff, by virtue of the process agreed upon, had no valid attachment or lien upon the deposit. An attachment by common law garnishment or trustee process, as it is called under our statute, cannot be created by consent.—"Garnishment rests wholly upon judicial process and depends upon the due pursuit of the steps prescribed by law for its prosecution. It can borrow no aid from the volunteered acts of the garnishee. Such acts will be regarded as void so far as they interfere with the rights of third persons." *Insurance Company* v. *Friedman Bros.*, 74 Texas, 56; Drake on Att. 451, b; Wade on Att. 336.

We think the familiar rule of law, applicable to the construction of written contracts, fully warrants the interpretation above given to the written agreement now under consideration. In *Merrill* v. *Gore*, 29 Maine, page 348, the court say:—"To ascertain the true construction of a written contract, the situation of the parties, the acts to be performed under it, and the time, place, and the manner of performance may be considered. The intention of the parties is to be

ascertained by an examination of the whole instrument and of its effect upon any proposed construction, and such a construction should be adopted as will carry that intention into effect, although a single clause alone considered would lead to a different construction."

And the instrument may be read in the light of surrounding circumstances, says Judge WALTON, *Snow* v. *Pressey*, 85 Maine, page 417.

Applying this familiar rule to the agreement before us, we inquire first, what was the intention of the parties to this agreement with reference to the status of the money deposited and second, will the terms of the agreement warrant a construction that will carry that intention into effect?

Taking into consideration the situation of the parties and reading the agreement "in the light of the surrounding circumstances," the case before us shows the following facts:—The defendant had disclosed, in his immediate possession, much more than the amount of the plaintiff's execution. Of the sum disclosed, the plaintiff claimed an amount sufficient to pay his execution, by virtue of § 9, c. 330, Public Laws of 1897, as amended, which says: "When from such disclosure it appears that the debtor possesses, or has under his control, any bank bills, &c., which cannot be come at to be attached, and the petitioner and debtor cannot agree to apply the same toward 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, by virtue of this statute, having acquired the right to this set-off claimed, as conceded by the acts of the defendant, there was, up to this point, no avoidance of his right to the money, or legal defense to it. If nothing further had been done, the plaintiff would have received the money. The question of appraisal was waived, as shown by the deposit.

But at this juncture of the disclosure, although conceding all the plaintiff's claims under the disclosure statute, the defendant set up an alleged defense, entirely new and distinct from anything contained in the disclosure statute, or the disclosure proceedings, namely, exemption of the money disclosed under § 14, c. 320, Public Laws of 1897.

And it should be noted that this was the only defense claimed. The plaintiff was not, however, obliged to surrender his rights acquired under the disclosure statute to enable the defendant to make this defense. It was only by his consent that the defendant could be relieved from the operation of the statute. Therefore, by request of the defendant and the consent of the plaintiff, the new procedure, under the agreement, was instituted for the express purpose of affording the defendant an opportunity to present his defense to the determination of the court.

This, then, was the situation of the parties when they approached the agreement now under consideration. The agreement was the outgrowth of this situation. What was the intention of the parties with reference to the deposit? The very first provision in the agreement was that the defendant should deposit $500. In other words, "set-off" this amount for the contingent purpose of paying the plaintiff's judgment. Can there be any doubt that this was intended, by the defendant, to take the place of the set-off contemplated by the statute, "to satisfy the debt, costs and charges" in accordance with section 9, chapter 330, supra? The disclosure, and all the proceedings, up to the time of making the agreement, were under this statute. It provided for a set-off of money or other property disclosed, and it is clearly evident that both parties intended the deposit to be a substitute for the set-off required by statute, and by agreement they put it in the form of a deposit to await the decision of the court. It was the conditional or contingent property of the plaintiff.

The point of the agreement is found in the clause "said arrangement is made for the purpose of testing said Hathorn's right to said fund, etc." "Right" is defined in law as "an enforceable claim or title to any subject matter whatever;" by Webster as "a legal claim, ownership, property." From the attitude of the defendant toward the deposit, as shown by his own contention, it is perfectly clear that he intended the word "right," as used in the agreement, to be synonymous with the word "ownership."

As before shown, the plaintiff claimed a sufficient amount of the money disclosed to pay his execution. The defendant did not deny the plaintiff's claim. He admitted it was valid under the statute.

In other words he said to the plaintiff, if the money is not exempt it is yours. Exemption was the only defense claimed as the opinion of the court, in *Hathorn* v. *Robinson*, 96 Maine, page 33, clearly shows. The chief justice in stating the defendant's position says:

"But it was claimed by the debtor that this money could not be seized or taken in any way, and applied to the payment of the execution, because it had been received by him, as a beneficiary, under an insurance policy, issued by a fraternal beneficiary organization, known as the United Order of the Golden Cross of the World, authorized to do business in this State under chapter 320 of the Public Laws of 1897; and that money so received was exempt from attachment or seizure on execution by reason of the provisions of that chapter." Thus it clearly appears from the opinion of the court, that the only defense set up was exemption, and the only contention between the parties the ownership of the deposit, contingent upon the finding of the court. The defendant did not pretend to claim it himself; he set it apart for the plaintiff, if not exempt; no other party was in the least interested in it, or claimed it; no other claim was, at the date of the agreement, pending against him. Therefore, considering "the situation of the parties, the acts to be performed under it, and the time, place and manner of performance," and reading the agreement, "in the light of surrounding circumstances," it seems clear that it was the intention of the parties to the agreement that the contingent ownership of the deposit should become absolute in the one, in whose favor the opinion was rendered.

Will the terms of the agreement warrant the above construction intended by the parties? We think they will.

The agreement, after reciting the facts with reference to the deposit of the fund, expressly says, "said arrangement is made for the purpose of testing said Hathorn's right to said fund." What right? Clearly the right acquired by virtue of the disclosure. And this right is also conceded by the express terms of the agreement, because Hathorn's "right" could not be tested unless he first had the right to test. The defendant, for the purpose of making this test, agrees that the plaintiff has a right to said fund, and then, in the manner agreed upon, undertakes to defeat it. If he cannot

defeat it, the plaintiff's right continues unaffected by the proceedings employed to test it. The term right as used in the agreement is equivalent to the word "ownership." By the act of deposit the money had gone from the absolute ownership of Robinson to the contingent ownership of Hathorn which was made absolute by the decision of the court.

This interpretation of the contract also secures to each party the very object of his contention; to the plaintiff the $500, to obtain which he cited the defendant to disclose; to the defendant the full opportunity to present his defense and protect his property. His object was to protect it for himself, not for his creditors. If it was to go, it made no financial difference to the defendant to whom.

Under the circumstances of this case, we think the plaintiff, by the written agreement, acquired a right in the deposit of $500 which a court of equity ought to protect.

Bill sustained. Decree below reversed with costs. Decree to be made in accordance with this opinion.

WISWELL, C. J., STROUT, POWERS, JJ., DISSENTING.

WISWELL, C. J. I am unable to agree with the opinion concurred in by a majority of the sitting members of the court, the justice who ruled being, upon that account, disqualified.

The question whether the sum of money which was deposited by Robinson with the defendant, Walton, was simply deposited as the property of the former, so as to be subjected to attachment upon trustee process, or was in any way impressed with a trust in favor of the complainant, depends upon the construction of the agreement made by Robinson and Hathorn on Feb. 2, 1901. It seems to me that that agreement, in the light of the surrounding circumstances plainly shows that this sum of money was deposited in the hands of Mr. Walton as the property of Robinson, so that Walton thereby became the trustee of Robinson, and liable to be held as such upon trustee process; and that he did not hold this property as trustee for Hathorn under any circumstances or contingencies. And further

that, if the agreement of the parties admitted of any doubt upon this question, the contemporaneous conduct of the parties and their counsel shows beyond all question that they so intended and understood the effect of this agreement.

The complainant was a judgment creditor of Robinson; on February 2, 1901, the latter was before a disclosure commissioner at the summons of the complainant to make a disclosure; the debtor disclosed a considerable sum of money in his possession, more than sufficient to satisfy the creditor's judgment, but claimed that this money was exempt from attachment and seizure under the Public Laws of 1897, chap. 320, § 14, the money having been received by him as a beneficiary under an insurance policy issued by a fraternal beneficiary association. The creditor, upon the other hand, claimed that this money was not exempt from seizure under the statute. The parties were then before a tribunal which was authorized and was bound to decide this question, however serious and difficult a one it may have been. The complainant was entitled to have the question decided in one way or the other by the commissioner. If decided in favor of the creditor's contention, it was the duty of the commissioner to appraise and set off the money to the creditor, and upon its delivery to him by the debtor, and not until then, he would have acquired title to it. Stat. 1897, c. 330, § 9. But the creditor although entitled to a decision, and, in fact, entitled to a decision in his favor, as decided by this court in *Hathorn* v. *Robinson*, 96 Maine, 33, abandoned this proceeding and entered into an agreement with the debtor whereby the question might be decided in another way and upon an entirely different proceeding. By reason of this abandonment the commissioner did not decide the question, the money was not appraised, set-off, or delivered to the plaintiff. He acquired neither title to nor lien upon it under the disclosure proceedings, but voluntarily entered upon another method of procedure, the commencement of a trustee process to obtain the funds. Certainly up to this time this money had not become the property of the judgment creditor, the only question so far being whether or not it could be taken as the property of the judgment debtor to satisfy the claim of the creditor. But it was not taken, and, as we have seen, the pro-

ceedings before the commissioner were abandoned. The parties then made the agreement, which is quoted in full in the majority opinion of the court, wherein it was provided that Robinson should deposit the sum of $500 in the hands of his attorney, Walton, "and said Hathorn is to bring suit through his attorney against said Robinson as principal defendant and said Walton as trustee of said fund." To me it does not seem possible that there can be any doubt as to the intention of the counsel who, presumedly, drafted this agreement, as to the character of this fund, as to whose property it was, and as to whom Walton was trustee for, when this language was used, and the principal and controlling object of the agreement was that a trustee process might be commenced to hold this fund in the possession of Walton as trustee for Robinson, the debtor, provided that it was not exempt from attachment. It is elementary that the purpose of a trustee process is to make an attachment of the property of the principal defendant in the hands of a trustee of the principal defendant;— it is so provided by statute, R. S. 1883, c. 86, § 2. Again, it is provided in sec. 4 of the same chapter, that the service of the trustee writ on the trustee "binds all goods, effects or credits of the principal defendant entrusted to and deposited in his possession." The purpose of the trustee process being then to attach the property of the principal defendant in the possession of the trustee, must not the parties and their counsel have known, when this agreement was made for the sole purpose of having property of the principal defendant in the hands of the trustee that could be attached, that that was the principal defendant's property, placed there that it might be subjected to attachment by this process? Unless this money was the property of the principal defendant, it could not be attached in a common law action against the principal defendant and an alleged trustee. A plaintiff cannot obtain in such an action his own property in the hands and possession of a person who is alleged to be trustee for another.

That the counsel so intended and understood the effect of this agreement is shown by the fact that immediately after this money was deposited, the plaintiff commenced a common law action of debt upon his judgment, and attached this money as the property of the

defendant in the hands of Walton, the trustee for the defendant. That common law action was entered in court and prosecuted, no objection being made by the trustee or the principal defendant as to the maintenance of this trustee process; the court at nisi prius held that the trustee was chargeable; and this ruling, after being reviewed upon exceptions by the law court, was sustained. The result in that case necessarily involved the decision of two questions, first, as to whether or not this money was attachable under the statute of exemption above referred to, and second, a question, which, to be sure, was not discussed in the opinion, because conceded by counsel, whether or not this money was the property of the principal defendant in the hands of the alleged trustee, who held it as trustee for the principal defendant and for nobody else.

That this fund was not placed in the hands of Mr. Walton as trustee for the complainant, seems to me clear for the reasons already given, and, to my mind, that conclusion is strengthened by further analysis of the agreement in writing. That agreement contains this provision, "said arrangement is made for the purpose of testing said Hathorn's right to said fund, and it is understood and agreed that all provisions of law shall be available in defense thereof the same as though said fund had remained in the hands of said Robinson." But what right of Hathorn's to this fund was to be tested in the manner provided for by the agreement? Certainly not his right as owner of the fund, because this he did not claim, his only claim was a right to seize or attach the fund as the property of the defendant in satisfaction of his judgment; and the sole question that was to be determined by the court in the suit to be commenced, was as to his right to take this fund as the property of the defendant to satisfy his judgment. Again, what is meant by the clause "that all provisions of law shall be available in defense thereof the same as though said fund had remained in the hands of said Robinson?" Does it not show that the question to be determined was whether or not this money was subject to seizure or attachment as the property of the debtor, Robinson? This was the question argued and decided by the court in that case. 96 Maine, 33. The decision of the court was necessarily that it was the property of the defendant, else the alleged

trustee would not have been charged, and also that it was not exempt under the statute relied upon. That this money was the property of the debtor, and that it was not exempt from attachment was, and must have been, the contention of the plaintiff's counsel in the commencement, prosecution and argument of that case.

Before Robinson's death, the complainant and his attorney, as well as the adverse party and the court, all acted upon the theory that Walton was trustee for Robinson and chargeable as such upon trustee process. After Robinson's death, the whole theory of the complainant is changed and he now contends, in effect, that Walton was not the trustee of Robinson but was trustee for his client, the complainant, and that contention is sustained by a majority of the court. No principle of the law is better established, or is more sound in principle, than that no suitor shall be allowed to invoke the aid of the courts upon contradictory principles of redress, upon one and the same state of facts. That doctrine has been recently asserted by this court in *Hussey* v. *Bryant*, 95 Maine, 49. But in the present case the facts are identical in all respects with those of the common law action brought by the present complainant. In that action the plaintiff suitor claimed that Walton should be charged as the trustee of Robinson, and was successful in his contention, having obtained a final judgment of this court in his favor. In this case the same suitor, under the same facts seeks another and entirely inconsistent remedy. It seems to me that if there were any question as to the construction of the agreement of Feb. 2, 1901, this election by this complainant of his remedy by common law action and trustee process, acquiesced in by the adverse party, and brought to a successful termination for the plaintiff, ought to prevent his maintenance of this bill in which he seeks a remedy absolutely inconsistent with that of the former action.

Suppose Robinson had lived, is it conceivable, after the court had held that the trustee was chargeable because he had this money of the principal defendant in his hands, and after judgment had been entered, "trustee charged, etc." that this court would have then held that it was unnecessary for the creditor to perfect his foreign attachment by proceedings under the statute; and, notwithstanding the

fact, that the parties had already proceeded upon the theory that Walton was the trustee of Robinson, and the court had so decided, that in fact Walton did not hold this money as trustee for Robinson, but as trustee for Hathorn? And yet that such would be the decision of the court, is, it seems to me, the necessary result of the conclusion of the majority opinion; but Robinson's death in no way affected the question under consideration. It was a contingency which evidently was not contemplated by the parties at the time this agreement was made, and thereby the foreign attachment by trustee process was dissolved.

For these reasons, I am unable to concur with the majority opinion, and believe that the ruling of the presiding justice at nisi prius was correct.

STATE OF MAINE *vs.* JOSEPH PICHE.

Androscoggin. Opinion December 21, 1903.

Intox. Liquors, "Don't Know Beer 2½ per cent." *Question for Jury. Evidence. R. S. (1883), c. 17, § 1; c. 27, § 33.*

Whether any other pure or mixed liquor not enumerated in R. S., c. 27, § 33, is intoxicating is a question of fact to be proved by any competent evidence, and the force and effect of such evidence are for the jury to determine.

The composition and character of the liquor, the amount of alcohol it contains, and in what quantities it produces intoxication, are all competent evidence tending to determine the question.

The court cannot say as a matter of law that a liquor, which contains three per cent or more of alcohol, is intoxicating, and that one which contains a less percentage is not, but the question must be determined by the jury from all the evidence in the case.

Exceptions by defendant. Sustained.

Search and seizure of intoxicating liquors, under R. S. 1883, c. 27. At the close of the charge to the jury, the defendant requested

the following instructions which were refused by the presiding justice:—

1. That to find the respondent guilty, you must be satisfied beyond a reasonable doubt, that the beer seized is intoxicating.

2nd. That if you should find this beer contains malt, but is not intoxicating, then your verdict should be for the respondent.

3rd. That beer, to be a malt liquor under the statutes of this State, malt must constitute the principal component or constituent part entering into the composition or making of said beer.

4th. In order to find the respondent guilty you must be satisfied, beyond a reasonable doubt, that the beer seized at this respondent's place, contained malt, and that said malt had generated alcohol in sufficient quantity to render the same intoxicating.

5th. That if the jury shall find this beer, to be not intoxicating, the fact that it contains malt does not make the sale of it illegal and unlawful under our statutes relating to the sale and keeping of intoxicating liquors, and your verdict should be for the respondent.

6th. The proportion of alcohol, whether sufficient to make or render the beer intoxicating or not is for you to say, regardless of the percentage or proportion of alcohol found by analysis, even if containing three per cent or more.

The defendant took exceptions to the refusal to give these instructions; also to the instruction given and stated in the opinion of the court. The respondent's counsel also duly excepted to that part of the justice's charge relating to what percentage of alcohol in beer is necessary to constitute intoxicating liquor under the statutes, and what is a malt liquor under the statutes.

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

As to the first five requests, counsel argued:—

It is competent for the legislature to say what liquors shall be regarded as intoxicating within the meaning of an act regulating or prohibiting their sale. When such definition is given by statute, it is not a question as to whether the liquors included in it are intoxicating in fact, but whether they come within the classes named in the

definition. *Com.* v. *Brelsford*, 161 Mass. 61, and cases cited; *State* v. *Starr*, 67 Maine, 242. To the sixth request: The court will take judicial notice that certain liquors are intoxicating. *U. S.* v. *Ducournau*, 54 Fed. Rep. 138, and cases cited; *Carmon* v. *The State*, 18 Ind. 450; *Schlict* v. *The State*, 56 Ind. 176; *Fenton* v. *State*, 100 Ind. 598; *Briffitt* v. *The State*, 58 Wis. 42; *U. S.* v. *Ash*, 75 Fed. Rep. 651-2; *Nevin* v. *Ladue*, 3 Denio, 437.

The court properly instructed the jury that certain liquors were intoxicating, and submitted to them the issue as to whether the liquors in question came within that class.

J. G. Chabot, for defendant.

The statutes do not attempt to define or specify what percentage of alcohol, found in any liquor, other than those enumerated, shall constitute intoxicating liquors.

In the absence of any specific statutory definition in that respect, it is well settled in this State and Massachusetts, that what is an intoxicating liquor, and whether the liquor sold was intoxicating or not, are questions of fact to be determined by the jury upon the evidence in the case, in *State* v. *Starr*, 67 Maine, 244; *State* v. *Page*, 66 Maine, 419; *State* v. *Wall*, 34 Maine, 165; *Com.* v. *Blos*, 116 Mass. 56; *State* v. *Biddle*, 54 N. H. 379, 384; *Daffer* v. *State*, 32 Ind. 402; *Plunket* v. *State*, 69 Ind. 68; Bishop on Statutory Crimes, 2nd ed. 1007; *Rau* v. *People*, 63 N. Y. 279; *Intox. Liquor Cases*, 25 Kan. 751, 37 Am. Rep. p. 291; *State* v. *Peterson*, 41 Vt. 504; *Russell* v. *Sloan*, 33 Vt. 659.

Court cannot say as a matter of law that the presence of a certain per cent of alcohol brings the compound or liquor within the prohibition of the statutes.

The question is one of fact to be settled by the jury as other questions of fact. *Com.* v. *Blos*, supra. Courts are not called upon to construe the terms intoxicating liquors. 11 Am. & Eng. Ency. of Law, 572, and cases cited.

The beer seized at the defendant's place not being specifically declared to be intoxicating, by the statutes, the question as to whether or not it came within the prohibition of the statutes, and

whether it was intoxicating liquors, are questions to be determined by the jury from evidence in the case.

No plausible reasons or legal authorities, justify the statement or belief that three per cent of alcohol, (in the absence of any statutory limitation,) makes the liquor which contains it, intoxicating liquors.

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

POWERS, J. Case based on search and seizure complaint.

The officer seized a quantity of beer at the respondent's premises marked, "Don't Know Beer 2½ per cent." At the trial, the verdict was for the State, and the respondent excepted to the following portion of the charge of the presiding justice: "A liquor kept for sale, or sold by a person in this State, as a beverage, containing three per cent or more of alcohol, is an intoxicating liquor within the meaning of the statutes of this State. I instruct you under this definition that if you find beyond a reasonable doubt, that the liquor which was seized and which has been presented before you, contained three per cent or more of alcohol, that it is an intoxicating liquor. Now then, I submit to you the question of fact to determine whether it did or it does contain three per cent or more of alcohol, whether the evidence in this case satisfies you beyond a reasonable doubt, that this beer contains three or more per cent of alcohol. If so, they are intoxicating liquors."

By the statutes of this State, wine, ale, porter, strong beer, lager beer, and all other malt liquors and cider when kept or deposited with the intent to sell the same for tippling purposes, or as a beverage, as well as all distilled spirits, are declared intoxicating within the meaning of the chapter under which these proceedings were had, R. S. 1883, c. 27, § 33. As to liquors which fall within any of the enumerated classes, there is no question but that they are intoxicating. The statute so declares them. The same section provides that the above enumeration shall not prevent any other pure or mixed liquors from being considered intoxicating. Whether such liquors are intoxicating, is a question of fact to be proved by any competent evidence,

the same as any other question of fact, and the force and effect of such evidence are for the jury to determine. The composition and character of the liquor, the amount of alcohol it contains, and in what quantities it produces intoxication, are all competent evidence tending to determine the question. The court cannot say as a matter of law that a liquor, which contains three per cent or more of alcohol, is intoxicating, and that one which contains a less percentage is not; but in every case this question must be determined by the jury, from all the evidence before them.

It was held in *State* v. *Wall*, 34 Maine, 165, that in a prosecution for the unlawful sale of intoxicating liquors it is the province, not of the court, but of the jury, to determine whether the liquor sold was or was not as matter of fact intoxicating. Later this court held that the manufacture or sale of unadulterated cider or wine made from fruit grown in this State was exempted from the prohibition of c. 27, but that whether such liquors were intoxicating under R. S. (1883), c. 17, § 1, relating to nuisances, is for the jury to determine. *State* v. *Page*, 66 Maine, 418.

A case precisely in point is *Commonwealth* v. *Blos*, 116 Mass. 56. It is there held that whether beer is intoxicating, is a question of fact for the jury, and that the fact that it contains a certain percentage of alcohol, is not conclusive upon that point.

The presiding justice erred in withdrawing from the jury the determination of the principal question of fact, and leaving to their decision only one of the collateral facts tending to establish the main proposition.

Exceptions sustained.

HARRY N. TWOMBLY,

vs.

CONSOLIDATED ELECTRIC LIGHT COMPANY.

Cumberland. Opinion December 21, 1903.

Master and Servant, Safe Appliances. Repairs. *Negligence,* Defective Ladder, Fellow-Servant and Foreman.

1. It is the duty of the master to exercise reasonable care in providing suitable appliances for his servants to use, and in inspecting them afterwards, so as to ascertain their condition and, when necessary, to put them into a proper state of repair. And while there are some duties respecting the repair of appliances which the master may so delegate to a servant as to escape responsibility for the negligence of the servant in performing them, there are others which the master may not thus delegate.
2. A forty-foot extension ladder used in the business of an electric light company, is held not to be a common tool or appliance within the meaning of the rules that there is no duty resting on a master to inspect, during their use, those common tools and appliances with which every one is conversant, and that if they wear out and become defective, the employer may rely upon the presumption that the servant using them will first detect the defect, and that the master is not to be held for negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master.
3. Nor is the replacing of a dozy or rotten round in such a ladder to be held as such "ordinary repairs" as a workman is usually expected to make, in the absence of proof that the defective condition of the round was known to the servant.
4. While the master may delegate to a servant such ordinary repairs as arise incidently from the use of properly constructed appliances, and such as they must naturally require from time to time by reason of their use, and be relieved from responsibility therefor, *held;* that the replacing of a rotten round in the ladder in this case was not such an ordinary repair.
5. A master, using ladders in his business, cannot escape the consequences of the breaking of a rotten round in a ladder, by merely showing that he had a foreman, and that that foreman had the general oversight of all appliances with the general duty, among others, of seeing that repairs were

made, when necessary. The negligence of such a foreman, in the matter of inspecting or repairing such a ladder, is the negligence of the master, and not the negligence of a fellow-servant of the one injured by its breaking.

6. The court is unable to say that the verdict was clearly wrong either as to liability or amount of damages.

Motion by defendant. Overruled.

Case for personal injuries sustained by the plaintiff Jany. 1, 1902, while in the defendant's employ at work upon an extension ladder at a house on Congress Street, in the City of Portland.

From the testimony it appeared that the defendant corporation was engaged on the first day of January, 1902, and had been for a long time previous thereto, in generating and transmitting electricity for lighting houses and other buildings in Portland, and for various other purposes, and had lines of poles, or posts, erected upon and along the public streets and highways of Portland for the purpose of transmitting electricity thereon, and the plaintiff was a "lineman" in its employ, and had been from August, 1901, to the day of the accident.

For the purpose of attaching brackets and wires to buildings, at points high up from the ground, the defendant corporation used a forty-foot extension ladder, that is, the part of the ladder that stood upon the ground was twenty feet long and the extension part was also twenty feet long.

At about two o'clock in the afternoon of the day of the accident, the plaintiff, George Moody and John F. Foster, two other men then in the employ of the defendant, were sent to this house by Mr. Phillips, foreman of outside construction, to connect it with wires for the purpose of lighting, Moody being put in charge and control of the work and of the other men.

As it was necessary to put two corner brackets into the corner of the house at a point thirty feet from the ground, the extension ladder was placed on the sidewalk in front of the house and extended and the top end allowed to lean against the side of the house and near to its northwesterly corner. Plaintiff was sent by Moody up this ladder to put in the corner brackets and attach the wires thereto. This he did.

Foster was sent up a pole standing in the street in front of the house and from which the wires were taken to insert into the house. The plaintiff put in the brackets; and the wires which were thrown to him by Foster from the pole by means of a handline, he fastened to the brackets; the handline, in the meantime, lying on the top of a railing, which was on the roof of a bay window in the second story of the house, the top of which railing was twenty-five feet and nine inches high.

When plaintiff had completed all the work up there that he was directed by Moody to do, he prepared to descend to the ground and took hold, with his right hand, of the top round in the ladder and placed his left foot over on to the roof of the bay window to enable him to reach for the handline, he got hold of the line in his left hand and made an effort to pull himself back in an upright position on the ladder by his right hand when the round that he had hold of suddenly broke at one side of the ladder and pulled out from the other side and thus threw him over backwards down on to the sidewalk, one of his feet striking the glass in the upper bay window, breaking two lights.

On the way down he caught hold of the top part of the lower section of the ladder with his right hand, changing the position of his body so that his feet were lower than his head, and fell the rest of the distance of twenty feet, striking the sidewalk in a sitting position, but leaning backwards, receiving injuries to his back, right foot, and left arm and hand, from which he has ever since suffered and still suffers, and has not been able to do, and has not done, any labor to speak of since that time.

The jury returned a verdict of $3000 for the plaintiff.

Wm. Lyons, for plaintiff.

Counsel cited: *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, p. 116; *Dixon* v. *Rankin*, 14 Ct. of Sessions Cases, 420; *Shanny* v. *Androscoggin Mills*, 66 Maine, 425; *Gilman* v. *Eastern R. R. Co.*, 13 Allen, 440; *Hall* v. *Emerson-Stevens Co.*, 94 Maine, 450; *Donnelly* v. *Booth Bros. Granite Co.*, 90 Maine, 114.

Damages: *Hunter* v. *Stewart*, 47 Maine, 421; *Wyman* v. *Leavitt*, 71 Maine, 227, 229, 36 Am. Rep. 303; *Blackman* v. *Gardiner*

Bridge, 75 Maine, 216; *Murdock* v. *N. Y., etc., Express Company*, 167 Mass. 549; *Braithwaite* v. *Hall*, 168 Mass. 39; *Filer* v. *N. Y. Central R. R. Co.*, 49 N. Y. 42; *Matteson* v. *N. Y. C. R. Co.*, 35 N. Y. 491.

Motion: *Kimball* v. *Bath*, 38 Maine, 222; *Donnelly* v. *Booth Bros. Granite Co.*, supra; *Frye* v. *Gas Company*, 94 Maine, 26.

Geo. E. Bird and Wm. H. Bradley, for defendant.

Counsel cited: *Johnson* v. *Boston Tow-Boat Co.*, 135 Mass. 209; *Rogers* v. *Ludlow Mfg. Co.*, 144 Mass. 198, 203, 59 Am. Rep. 68; *Rice* v. *King Philip Mills*, 144 Mass. 229, 59 Am. Rep. 80; Am. & Eng. Enc. of Law, *Master and Servant*; *Wachsmuth* v. *Electric Crane Co.*, 118 Mich. 275; *Miller* v. *Railroad Co.*, 21 N. Y.; *Pellerin* v. *International Paper Co.*, 96 Maine, 388.

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

SAVAGE, J. Case by servant against master to recover damages for personal injuries.

The plaintiff was employed upon a ladder about twenty-five feet from the ground, and in reaching for a rope with one hand, nearly his whole weight was suspended from a round in the ladder which he held with the other hand. The round broke, and he fell to the ground sustaining injuries. No complaint is made that the plaintiff himself was not in the exercise of due care. But after a verdict for the plaintiff, the defendant now contends, upon a motion for a new trial, that the case shows no want of due care on its own part.

The ladder in question was a forty-foot extension ladder, and was extended at the time of the accident to the plaintiff. There was evidence that an examination of the round after the accident showed it to be dozy on the outside and rotten. The ladder had been in use somewhat more than three years. It seems that the defendant company had no regular rules governing the inspection of appliances. Such inspection and repairs consequent upon it were usually reserved for rainy weather, when the men could not work out of doors. The foreman of construction had general oversight over the appliances,

and was under the duty of keeping them in repair. A man was especially delegated to make general repairs, but it does not appear that it was his duty to make inspections. It is true that the testimony of the defendant tended to show that the rounds of the ladder were of white ash and sound, that an examination of the round after the accident showed it to be well seasoned and sound, that it broke off at both ends by the sides of the ladder, showing fresh breaks, and leaving slivers or "burrs" on the edges of the holes through which the ends of the round had passed; and the defendant's evidence tended further to show that the ladder had been inspected only a few days before it broke, and was found to be all right. And in respect to this testimony, we may add, that if it be reliable, it is utterly incomprehensible how the accident could have happened. The jury certainly were warranted in finding, as they undoubtedly did, that this testimony was not reliable, and that the round was not sound and reasonably safe. And we think it was fairly open to the jury to find that the defective condition of the round might have been discovered had it been suitably inspected. Not perhaps by such an inspection as would naturally be given to it by the workman upon it, whose duty it was to work, not to inspect, and who might lawfully rely upon the presumption that the master had performed its duty; but by such an inspection on the part of the master as reasonably would be necessary to make sure that an appliance upon which the servant was to risk his life or limb every time he used it, was reasonably safe.

The plaintiff testified that the round looked all right as he worked upon the ladder. But even that fact does not show that it was all right, or that the unsafe condition might not have been discovered by suitable inspection, such as was incumbent upon the master, unless in some way relieved from the duty.

But it is contended as a matter of law that the defendant is not liable upon the evidence. It is urged that there is no duty resting on the master to inspect, during their use, those common tools and appliances with which every one is conversant; that if they wear out and become defective, the employer may rely upon the presumption that those using them will first detect the defect; and that the

employer is not to be held for negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master. And the defendant cites authorities in support of these propositions. But it seems to us that a forty-foot extension ladder is not a common tool or appliance within the meaning of these rules. A defect in a ladder arising from age or decay might not be discoverable by such inspection as a workman is expected to make, and might be upon more careful inspection. To replace a dozy round of a ladder is not, we think, such "ordinary repairs" as a workman using it is usually expected to make, and certainly not unless the defect is brought to the knowledge of the servant. Of course a master may furnish suitable materials for such renovations, and the circumstances in a given case may show that the workman is expected to make his own repairs. And in such case the master is not responsible for the neglect of the workman. But that is not this case. This plaintiff was under no special duty to inspect or repair this ladder, except as rainy day work in common with his fellow laborers, when he might be directed specially to do so.

But the defendant further says that it provided proper persons to see that the ladder was kept in proper condition and to make ordinary repairs and renewals, and that such persons were fellow-servants of the plaintiff; and from this the defendant contends that if by the negligence of any of these persons the ladder was not suitably inspected and properly repaired it was the negligence of the plaintiff's fellow-servants, for which the defendant is not responsible.

While it is generally the duty of the master to use reasonable care in seeing that appliances furnished are reasonably safe, and by repairs are kept reasonably safe, doubtless there are some duties respecting the repair of appliances which the master may so delegate to a servant as to escape responsibility for the negligence of the servant in performing them; and doubtless there are some duties which the master may not thus delegate. The line between these classes of duties must necessarily be shadowy, and any rule stating them must be indefinite. *Rogers* v. *Ludlow Manufacturing Co.*, 144 Mass. 198, 59 Am. Rep. 68. As was said in *Rice* v. *King Philip Mills*, 144 Mass. 229, 235, 59 Am. Rep. 80, "It is the duty of the master to

exercise due care in employing competent servants, in providing suitable machines, and in keeping them in proper repair, and the master cannot wholly escape responsibility by delegating these duties to a servant. If this could be done, a master might escape all responsibility by employing a competent superintendent to perform all these duties. But there are defects in machinery which are of such a character that the master has been held to perform his duty if he furnishes suitable materials, and employs competent servants, and instructs them to keep the machinery in repair, although the servants neglect to make the repairs, or make them in an improper manner. The master must exercise a reasonable supervision over the manner in which his business is done; but the repairs which machines properly constructed require to keep them in running order may be entrusted to competent servants. They are regarded as incidental to the use of the machines, because they are such as machines in substantially good repair must from time to time need." This case is cited and relied upon by the defendant here. But we think the distinction is obvious. If the test be as suggested in the last sentence quoted, it is that ordinarily, at least, the repairs which the master may delegate are those arising incidentally from the use of properly constructed appliances, such ordinary repairs as they must naturally require from time to time by reason of their use. To replace a rotten round of a ladder is not as we have said, such an ordinary repair. The rottenness, such as is complained of here, is not incidental to the use of a well constructed ladder.

Besides, we think the jury were warranted in finding that the master had not delegated his duties with respect to the inspection and repair of this ladder. It had a man to make repairs, so does every master using machinery. But this man had no duty of inspection. It had a foreman of construction of its lines, and this foreman had general oversight over all the appliances, as we have already stated, and the making of repairs when needed. So it is in the case of every corporate master, using appliances and employing men. To say that a master can escape the consequences of the breaking of a rotten round in a ladder, by merely showing that he had a foreman and that that foreman had the general oversight of all appliances, with the

general duty among others of seeing that repairs were made, when necessary, would excuse practically all masters from responsibility in respect of keeping appliances in sound or safe condition. We do not think this is the law. The jury, therefore, upon the whole, were warranted in finding the defendant liable.

The defendant contends that the verdict for $3000 was too large, and that it should be set aside on that account. The plaintiff was a competent lineman earning sixty dollars a month at the time of his injury. There was testimony that between the time of the accident and the time of the trial he had been able to do but comparatively little work. His present condition and his probable future condition were also matters for the jury to take into consideration. The defendant says that the medical testimony shows that he had virtually recovered. The jury however were not confined to the medical testimony, and they evidently thought he had not recovered. We cannot say that the evidence did not justify them in their conclusion. And while the verdict seems large, it is not clearly shown to be so extravagant as to justify the interference of the court.

Motion overruled.

COLEMAN WELCH *vs.* BATH IRON WORKS.

Cumberland. Opinion December 26, 1903.

Negligence. Master and Servant, Dangerous Appliances, Dynamite, Duty of Warning Servant not to be delegated, Assumption of Risk.

An employer of laborers may, when necessary for the prosecution of his work, use agencies and appliances which are particularly dangerous to the lives and limbs of those who use them, provided precautions can be and are taken to guard against such dangers, so that by the employment of these precautions the necessary and inherent dangers are reduced to a condition of reasonable safety, and unnecessary dangers can be avoided. Under these circumstances employers are required to exercise great care because of the corresponding great danger to those who are exposed.

And the additional duty is imposed upon an employer, who finds it necessary to adopt the use of particularly hazardous agencies and appliances, of giving full information to his servant, who does not already have that information, of the particular dangers arising from the use of such extraordinary hazardous agencies, and sufficient instructions in relation thereto, to enable him to intelligently determine whether or not he will accept the dangerous employment, and, if he does, that he may know how to avoid them by the exercise of due care upon his part. This doctrine is based upon the preliminary one that a servant who enters into the employment of another only assumes the risk of such dangers as are ordinarily incident to the employment, and such unnecessary dangers as he knows of and appreciates. The doctrine of assumption of risk has no application to dangers which are not and should not be contemplated by the servant, and certainly does not apply when there is an extraordinary risk of which the servant has no knowledge or warning. This duty of giving notice to a servant is one that cannot be delegated by the master to another so as to escape liability if the notice is not given.

The plaintiff was employed as a common laborer in making excavations in the frozen ground for the purpose of laying the foundations for a new building, dynamite was used to facilitate the work. The plaintiff knew that dynamite was being used, and had a general knowledge of its powerful explosive character, but he had no information in regard to any particular dangers of this explosive or of any means to be adopted to avoid them, and was not aware and had no reason to apprehend that any dynamite was in fact left, or was liable to be left, unexploded. No instructions were given him as to the care to be observed by him, in his work of removing the pieces of frozen earth, to see that none of the dynamite had been left unexploded.

There was evidence tending to show that when a number of charges of dynamite, placed in different holes, are attempted to be all fired by fuses at the same time, there is a liability that some of these charges, for various reasons, will not always explode and that this is not merely a remote possibility of so unusual an occurrence as not to be reasonably anticipated, but something so liable to occur, and so well known to those having experience in the use of dynamite, that care must be taken after every explosion to see that none of the charges were left unexploded, and that this was especially necessary in view of the great danger that a workman might strike one of the unexploded pieces with his pickaxe or shovel. There was also evidence tending to show that there were other peculiar dangers arising from the use of dynamite in this manner.

On the morning after an explosion of dynamite the day before, used in the manner above described, the plaintiff was directed by the foreman in charge of the crew to go to work with his pick and shovel removing the earth that had been loosened by the explosion, and while so at work an explosion occurred causing him great injury. It is fairly to be inferred that the explosion which did this injury was of a fragment of a dynamite cartridge placed in the ground in the course of blasting the day before, and which had not exploded with the rest.

Held; that under these circumstances a verdict for the plaintiff was warranted by the evidence upon the ground that the defendant had failed to perform its duty to give notice to the plaintiff of the peculiar dangers attending the use of dynamite as it was used in the prosecution of this work, or instructions as to the means to be taken of avoiding such dangers. *Also,* that the damages awarded by the jury are not excessive.

On motion and exceptions by defendant. Overruled.

The gist of the claim as set out in plaintiff's declaration is the alleged negligence of defendant, or its failure; (1) "To use proper diligence to provide a safe and suitable place for the plaintiff to work in, and to surround the plaintiff with proper and suitable safeguards to shield him from danger in the performance of his duty as aforesaid, and especially to see that all dynamite which had been in the holes as aforesaid was properly discharged or removed before calling the plaintiff to clear away the dirt and debris from said holes as aforesaid." (2) In not warning the plaintiff of the danger which defendant well knew to exist and of which he was ignorant and did not appreciate.

The grounds of defense as to the facts were: (1) That the accident was of a character not to be reasonably anticipated. (2) That neither the defendant nor its servants could be reasonably expected

or required to know or foresee that part of a charge of dynamite might explode and a part remain unexploded. (3) That the foreman and other men in charge of the blasting were competent and skillful for their work. (4) That the appliances provided and the place of employment were reasonably safe and suitable. (5) That the manner of conducting the blasting was proper. (6) That no incident connected with the blasting, either in the manner of loading or discharging, or the appearance of the ground thereafter, were such as to suggest to a reasonably competent and skillful workman that a piece of dynamite remained in the ground unexploded.

This was an action brought by an employee of defendant corporation to recover damages for injuries sustained by him while at work upon the defendant's premises January 4, 1899.

Plaintiff with other employees of the defendant corporation was engaged in clearing away the ground for foundation for the new machine-shop. Certain of the crew were blasting the frozen dirt which the defendant and others broke up with picks and carried away in barrows. On the morning of January 4th, defendant was set at work, by the foreman directing the men, at a spot where, the day previous, some charges of dynamite had been exploded, and while using his pick presumably struck a small piece of dynamite which remained in the ground after the aforesaid blasting and sustained the injuries complained of.

The jury returned a verdict for the plaintiff for $5000.

Charles P. Mattocks and Sanford L. Fogg, for plaintiff.

Duties of the master: *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, 113; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420, 14 Am. Enc. of Law, 843, 844; *Cunningham* v. *Bath Iron Works*, 92 Maine, 501; *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Ford* v. *Fitchburg R. R. Co.*, 110 Mass. 240; *Kelley* v. *Norcross*, 121 Mass. 508; *Killea* v. *Faxon*, 125 Mass. 485; *Elmer* v. *Locke*, 135 Mass. 575; *Lawless* v. *Connecticut River R. R. Co.*, 136 Mass. 1; *Flike* v. *Boston and Albany Railroad Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Hough* v. *Texas and Pacific R. R. Co.*, 100 U. S. 213; *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Taylor* v. *Evansville & Terre Haute R. R. Co.*, 121 Ind. 124;

Moynihan v. *Hills Co.*, 146 Mass. 586; *Brennan* v. *Gordon*, 118 N. Y. 489; *Kane* v. *Northern Central R. Co.*, 128 U. S. 951.

Williamson v. *Sheldon Marble Co.*, 66 Vt. 427; *Wagner* v. *Jayne Chem. Co.*, 147 Pa. St. 475; *Rummell* v. *Dillworth*, 111 Pa. St. 343; *Ingerman* v. *Moore*, 90 Cal. 410; *Jones* v. *Florence Mining Co.*, 66 Wis. 268, 57 Am. Rep. 269; *Pantzar* v. *Tilly Foster Iron Mining Co.*, 99 N. Y. 368; *Lofrano* v. *N. Y. & Mt. Vernon Water Co.*, 55 Hun, 452; Wood's Master and Servant, pp. 177, 186–9, 681, 714, 738–9, 749, 751, 763; Whart. Neg. 215; *Myhan* v. *La. Electric Light & Power Co.*, 41 La. An. Rep. 968; Beach on Cont. Neg. 370; Wood's Master and Servant, p. 763; *Sullivan* v. *India Mfg. Co.*, 113 Mass. 396; *Finnerty* v. *Prentice*, 75 N. Y. 615; *Wheeler* v. *Wason Mfg. Co.*, 135 Mass. 297; *Hickey* v. *Taaffe*, 105 N. Y. 26; *Brennan* v. *Gordon*, 118 N. Y. 489; *Hough* v. *Texas and Pacific R. R. Co.*, 100 U. S. 213; *Lebbering* v. *Struthers Wells Co.*, 157 Pa. St. 312; *Shumway* v. *Walworth & Neville Mfg. Co.*, 98 Mich. 411; *Lafayette Bridge Co.* v. *Olsen*, 108 Fed. Rep. 335; *Louisville & N. R. Co.* v. *Miller*, 104 Fed. Rep. 124; *Felton* v. *Girardy*, 104 Fed. Rep. 127; Shear. Redf. on Neg. 185, 203; *Patterson* v. *Pittsburg, etc., R. R. Co.*, 76 Pa. St. 389; *Rummell* v. *Dillworth*, 131 Pa. St. 509.

The duty to warn inexperienced servants: Shear. & Redf. on Neg. 4th ed. 218; *Smith* v. *Peninsular Car Works*, 60 Mich. 501; *Leary* v. *B. & A. R. R. Co.*, 139 Mass. 580; *Hughes* v. *Chicago, M. & St. P. R. R. Co.*, 79 Wis. 264; *McMahon* v. *Ida Mining Co.*, 95 Wis. 308; *Jones* v. *Florence Mining Co.*, 66 Wis. 268; *McGowan* v. *La Plata Mining & Smelting Co.*, 9 Fed. Rep. 861; *Washn. & Georgetown R. R. Co.* v. *Gladmon*, 15 Wall. 401; *Grizzle* v. *Frost*, 3 Foster & F. 622; *McElligott* v. *Randolph*, 61 Conn. 157; *Hanson* v. *Ludlow Mfg. Co.*, 162 Mass. 187; *Atkins* v. *Merrick Thread Co.*, 142 Mass. 431. Corporations—Vice-Principals: *Mulcairns* v. *City of Janesville*, 67 Wis. 24; *Ford* v. *Fitchburg R. R. Co.*, 110 Mass. 241; Whart. Neg. 211, 212, 232a; *Flike* v. *Boston & Albany R. R. Co.*, 53 N. Y. 540, 549; *Kehler* v. *Schwenk*, 151 Pa. St. 505; *Sullivan* v. *India Mfg. Co.*, 113 Mass. 396; *Crispin* v. *Babbitt*, 81 N. Y. 516, 521; *Pantzar* v. *Tilly Foster Iron Mining Co.*, 99 N. Y.

368; *Rogers* v. *Ludlow Mfg. Co.*, 144 Mass. 198, 201; *Booth* v. *Boston & Albany R. R. Co.*, 73 N. Y. 38, 40; *Mann* v. *Pres. of D. & H. C. Co.*, 91 N. Y. 500; Wood on Master & Serv. 349, 350, 444; *Brennan* v. *Gordon*, 118 N. Y. 489; *Loughlin* v. *State of N. Y.* 105 N. Y. 159, 162; *Union Pacific R. R. Co.* v. *Fort*, 17 Wall. 553; *Brennan* v. *Gordon*, 118 N. Y. 489; *Kerr-Murray Mfg. Co.* v. *Hess*, 98 Fed. Rep. 56. Fellow-servant: *Hayes* v. *Colchester Mills*, 69 Vt. 1; *Brabbits* v. *Chicago, etc., Ry. Co.*, 38 Wis. 289.

Benj. Thompson and Joseph M. Trott, for defendant.

The trend of authority as shown by the decisions of the various courts of the highest respectability upon which we rely, is clearly in the direction of interpreting, limiting and applying the rule in the light of the methods and understanding ordinarily prevailing among practical men, rather than from any academic or arbitrary standpoint.

Counsel cited: *Stevens* v. *Chamberlain*, 100 Fed. Rep. 378; *Hermann* v. *Port Blakely Mill Co.*, 71 Fed. Rep. 853; 2 Thompson Negligence, p. 1026, § 31; Cooley, Torts, p. 541, note 1; Wood, Ry. Law, 338; Beach Con. Neg. p. 338, § 115; *Perry* v. *Rogers*, 157 N. Y. 251; *Armour* v. *Hahn*, 111 U. S. 315; *Randall* v. *Baltimore and Ohio R. R. Co.*, 109 U. S. 478; *N. E. R. R. Co.* v. *Conroy*, 175 U. S. 323, 7 Am. Neg. Reps. 182; *Baird* v. *Reilly*, 63 U. S. C. Court App. 157, 7 Neg. Cases, 712; *Cullen* v. *Norton*, 126 N. Y. 1; *Neven* v. *Sears*, 155 Mass. 303; *Daves* v. *So. Pac. Co.*, 98 Cal. 19, 25, 26, 35 Am. St. Rep. 133; *Baron* v. *Detroit, etc., Co.*, 91 Mich. 585; *Hoar* v. *Merritt*, 62 Mich. 386; *Caniff* v. *Blanchard Nav. Co.*, 66 Mich. 638; *Russell Creek Coal Co.* v. *Wells*, 96 Va. 417; *Richmond Loc. Works* v. *Ford*, 94 Va. 640; *City of Minneapolis* v. *Lundin*, 58 Fed. Rep. 525; *Curley* v. *Huff*, reported in 5 Neg. Cases, 668; *Wilson* v. *Merry*, (L. R. 1 H. L. § 326); *Bertha Zinc Co.* v. *Martin*, 93 Va. 791; *Titus* v. *Bradford, etc., R. R. Co.*, 136 Pa. St. 618; *Schwartz* v. *Schull*, 45 W. Va. 405; *Allison Mfg. Co.* v. *McCormick*, 118 Pa. St. 519, 4 Am. St. Rep. 613; *Innes* v. *Milwaukee*, 2 Am. Neg. Rep. 782; *Henderson* v. *Williams*, 66 N. H. 405; *Houston* v. *Culver*, 88 Ga. 34; *Welch* v. *Grace*, 167 Mass. 590; *Vitto* v. *Farley*, 15 N. Y. App. Div. 229, 2 Am. Neg. Rep. 47; *Donovan* v. *Ferris*, 7 Am. Neg. Rep. 390; *Anderson* v. *Daly*

Mining Co., 4 Am. Neg. Rep. 86, 87; *Mast* v. *Kern*, 5 Am. Neg. Rep. 88; *Burke* v. *Anderson*, 69 Fed. Rep. 814.

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

WISWELL, C. J. The plaintiff was employed by the defendant, and was engaged, with a crew of men, in making excavations for the purpose of laying the foundations for a machine-shop that the defendant proposed to build. The work was being done during the winter season when the ground was frozen hard to a depth of about two feet; it was therefore necessary, in making these excavations, to use some explosive, and dynamite was used for that purpose. On the day preceding the accident to the plaintiff, four holes had been drilled in the frozen ground several feet apart, and one whole cartridge of dynamite, some eight inches in length, and a short piece of cartridge, two or three inches in length, were inserted in each hole, the whole cartridge being placed upon top of the smaller one, and was to be discharged by means of a fuse with which it was connected; the lower piece of cartridge was not connected with the fuse but was intended to be exploded by the concussion caused by the explosion of the upper cartridge. The charges in the four holes were then all attempted to be fired at the same time, and it was supposed at the time that all of the charges of dynamite were exploded upon this occasion, but subsequent developments show that this was not so. The next morning the foreman in charge of the crew directed the plaintiff to go to work with his pick and shovel removing the earth that had been loosened by the explosion of the day before; while so at work an explosion occurred causing the plaintiff great injury. It is fairly to be inferred that the explosion which did this injury was of a fragment of a dynamite cartridge placed in the ground in the course of blasting the day before, and which had not exploded with the rest.

The plaintiff was a common laborer and was so employed upon this occasion. He knew that dynamite was being used in the work of making the excavations of the frozen earth, and had a general knowledge, from his experience while at work in this place, of its

powerful explosive character, but he had no information in regard to any particular dangers of this explosive, or of any means to be adopted to avoid such dangers, and was not aware and had no reason to apprehend that any dynamite was in fact left, or was liable to be left, unexploded. No instructions were given him in regard to the care to be observed by him, in his work of removing the pieces of frozen earth, to see that no pieces of the cartridges had been left unexploded.

The plaintiff claims that the defendant is liable to compensate him for the injuries sustained by him because of negligence upon its part or upon the part of its servants for whom it was responsible. He also claims that the defendant was in fault, and on that account liable to him, in not giving him the necessary information in regard to the dangers to be apprehended from the use of dynamite, and the manner to avoid them. The trial of the case resulted in a verdict for the plaintiff.

So far as the first proposition is concerned, for the reasons briefly stated below, we do not consider it necessary to enter into a discussion of the principles, so frequently stated by this court, relative to the respective duties and obligations of master and servant, ordinarily existing. The defendant, so far as the evidence shows, properly performed the duty imposed by law upon it, by exercising reasonable diligence in providing a safe and suitable place for the plaintiff to work, and in furnishing proper appliances, when properly and intelligently used, to work with. There were no concealed dangers, and, in fact, no dangers at all in the place where the plaintiff and his co-laborers were set to work when the work of blasting first commenced. It does not appear that the explosive used was defective or unsuitable, and there is no objection to the use of dynamite in making such excavations as these, provided all reasonably proper and safe precautions are used, and when those who are entrusted with its use, and those who may be exposed to danger thereby, have the necessary information in relation to its particular dangers so that such dangers may be avoided, or so that a servant may be able to intelligently determine as to whether or not he will accept the employment with its consequent dangers.

It seems evident from a careful examination of the case that the immediate negligence which caused the unexpected explosion was the failure to make such an examination, after the intended explosion of the preceding day, as was necessary to ascertain if any of these pieces of dynamite were left in the ground unexploded. It is true, that because of the failure to make this examination, when the plaintiff went to work on the next morning, the place was unsafe, but this negligence whereby the place became unsafe, it having been a proper and suitable place when the work of excavating first commenced, was the negligence of those engaged in the operation, that is, negligence of some fellow-servant of the plaintiff, a negligence which the plaintiff assumed when he entered into this employment, under the well settled doctrine of this State. Even if this failure to do what was necessary in this particular was the negligence of the foreman who had the immediate charge of the work and control of the crew there engaged, it was still the negligence of a fellow-servant, because although the foreman was in immediate charge of the work, and was superior in rank to the plaintiff, he was still a fellow-servant with the plaintiff, and in the performance of the duties entrusted to him, he was not engaged in the discharge of the particular and personal duties which the master owes to his servants, and which he cannot delegate to another so as to be relieved from liability. He was not, while in charge of this work, a vice-principal acting in the place of his principal, for the reasons frequently stated in previous decisions of this court. See *Small* v. *Allington & Curtis Manufacturing Company*, 94 Maine, 551.

So that, if the decision of this case depended upon the question as to whose negligence immediately caused the explosion and the consequent injury to the plaintiff, and if there was no other alleged failure upon the part of the defendant to perform a duty which it owed to the plaintiff, we should be constrained to hold that the verdict for the plaintiff was not warranted by the evidence. But this is not the only, nor, perhaps, the principal fault of the defendant that the plaintiff relies upon, and we do not think that these well settled principles which we have referred to relative to the negligence of a fellow-servant, and as to when and under what circumstances a

superior servant is still a fellow-servant of the one injured, are decisive of the case.

It is undoubtedly true that an employer of laborers may, when necessary for the prosecution of his work, use agencies and appliances which are particularly dangerous to the lives and limbs of those who use them, provided precautions can be and are taken to guard against such dangers, so that by the employment of these precautions the necessary and inherent dangers are reduced to a condition of reasonable safety, and unnecessary dangers can be avoided. It is, of course, true that under these circumstances employers are required to exercise great care because of the corresponding great danger to those who are exposed.

And an additional duty, one that is to be particularly considered here, is imposed upon an employer who finds it necessary to adopt the use of particularly hazardous agencies and appliances, of giving full information to his servant, who does not already have that information, of the particular dangers arising from the use of such extraordinarily hazardous agencies, and sufficient instructions to enable him to intelligently determine whether or not he will accept the dangerous employment, and, if he does, that he may know how to avoid them by the exercise of due care upon his part.

We quote from and refer to a few of the many cases wherein this well recognized principle has been stated. In *Mather* v. *Rillston*, 156 U. S. 391, it was said by the court: "So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained." In *Leary* v. *Boston & Albany Railroad Company*, 139 Mass. 580, 52 Am. Rep. 733, this is the language used: "Where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his part, through inexperience, or through reliance on the directions given, fails to perceive or understand the risk, and is injured, the

employer is responsible." In *O'Connor* v. *Adams*, 120 Mass, 427, it was said: "Upon a careful examination of the report, the court is of opinion that there was evidence tending to show that the defendants' agents put the plaintiff in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks, or instructing him how to avoid them. That question was proper to be submitted to the jury." In *Wheeler* v. *Wason Manufacturing Company*, 135 Mass. 294, the court said: "We are of opinion that the duty resting upon the master is not merely one of reasonable care and diligence to give a proper notice; but that he is responsible in case the servant suffers through a want of receiving a proper notice of the risks to which he is exposed. The servant does not assume, and is not to bear the risk of, unknown and undisclosed perils." This court in *Wormell* v. *Maine Central Railroad Company*, 79 Maine, 397, 405, 1 Am. St. Rep. 321, thus stated the doctrine: "Moreover, the law implies that where there are special risks in an employment of which the servant is not cognizant, or which are not patent in the work, it is the duty of the master to notify him of such risks; and on failure of such notice if the servant, being in the exercise of due care himself, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew or ought to have known of such risks."

This doctrine is based upon the preliminary one that a servant who enters into the employment of another only assumes the risk of such dangers as are ordinarily incident to the employment and such unnecessary dangers as he knows of and appreciates. *Mundle* v. *Hill Manufacturing Company*, 86 Maine, 400. But the doctrine of assumption of risks has no application to dangers which are not and should not be contemplated by the servant, and certainly does not apply when there is an extraordinary risk of which the servant has no knowledge or warning. See *Burke* v. *Anderson*, 69 Fed. Rep. 814, 16 C. C. A. 442. Moreover this duty of giving notice to a servant of such perils is one that cannot be delegated by the master to another so as to escape liability if the notice is not given. So that, while in the ordinary work of making these excavations the foreman was a fellow-servant of the plaintiff, still, if the duty to inform the

laborers of the unusual and peculiarly hazardous dangers arising from the use of dynamite that was adopted, was delegated to the foreman, and he failed to give such information and instruction as were necessary, it would be the fault of the employer.

We think that there was sufficient evidence to authorize the jury in finding that the defendant failed to perform this duty. There was evidence to the effect that when a number of charges of dynamite, placed in different holes, are attempted to be all fired by fuses at the same time, there is a liability, well known to those having experience in the use of dynamite, that some of these charges, for various reasons, will not always explode; and that this is not merely a remote possibility of so unusual an occurrence as not to be reasonably anticipated, but something so liable to occur that care must be taken after every explosion to see that none of the charges were left unexploded, and that this was especially necessary in view of the great danger that a workman might strike one of these unexploded pieces with his pickaxe or shovel. There may also have been some danger from the fact that one whole cartridge and a piece of another cartridge were placed in the same hole, the whole cartridge being the only one connected by a fuse. One of the witnesses at least, who had had special experience and knowledge upon this subject, testified that if dirt got between the connected cartridge and the unconnected piece, there was a liability of the latter not being fired by the explosion of the former. It is evident in this case that all of the dynamite used in the blasting of the preceding day was not exploded, because in addition to the piece that probably did the injury to the plaintiff, the foreman of the crew after this accident found still another unexploded piece of cartridge, rather a strong commentary upon the necessity of careful examination after each firing of the blast.

But as to these dangers, if they in fact existed, no information or instructions whatever were given to this plaintiff. The master who used this dangerous explosive, the use of which was attended, it is claimed, with these peculiar dangers, should have known of their existence, and should have also assumed that the plaintiff, a common laborer, had no knowledge concerning them, or at least have made inquiries in relation thereto. When the plaintiff entered into this

ordinarily safe employment of picking and shovelling earth, he undoubtedly assumed the ordinary and apparent dangers that were connected with the use of dynamite, but he did not assume the risk of a peculiar danger of which he had no knowledge whatever. If information had been given him as to these dangers and the methods of avoiding them so far as possible, it is quite possible that he might not have accepted the employment with the accompanying risks, or if he had accepted it with the necessary information, he might have exercised great care to avoid the danger, either by making himself a careful examination to ascertain if there were any unexploded pieces of dynamite left, or by seeing that some person who was competent to make this examination had done so before he placed himself in a position that was otherwise perilous.

Whether or not these dangers that have been referred to in fact existed was a question for the jury; they have decided that question in favor of the plaintiff, because the charge of the presiding justice shows that this was the principal question submitted for the determination of the jury. This was a question of fact, peculiarly within the province of the jury, and while it is possible that we might come to a different conclusion if this question was originally submitted to our determination, we do not feel by any means certain that the finding of the jury in this respect was clearly wrong.

It cannot be seriously contended that the damages awarded by the jury for the injuries sustained by the plaintiff, the entire loss of one eye, injury to the other, more or less impairment of hearing, and other injuries of less importance, were excessive.

Various exceptions were also taken to the instructions given by the presiding justice and to his refusal to give certain requested instructions, but these exceptions have not been argued, except so far as they were necessarily involved in the motion for a new trial. The first exception was to the refusal of the presiding justice to direct a verdict for the defendant; this of course cannot be sustained if the jury were authorized to find for the plaintiff upon any of the grounds submitted. Certain other requested instructions were not given in the language of the requests but the charge, which is printed as a part of the case, shows that so far as necessary and material they

were given in substance, and to the instructions given, we find no ground for complaint or exception.

Motion and exceptions overruled. Judgment on the verdict.

WILLIAM S. MORROW *vs.* ARTHUR E. MOORE.

Somerset. Opinion December 26, 1903.

Contracts, Sale of Real Estate. *Stat. of Frauds*, Deed not delivered. *Vendor and Purchaser*, Rights and Liabilities as to each other. Rescission. *Check*, Consideration.

A contract for the sale of real estate, wholly oral, does not become enforceable by reason of the fact that the vendor has signed a deed in accordance with the oral contract, so long as that deed remains in his possession or under his control; and it is equally under his control while it is in the possession of his attorney. Nor does the signing of a deed of land agreed to be conveyed, and its being sent to the attorney of the person signing, constitute a memorandum in writing which will satisfy the statute of frauds.

Although the owner of real estate may have determined to sell his property at a certain price, he is under no obligation to communicate that fact to a prospective purchaser, but may obtain a larger price if the purchaser is willing to pay it. Where there is no obligation upon a vendor to inform a purchaser of a fact, it is not a fraudulent concealment to withhold information in regard thereto.

Held; that the facts in this case do not disclose that the check in suit was obtained by the plaintiff by means of any fraudulent misrepresentations, or fraudulent concealments of material facts, and that the evidence shows a sufficient consideration for the check in suit.

On report. Judgment for plaintiff.

This was an action of assumpsit to recover one hundred and eighty-nine dollars, the amount of a check given the plaintiff by the defendant on March 6th, 1902, as part of the purchase price of a piece of land situated in Madison, Somerset County, sold by the plaintiff to the defendant.

The defendant pleaded the general issue and a brief statement setting out that the check was obtained by deceit, concealment of material facts, and fraud, practiced on the defendant by the plaintiff.

The case is stated in the opinion.

Forrest Goodwin, for plaintiff.

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

The check obtained by a designed concealment of the truth; by deceit and fraud practiced by the plaintiff upon the defendant.

What is the difference between stating to a party what is absolutely false at the time, or stating what is true at the time, then secretly doing what makes it untrue, and afterward by silence and evasive statements inducing the person to whom the statement was made to rely upon it, when at that time it has become, by the act of the deceiving party, absolutely untrue?

"He is guilty of a fraud who secretly changes a state of affairs, and then, without revealing this fact, procures another to do an act into which the true state of affairs enters as a motive." Bigelow on Fraud, p. 46; *Prentiss* v. *Russ,* 16 Maine, 30; *Baglehole* v. *Walters,* 3 Camp. 154; *Milliken* v. *Chapman,* 75 Maine, 306, 321; *Lewis* v. *Gamage,* 1 Pick. 346, 350; *Fay* v. *Winchester,* 4 Met. 513; *Kidney* v. *Stoddard,* 7 Met. 252; *Marcotte* v. *Allen,* 91 Maine, 74; *Short* v. *Currier,* 153 Mass. 182; 1 Story Eq. Jur. §§ 192, 217, and intervening sections, and cases cited.

There was no consideration for the check. It was given as inducement for plaintiff to do what had already been done. It was a promise founded on past consideration and therefore nudum pactum.

Whether in escrow or not, the deed was in Small's hands to be delivered to defendant upon payment of $3786. This direction was never countermanded. And defendant never consented to its being withdrawn. He simply gave the $189 check in order to obtain from plaintiff the execution and forwarding of the deed to Small. Plaintiff's promise to do this was the real consideration for the check. And as the deed had been already executed and sent to Small, and was then in Small's possession, by the familiar rule of law, this bygone transaction did not constitute a good and legal consideration for defendant's promise as evidenced in the check in suit. 1 Addison

on Contracts, 16; Bishop on Contracts, 90; *Greene* v. *Malden*, 10 Pick. 499; *Dodge* v. *Adams*, 19 Pick. 429; *Dearborn* v. *Bowman*, 3 Met. 155; *Sanderson* v. *Brown*, 57 Maine, 308, 313.

The check was additional compensation to plaintiff for carrying out his verbal contract. This he was under legal obligation to do. It was, therefore, no legal consideration. *Jennings* v. *Chase*, 10 Allen, 526, 527; *Wimer* v. *Worth Township*, 104 Penn. 317, 320.

Plaintiff's letter to Small constitutes a sufficient memorandum to satisfy the statute requirement. *Hurley* v. *Brown*, 98 Mass. 545; *Mead* v. *Parker*, 115 Mass. 413; *Giles* v. *Swift*, 170 Mass. 461; *Walker* v. *Walker*, 175 Mass. 349; Browne on Statute of Frauds, 5th ed. 482; *Spangler* v. *Danforth*, 65 Ill. 152; *Moss* v. *Atkinson*, 44 Cal. 3; *Owen* v. *Thomas*, 3 Mel. & Keene, 353; *Drury* v. *Young*, 58 Md. 546, 42 Am. Rep. 343.

Therefore, for the plaintiff's refusal to carry out the verbal contract defendant would have a claim against him for damages, so far as he had to pay more for the property.

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

WISWELL, C. J. Action of assumpsit upon a bank check given by the defendant to the plaintiff. The defense is a want of consideration, and that the check was obtained by the plaintiff by means of fraudulent misrepresentations and a fraudulent concealment of a material fact. The case comes to the law court upon a report of the evidence.

The check in suit was given as a part of the following transaction: The plaintiff, who lived in the State of Connecticut, owned real estate, consisting of a lot of land and the buildings thereon, in the village of Madison in this State; the defendant being desirous of purchasing this property, after some correspondence with the plaintiff, sent his father to Connecticut to see the plaintiff and negotiate for its purchase; the father went, saw the plaintiff, informed him of his errand, inquired the price of the property, and after various offers made by the one side and the other, they agreed upon a sale and purchase of the property for the sum of $3750, in addition to which the pur-

chaser was to pay the amount of an insurance premium recently paid by the plaintiff, making in all the sum of $3786. It was further agreed at the time that the plaintiff should have the deed drawn by Mr. Small, an attorney at Madison, sent to the plaintiff for the signatures of himself and wife, and then returned to the attorney at Madison to be delivered by him to the defendant upon the payment of the purchase price; this method of carrying out the transaction being suggested and insisted upon by the plaintiff,—a matter of some importance as showing the position and relation of Mr. Small to the parties.

Shortly after this the plaintiff wrote two letters to Mr. Small, directing him to draft the deed, informing him of the purchase price, giving him certain instructions in regard to an existing lease upon a portion of the property, and saying that he should expect him to look out for his (the plaintiff's) interests in the matter. The deed was drafted by Mr. Small according to instructions and sent to the plaintiff for the signatures of himself and wife and for acknowledgment, but by that time the plaintiff had concluded not to sell the property at the price agreed upon and so informed the defendant by letter; thereupon the defendant started for Connecticut, saw the plaintiff and finally a new trade was concluded between them, whereby the defendant was to pay the sum of $3975 for the property. This amount was made up by calling the purchase price $4000 but an allowance of $25 was made to the defendant on account of his traveling expenses. Then and there the defendant gave the plaintiff the check in suit for $189 and agreed to pay the balance of $3786 to Mr. Small in Madison upon the delivery of the deed.

This was on March 6, 1902, but in the meantime, on March 4, 1902, the plaintiff had again changed his mind and concluded to carry out the first trade to sell for $3786, and had forwarded the deed, signed by himself and wife, and duly acknowledged, to the attorney in Madison with instructions to deliver the same upon the receipt of the above sum. The defendant left Madison for Connecticut upon the morning of March 5, the same day, but before this last letter from the plaintiff was received by Mr. Small, and without any knowledge of this letter. The defendant claims that he had no

knowledge of the fact that the plaintiff had concluded to carry out his first trade and to sell the property for the sum of $3786 until after the second trade was made and he had given his check for $189 in pursuance thereof, and that the plaintiff then first informed him that he had already sent the deed to Mr. Small to be delivered upon the payment of the sum first agreed upon. After more or less controversy between the parties arising out of the information then, as he claims, first obtained, the defendant started for home, and while on the way directed payment upon this check to be stopped by a telegram to the bank upon which it was drawn.

But notwithstanding this, the defendant upon his return home carried out the trade for the purchase of the property by paying to Mr. Small the sum required, $3786, and by receiving delivery of the plaintiff's deed.

There is no great conflict in the testimony about these facts, except that the plaintiff claims that this information in regard to the deed having been sent to Mr. Small for delivery was given to the defendant before the check in suit was drawn by the plaintiff and given him. But we think that this conflict is immaterial and that it is not necessary to determine the issue of facts thus raised, because assuming that the defendant's position in that respect is the correct one, and that he had no knowledge of this fact until after the check had been given, it does not constitute a defense to this suit upon the check.

The first contract between the plaintiff and the defendant's father, acting for the latter, was wholly oral, and being for the sale of lands was not enforceable under our statute. The plaintiff had a legal right to refuse to carry out the terms of that unenforceable contract. It did not become enforceable against the plaintiff by his signing a deed, so long as that deed remained in his possession or under his control, and it was equally under his control while it was in the possession of his attorney. That Mr. Small, throughout the transaction, was and acted as the attorney for the plaintiff, and that the deed was not simply sent to him to be held in escrow until the performance of some condition, is clearly apparent from the evidence in the case. See *Day* v. *Lacasse*, 85 Maine, 242. So that the possession of the deed by the plaintiff's attorney was the possession of the plain-

tiff, and the deed was as fully subject to his control as if in his manual possession.

Nor do these facts, the signing of the deed by the plaintiff and its being sent by him to his attorney, constitute a sufficient memorandum in writing to take the contract out of the statute of frauds. It was still an unexecuted deed because undelivered and still in the possession and under the control of the grantor. *Day* v. *Lacasse*, supra.

When, on March 6, the defendant visited the plaintiff and they concluded a new contract for the sale of the property, there was no duty imposed upon the plaintiff to inform the defendant that he had previously concluded to sell for a less price, nor that he had already signed a deed for a smaller consideration, so long as that deed remained in his possession or subject to his control. Although he had determined to sell the property at a certain price, he had the right until he did sell or make a valid contract of sale, to get a larger price if a purchaser was willing to pay it. An owner of property may have determined to sell that property at a certain price, but he is under no obligation to communicate that fact to a prospective purchaser. So that as there was no duty upon the plaintiff to disclose these facts above referred to, it was not a fraudulent concealment to withhold this information. These were not material facts which he was bound to disclose to a person who was desirous of purchasing the property.

Moreover, the defendant after being in full possession of all of these facts completed the transaction to the extent of paying the remainder of the purchase price and by taking a deed of the property. If he had had sufficient cause to rescind the contract by reason of fraud upon the part of the plaintiff, he should have done so in whole, by refusing to take the deed, so that the plaintiff would have retained the title to his property. The law does not allow a partial rescission, whereby the party claiming the right to rescind can retain the beneficial part of a contract and refuse performance of his part.

Judgment for plaintiff for $189.00 and interest from March 10, 1902, the date of the presentation of the check and refusal of payment, and for protest fees.

INHABITANTS OF NEW LIMERICK *vs.* JOHN WATSON.

Aroostook. Opinion December 26, 1903.

Taxes. Place of Taxation. Stock manufactured, but not employed in trade where stored. "*Store-house,*" *and* "*Store.*" *R. S.* (*1883*), *c. 6, § 14.*

A finished manufactured product, which had been entirely completed in the fall of one year, and as to which nothing further remained to be done, except to be sold when the opportunity offered, and which is stored because not sold, until the following April, is not employed in the mechanic arts on the first day of that April, so as to come within the meaning of the first paragraph of R. S. (1883), c. 6, § 14, for the purposes of taxation.

Where starch has been manufactured in a town other than that in which the owner was an inhabitant, and was stored in the town where manufactured, until after the first day of the following April, awaiting shipment by rail out of that town as the same should be sold, no sales being made or intended to be made in that town, and all of the sales and correspondence in relation to sales being made in the town where the owner lived and conducted his business, it is not employed in trade in the town where stored, within the meaning of the section above referred to, for the purposes of taxation.

Held; further, that the defendant did not occupy any store or shop in the plaintiff town for the purpose of the employment of this starch in trade. While a store-house may, under some circumstances, come within the meaning of the word "store" as used in the statute, it does not in this case, because the defendant's store-house was not occupied by him for the purpose of employing this starch in trade in the plaintiff town. The starch was not in a store for trade but in a store-house for storage.

On report. Judgment for defendant.

Debt to recover a tax assessed for the year 1900, against the defendant, a resident of Houlton, upon one hundred tons of starch manufactured and stored by him in New Limerick, Aroostook County.

The defendant was a hardware merchant in Houlton where he resided. He also owned and operated in Aroostook County at the time of the assessment of this tax five starch factories, two in Houlton, one in Monticello, one in Smyrna and one in the plaintiff town. Such factories are operated two or three months in the fall, commencing

with the harvesting of the potato crop and closing when the small and unmarketable potatoes are ground up. Such was the duration of the season at the New Limerick factory, the annual output of which was from seventy-five to one hundred tons per year. At the end of the season the buildings were closed and were put to no further use, unless possibly for storage purposes until another crop had grown. Frequently the entire output is shipped at once to market, but in this particular year it remained in the store-house until April first.

The only question at issue was whether the defendant was legally liable to be taxed in the town of New Limerick.

Don A. H. Powers and Jas. Archibald, for plaintiff.

The starch was intended for sale, and when sold was shipped direct from New Limerick to the purchaser. It cannot be doubted but that sales of starch were made to be delivered at station in New Limerick. This starch was "employed in trade" as contemplated by R. S. (1883), c. 6, § 14, cl. 1. *Ellsworth* v. *Brown,* 53 Maine, 519; *Farmingdale* v. *Berlin Mills Co.,* 93 Maine, 333; *Gower* v. *Jonesboro,* 83 Maine, 145; *Martin* v. *Portland,* 81 Maine, 293.

It was taxable under two views, either as "employed in trade," or as "employed in the mechanic arts." This product is produced by mechanical means—by machinery employed for that purpose.

It was certainly employed in trade as defined in *Farmingdale* v. *Berlin Mills Co.,* and *Ellsworth* v. *Brown,* and *Gower* v. *Jonesboro,* p. 145, supra.

As to occupying a store there, it appears that the starch was kept in a "store-house." A store is, according to one of the definitions of Webster, a place where commodities are "stored." We are aware that *Huckins* v. *Boston,* 4 Cush. 543, and *Hittinger* v. *Westford,* 135 Mass. 258, are cited as authority for the claim that "store-houses" are not "stores" such as are contemplated by the statute. But in *Huckins* v. *Boston* this question does not arise, as the plaintiff in that case did not himself "hire or occupy" any store &c., as contemplated by statute. It was the nature of the occupancy not the nature of the building that decided the case. The same is true of *Martin* v. *Portland,* 81 Maine, 293.

Whether the defendant occupied a store in New Limerick or not he certainly occupied a mill where potatoes were ground up and made into starch, and this starch was intended for sale, and was a part of the New Limerick business, just as truly as the owner of a grist mill where wheat is converted into flour occupies a mill.

A. W. and J. B. Madigan, for defendant.

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

WISWELL, C. J. The defendant, an inhabitant of the town of Houlton on the first day of April, 1900, was the owner of a quantity of starch, which, on that day, was stored within the limits of the plaintiff town. This starch was taxed to the defendant by the assessors of the town wherein it was stored, and this suit is brought to recover that tax. The only question involved in the case, which comes to the law court upon a report of the evidence, is whether or not this personal property was taxable in the plaintiff town under the facts of the case.

The general provision of law in regard to the taxation of personal property is, that it "shall be assessed to the owner in the town where he is an inhabitant on the first day of each April." To this general rule however, there are various exceptions, some of which are stated in the first paragraph of R. S. (1883), c. 6, § 14, as follows: "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; *provided*, that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or ship yard therein for the purpose of such employment." It is contended by the plaintiff that the personal property taxed came within these exceptions.

The facts, about which there is no dispute, are these: The defendant on April 1, 1900, and for some time prior thereto, including the preceding year, was the owner and in occupation of a starch factory in the plaintiff town, the plant consisting of a mill, two dry-houses and a store-house; in the early part of September, 1899, he com-

menced therein the manufacture of starch from potatoes, the process of manufacture lasted some seven weeks, and after it was completed and the starch dried, the finished product, about one hundred tons, was stored in the store-house to await shipment, not being sold it remained there until after the first day of April of the year in which the tax was assessed. The defendant was in business in the town of Houlton, having there, in addition to a store, an office where all of his books and accounts were kept and where all of the business in connection with the sales of starch manufactured at this factory, as well as at others which he operated, was transacted, here all of the sales of starch were made and all of the correspondence conducted in relation to such sales; none of this starch was intended to be sold in New Limerick, and none of it was in fact sold there, it was simply stored there, after its manufacture, to be shipped from the store-house as sales were made by the defendant in his office at Houlton, or by correspondence conducted there.

While the precise meaning of the phrase "employed in the mechanic arts" may be somewhat obscure, we think it is clear that a finished manufactured product, which had been entirely completed in the fall before, and as to which nothing further was to be done, except to be sold when the opportunity offered, and which is kept because unsold until the following April, cannot be said to be employed in the mechanic arts on the first day of April, within the meaning of that phrase of the statute.

Neither do we think that it can be said that this starch was employed in trade in New Limerick within the meaning of the statute. It was not there employed in trade. It was not exposed for sale; it was neither intended to be sold nor was it in fact sold to customers in that town; no contracts for sale ever had been or were to be made there; it was not in any store in New Limerick for the purpose of sale or trade there, but was simply stored in a store-house awaiting shipment after contracts for its sale were made elsewhere; although kept in that town, it was entirely employed in trade elsewhere.

The previous decisions of this court, wherein this statute has been considered and construed, and which are cited by the plaintiff are

not in point. In *Ellsworth* v. *Brown*, 53 Maine, 519, the question was, whether logs which were intended to be manufactured and sold in a town in which the owner occupied a mill at which the logs were to be sawed, he being an inhabitant of another town, were taxable in the town where they were to be manufactured, although the logs had not arrived within the limits of that town on the first day of April of the year for which the tax was assessed. And in *Farmingdale* v. *Berlin Mills Co.*, 93 Maine, 333, precisely the same question was presented, although under a somewhat more favorable statute in that respect.

In *Gower* v. *Jonesboro*, 83 Maine, 142, the personal property taxed was firewood that the owner had caused to be hauled to a landing place occupied by him within the limits of the town in which the tax was assessed; this wood, as found by the court, was "to be sold or disposed of either in small quantities or by the whole lot, as might be found expedient," and was to be sold to local or other parties as might thereafterwards be found expedient, and was in fact so sold as opportunity was offered. The distinction between the facts of the case now being considered and those of the case last cited is apparent.

The case of *Huckins* v. *Boston*, 4 Cush. 543, and *Hittinger* v. *Westford*, 135 Mass. 258, in both of which questions arising under a very similar statute were considered, and in which the decision was against the right to tax the property in the towns where the property was stored, approach more closely the question involved in this case. These cases were cited by this court in the opinion in *Martin* v. *Portland*, 81 Maine, 293, where the same conclusion was reached.

Nor do the facts of this case bring it within the proviso of the statute which we have been considering. It is necessary, before personal property can be taxed in a town other than that in which the owner is an inhabitant, that he should occupy in that town, so far as this case is concerned, a mill for the employment of such property in the mechanic arts, or a store for the purpose of its employment in trade. True, the defendant occupied a starch factory or mill, but we have already seen that this starch was not employed in the mechanic arts on the first day of April, 1900. He did not occupy any store or

shop in the plaintiff town for the purpose of the employment of this starch in trade; while a store-house may, under some circumstances, come within the meaning of the word "store" as used in the statute, it does not in this case because this store-house was not occupied by him for the purpose of employing this starch in trade in that town. It was not in a store for trade but in a store-house for storage. See *Hittinger* v. *Westford*, supra.

Judgment for defendant.

JOSEPH SHEPHERD *vs.* ALBERT F. PIPER.

Knox. Opinion December 26, 1903.

Libel and Slander. Words actionable and non-actionable.—Commission of no offense charged. Double Voting. Demurrer sustained.

Slanderous words which impute the commission of some crime by the plaintiff involving moral turpitude, or which would subject the offender to an infamous punishment, are actionable per se; and this is true whether such crime is one at common law or has been made so by statute.

Double voting upon a question merely calling for an expression of opinion, and where those voting have no power to determine the question voted upon, is not an offense either at common law or by statute.

In the declaration in an action of slander, the cause of action set out was language charging the plaintiff with being guilty of counseling and procuring another to cast more than one ballot, and thereby being accessory thereto, at a meeting of the inhabitants of a town, duly called and held, upon the question of the passage of a resolution declaring that the use of soft coal in the lime kilns in that town constituted a nuisance and should be abated. The declaration contained no averment of special damage. *Held;* that the declaration was demurrable, as the language declared upon did not impute the commission of any crime either at common law or by statute.

Exceptions by plaintiff. Overruled.

Case for slander. The defendant filed a general demurrer to the declaration, which having been sustained, the plaintiff took exceptions.

The material part of the declaration is as follows:—

"That ballot box was stuffed (meaning that many votes had been placed by one party in the ballot box by the solicitation and procure-

ment of the plaintiff at the time of taking the vote hereinafter referred to) and a good reliable man from out of town told me that he saw a man throw a handful of 'no' votes (meaning votes opposed to a motion made by one C. Fred Knight hereinafter referred to and advocated by the defendant) into the ballot box; and he heard Joe Shepherd (meaning the plaintiff) tell him to put them in and he would back him up." (Meaning that the plaintiff requested said man to put in illegal votes on said motion and to vote numerous times thereon and he (the plaintiff) would protect him from the punishment and penalties provided by law for illegal voting.)

A. S. Littlefield, for plaintiff.

Counsel cited: *Coburn* v. *Harwood,* Minor, (Ala.) 93, (S. C. 12 Am. Dec. 37, and cases cited in note); *Com.* v. *Silsbee,* 9 Mass. 417; *State* v. *Philbrick,* 84 Maine, 562; McCrary on Elections, § 550; *Com.* v. *Howe,* 144 Mass. 144.

D. N. Mortland, for defendant.

Counsel cited: *Carter* v. *Andrews,* 16 Pick. 1; *Emery* v. *Prescott,* 54 Maine, 389; *Small* v. *Clewley,* 60 Maine, 262; *Bloss* v. *Tobey,* 2 Pick. 329; *Patterson* v. *Wilkinson,* 55 Maine, 42.

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

WISWELL, C. J. The defendant filed a general demurrer to the plaintiff's declaration in an action of slander; the demurrer was sustained and the case comes here upon the plaintiff's exception to this ruling.

As the declaration contains no averment of special damage and as the words were not spoken of the plaintiff with reference to his trade, profession or calling, the question is whether the words alleged to have been used of and concerning the plaintiff were actionable per se. They are if they impute the commission of some crime involving moral turpitude or which would subject the offender to an infamous punishment, and this is equally true whether the crime imputed by the words used is one at common law or has been made so by statute.

The slander relied upon and set out in the declaration is language charging the plaintiff with being guilty of counseling and procuring

another to cast more than one ballot, and thereby being accessory thereto, at a meeting of the legally qualified voters of the town of Rockport, duly called and held at the time and place named upon the question of the passage of this resolution: "That the smoke and gas from the kilns where soft coal is used for fuel has become such a nuisance to Rockport village and should be abated."

It is not claimed that this charges the commission of a statutory offense; does it one at common law? Illegal voting at the election of a town or school district officer has been decided by this court to be an offense at common law. *State* v. *Philbrick*, 84 Maine, 562; citing *Commonwealth* v. *Silsbee*, 9 Mass. 417. And we may go further and assume, for the purpose of this case, that it is equally an offense at common law for a person to wilfully cast more than one vote at the same balloting upon any question that is submitted by authority of law to the determination by ballot of the qualified voters of a town or any other political division.

But that is by no means this case. The question as to whether or not the use of soft coal in lime kilns constituted a nuisance, was not one submitted by authority of law to the determination of the qualified voters of Rockport. The result of the ballot upon this resolution decided nothing. The voters of that town had no authority whatever to determine that question. They did have the right, guaranteed by the State Constitution, to assemble at all times for consultation and expression of opinion upon all questions concerning the public good. This must have been the sole purpose of this meeting, and the resolution voted upon was simply submitted for the purpose of obtaining an expression of opinion upon this subject matter.

Double voting upon a question merely calling for an expression of opinion, and where those voting have no power to determine the question voted upon, has never been considered an offense at common law in any authorities called to our attention, or that we are aware of. It cannot be an offense against the law to cast more than one ballot upon a question as to which the law does not recognize the right of any one to vote at all. The demurrer was rightfully sustained,

Exceptions overruled.

STATE OF MAINE *vs.* HAZEN BUNKER.

Hancock. Opinion December 26, 1903.

Fish and Fisheries. Clams. No prohibitory statute against non-residents. Town By-Laws of no effect. *R. S. (1883), c. 40, §§ 1–33. Stat. 1901, c. 284, § 37.*

Since chapter 284 Public Laws of 1901, approved March 22, 1901, took effect, no statute in force in this State contains any prohibition against a person taking clams from their beds within the limits of a town of which he is not a resident; or which authorizes inhabitants of a town to adopt any by-law or regulation prohibiting a non-resident from taking clams within the limits of their town, or requiring him to first obtain a license from the municipal officers of such town.

In the absence of legislative authority the inhabitants of a town have no power to adopt a by-law or regulation controlling the subject of sea-shore fisheries.

Agreed statement. Judgment for defendant.

Indictment for taking clams by the defendant, a non-resident, within the limits of the town of Lamoine, Hancock County, March 18, 1903.

The case was reported upon an agreed statement of facts and portions of the records of the town of Lamoine showing such municipal regulations as the town had made concerning the taking of clams within its limits.

The statutory provisions applicable to the case are found in chapter 284 of the Stat. of 1901, § 37, and are as follows:

"Any town may at its annual meeting fix the times in which clams may be taken within its limits, and the prices for which its municipal officers shall grant permits therefor; and unless so regulated by vote, residents of the town may take clams without written permit. But without permit any inhabitant within his own town, or transient person therein, may take clams for the consumption of himself and family. This section does not apply to hotel keepers taking clams for the use of their hotels, nor does it interfere with any law relating to the taking of shell fish for bait by fishermen. Whoever takes clams contrary to municipal regulations authorized by this sec-

tion, shall, for each offense, be fined not more than ten dollars, or imprisoned not more than thirty days or both."

The parties further agreed that the defendant at the time alleged in the indictment, to wit, March 18, 1903, upon a shore within the town of Lamoine, did take clams. The defendant did not take such clams for bait as a fisherman nor as a hotel keeper for the use of his hotel. The defendant was then and there a resident in the town of Trenton and not of Lamoine, and was not a transient person therein taking clams for the consumption of himself and family, and the said clams were taken by the defendant for factory and canning purposes.

Said clams so taken were at the time in a natural state, not artificially propagated nor enclosed.

Bedford E. Tracy, County Attorney, for State.

L. B. Deasy, for defendant.

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

WISWELL, C. J. After chapter 284, Public Laws of 1901, approved March 22, 1901, took effect, the only statute in this State which in any way regulated or related to the taking of clams from their beds was section 37 of that chapter, since the legislature by that act, in express terms repealed sections 1 to 33 of chap. 40 of the Revised Statutes, which sections included all of the previous existing statutes relating to the subject.

Section 37 of this chapter, in which the language of section 25 of chap. 40 of the Revised Statutes is retained, contains no prohibition against a person taking clams within the limits of a town of which he is not a resident, nor does it authorize the inhabitants of a town to adopt any by-law or regulation prohibiting a non-resident taking clams within the limits of their town, or requiring him to first obtain a license from the municipal officers of such town.

It is true that some portions of the section, as it now exists, are meaningless, and that there may be a very strong inference from the language of the section that the legislature intended to adopt further provisions to take the place of the repealed sections as to the authority

of the inhabitants of towns to regulate the taking of shell fish within their town by non-residents thereof, but a statutory offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used.

It is equally clear that without legislative authority the inhabitants of a town have no power to adopt by-laws or regulations controlling the subject of sea-shore fisheries.

It is unnecessary to consider the constitutionality of legislation which discriminates between residents and non-residents of a town in this respect, since there is no such legislation.

It follows that the allegations in the indictment against the respondents do not constitute any offense under our laws.

In accordance with the stipulation of the report upon which the case comes to the law court, the entry will be,

Judgment for respondent.

FRANK BRYANT

vs.

JOHN GRADY and the HIGGINS CLASSICAL INSTITUTE BUILDING and LAND.

Penobscot. Opinion December 26, 1903.

Payment. Appropriation. *Lien,* not extinguished. *Bills and Notes.* Presumption of payment by taking note.

While it is well settled in this State that the acceptance of a negotiable promissory note, in the absence of any testimony or circumstances to the contrary, is presumed to be a payment of the indebtedness for which it was given, it is equally well settled that this presumption may be rebutted and controlled by evidence that such was not the intention of the parties; and, as a general rule, this presumption will be overcome by the fact that the acceptance of a note in payment would deprive the creditor of the substantial benefit of some security.

The plaintiff furnished labor and materials for the construction of the building upon which he claims a lien, under a contract with the defendant and with the consent of the owner of the building. During the progress of the work, upon January 24, 1902, in response to an application for a payment upon account, the defendant gave to the plaintiff his negotiable promissory note for $1000, on thirty days time; this note the plaintiff took, had discounted at a bank, and gave the defendant credit for the amount. On March 14, 1902, the architect in charge of the construction gave to the defendant, who had entered into a contract to construct the building, a certificate that he was entitled under his contract with the owner to a payment of $1000. The defendant indorsed the certificate to the plaintiff and also gave him an order on the treasurer of the owner for $1000, which sum was paid by the treasurer direct to the plaintiff and charged by the treasurer to the defendant, the contractor. The plaintiff applied this sum to the payment of the defendant's note of like amount which had become due on the twenty-fourth of the preceding month. Later, another note was taken and paid under the same circumstances. In taking these two notes, the plaintiff did not intend to release or reduce his lien claim on the building, nor did he suppose that he had done so, and the defendant did not claim that any lien had been affected thereby.

Held; that these two notes were not taken by the plaintiff in payment pro tanto of his account; and further, that, even if they had been taken in payment, the payments made by the treasurer on the architect's certificate were not payments made by the owner to the plaintiff, but by the defendant to the plaintiff; and that they had a right to make application thereof, as they did, to the payment of these two notes.

On report. Judgment for plaintiff.

Action to enforce a lien claim. The case was reported to the law court upon the following facts, found by the presiding justice:—

In August, 1901, the defendant John Grady made a contract with the Higgins Classical Institute to build a school building and a dormitory building. The plaintiff Bryant contracted with the defendant Grady to supply him with certain wood-work for those buildings. Under this contract the plaintiff did furnish labor and material to the amount of $1692.42 which was used in the construction of the school building with the consent of the Institute. They were charged on his books to Grady. The plaintiff seasonably filed his lien claim in proper form and seasonably began this action and attached the school building for his lien claim. The regularity of these proceedings is admitted.

In his writ the plaintiff gave a credit of $451.93 and at the hear-

ing gave a further credit of $465.12 received afterward making a total credit of $917.05 which deducted from the $1692.42 leaves a balance of $775.37 for which the plaintiff now claims a lien on the school building, the defendant Grady having been defaulted.

The plaintiff's account in this action began Nov. 1, 1901, but is only a part of his general account for both buildings. On January 24, 1902, he applied to the defendant for a payment on general account and after some correspondence he received the defendant's negotiable promissory note for $1000 on thirty days which he credited on the account on his ledger at that date as follows, "1902 January 24, Cr. by note 30 ds "$1000." This note Bryant discounted at the bank. On March 14, 1902, Mr. Mansur, the architect, certified that Grady, the defendant, was entitled under his contract with the Institute to a payment of $1000. Grady indorsed this certificate to Bryant and also gave him an order on the treasurer of the Institute for $1000 which sum was paid by the treasurer direct to Bryant, and charged by the treasurer to Grady. Bryant applied this $1000 to the payment of Grady's $1000 note of Jany. 24, preceding and did not enter it on his books or account.

Again on April 22, 1902, in response to requests for payment Grady sent to Bryant a negotiable promissory note for $500 which Bryant credited on his books and account on that date as cash and discounted at the bank. May 22, 1902, the architect gave Grady another certificate for a payment of $1000 which Grady turned over to Bryant with an order for payment to him as before. The $1000 was paid on this order by the treasurer direct to Bryant who applied $500 of it to pay Grady's note of April 22 preceding, and credited the remaining $500 to the account. Both of these applications were assented to by Grady. In the same way $2500 more was paid by the Institute direct to Bryant on account of Grady making $4500 in all so paid on general account.

In taking these two notes Mr. Bryant did not intend to release or reduce his lien claim on the building nor did he suppose he had done so. Mr. Grady did not claim that any lien had been affected thereby. None of the officers of the Higgins Classical Institute, however, knew anything about these notes till sometime in September following, nor

did either of them know that the first payment of $1000 and the half of the second payment of $1000 were applied to any notes.

In September Bryant submitted his account with Grady for both buildings to Mr. Mansur, the architect, in order to get a certificate for a further payment, but it appearing to Mr. Mansur that by crediting on the whole account the entire $4500 paid by the Institute direct to Bryant, the account appeared upon its face to be fully paid, he declined to give any further certificate for Bryant's benefit. Whereupon Bryant proceeded to enforce his lien claim on the school building.

To recapitulate: of the $4500 paid by the Institute direct to Bryant on Grady's orders only $3000 was credited by Bryant directly to his account with Grady; the remaining $1500 was applied to the negotiable promissory notes previously given by Grady to Bryant. This disposition of those payments, if allowable against the Institute, left a balance due Bryant of $775.37 for which he had a lien on the school building. If, however, the application of the $1500 to the notes of Grady was not allowable against the Institute, and the Institute is entitled to have the $1500 credited on the account as reduced by the notes, then, as to the Institute, Bryant's account is paid. If only the $500 is to be thus credited then there is a balance due as against the Institute of the $775.37 less the $500 or $275.37.

The original certificate of the architect on which the various payments were made by the Institute direct to Bryant were to be presented for inspection by the law court, if desired by either party.

J. W. Manson, for plaintiff.

A. L. Blanchard, for Higgins Classical Institute.

It is contended by the Higgins Classical Institute that the notes given by Davis & Grady to Bryant & Co. were accepted as payment pro tanto; that the application of the $1500 to the notes of Davis & Grady was not allowable against the Institute; that the Institute is entitled to have the $1500 credited on the account as reduced by the notes, and that, so far as the Institute is concerned, Bryant & Co. are paid.

This contention is urged for the following reasons:

(1.) Because the money was sent by the Institute direct to Bryant & Co. for the express purpose of protecting itself against any lien

that Bryant & Co. might have for material furnished, which fact was well known, or ought to have been known, by Bryant & Co.

(2.) That the money so sent was the money of the Institute, and that as such the Institute alone could have the disposal of it for its exclusive benefit, and that no arrangement or understanding between Bryant & Co. and Davis & Grady could in any way affect the rights of the Institute in the disposition of its funds as it saw fit.

A note accepted for a pre-existing debt is prima facie payment of that debt. *Varner* v. *Nobleborough*, 2 Maine, 121; *Wade* v. *Curtis*, 96 Maine, 309, 311; *Mehan* v. *Thompson*, 71 Maine, 492; *Brewer Lumber Co.* v. *B. & A. R. R. Co.*, 179 Mass. 228; *Wetherell* v. *Joy*, 40 Maine, 325; *Descadillas* v. *Harris*, 8 Maine, 298; *Newall* v. *Hussey*, 18 Maine, 249; *Fowler* v. *Ludwig*, 34 Maine, 455; *Shumway* v. *Reed*, 34 Maine, 560; *Bunker* v. *Barron*, 79 Maine, 62.

The debtor has the undisputed right to dispose of his money as he desires, and when a debtor makes a payment and his intention of its application is brought home to the creditor, the creditor must make the intended application, and if he does not the law will. Am. & Eng. Cycl. Law, (Payment) 2nd ed. p. 447, note 3; *Boutwell* v. *Mason*, 12 Vt. 608; *Parker* v. *Green*, 8 Met. 144; *Joy* v. *Foss*, 8 Maine, 455; *Starrett* v. *Barber*, 20 Maine, 457; *Bangor Boom Corp.* v. *Whiting*, 29 Maine, 123; *Treadwell* v. *Moore*, 34 Maine, 112.

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

WISWELL, C. J. This action to enforce a lien upon a building was reported for the determination of this court upon the facts found by the justice presiding at nisi prius. From that report the following facts, material to the issues involved, appear:—

The Higgins Classical Institute, the owner of the school building attached, and upon which the plaintiff seeks to enforce his lien, made a contract with the defendant for the construction of this building and also another building, to be used as a dormitory. Subsequently the plaintiff made a contract with the defendant to furnish him cer-

tain labor and material to be used in the construction of these buildings, and in pursuance thereof, and with the consent of the owner, did furnish labor and material to the amount of $1692.42 which were used in the construction of the building attached. This amount is to be reduced by credits of $917.05. The plaintiff seasonably filed his lien claim in proper form and seasonably began this action and caused an attachment to be made of the building upon which the lien was claimed; no question is made as to the regularity of these proceedings.

But the owner of the building claims that further credits should be given upon the plaintiff's account, at least so far as his lien claim is concerned, and this question, which arises under the following facts, is the only one involved. The plaintiff's general account for labor and materials furnished for both buildings commenced Nov. 1, 1901; on January 24, 1902, in response to an application for a payment upon account the defendant gave him his negotiable promissory note for $1000 on thirty days time, which the plaintiff took, had discounted at a bank and gave the defendant credit on his ledger for that amount. The entry on the plaintiff's ledger being "1902, Jan. 24, Cr. by note, 30 ds. $1000." On March 14, 1902, the architect in charge of the construction gave to the defendant a certificate that he was entitled under his contract with the owner to a payment of $1000. The defendant indorsed the certificate to the plaintiff and also gave him an order on the treasurer of the owner for $1000, which sum was paid by the treasurer direct to the plaintiff and charged by the treasurer to the defendant, the contractor. The plaintiff applied this sum to the payment of the defendant's note of like amount which had become due on the 24th of the preceding month.

Again, on April 22, 1902, in response to a request for a payment, the defendant sent to the plaintiff his negotiable promissory note for $500, for which amount the plaintiff gave the defendant credit on his books as cash, and had the note discounted at the bank. It does not appear from the report when this latter note matured. But on May 22, 1902, the architect gave the defendant another certificate that he was entitled to a payment of $1000 under his contract from the owner, which the defendant indorsed over to the plaintiff and

gave him at the same time an order for the payment of this sum, as before. The treasurer of the owner paid this sum of $1000 upon the architect's certificate and the defendant's order direct to the plaintiff, who applied $500 of it to the payment of the defendant's note of April 22, preceding, and credited the remaining $500 on his account.

The owner of the building claims that the plaintiff by taking these notes received pro tanto payments upon his account which he now seeks to enforce against the building, and further, that when these two payments of $1000 each were made as above stated by the owner to the plaintiff upon the order of the defendant, the plaintiff should have applied them to his general account and had no right to apply the whole of the first payment and half of the second to the payment of the notes above referred to.

We are unable to agree with the owner in either of these contentions. While it is well settled in this State that the acceptance of a negotiable promissory note, in the absence of any testimony or circumstances to the contrary, is presumed to be a payment of the indebtedness for which it was given, it is equally well settled that this presumption may be rebutted and controlled by evidence that such was not the intention of the parties; and, as a general rule, this presumption will be overcome by the fact that the acceptance of a note in payment would deprive the creditor taking the note of the substantial benefit of some security. *Bunker* v. *Barron*, 79 Maine, 62, 1 Am. St. Rep. 282. In this case the court below found that the plaintiff, in taking these two notes, did not intend to release or reduce his lien claim on the building, nor did he suppose that he had done so, and that the defendant did not claim that any lien had been affected thereby. The fact that the plaintiff gave credit to the defendant upon his book for the amounts of these two notes is only a circumstance bearing upon the question of whether or not the notes were in fact taken as payment. In view of the finding of facts upon this question by the court below and the strong improbability that the plaintiff intended to accept these notes in payment, pro tanto, of his account, thereby releasing the valuable security of his lien upon the buildings, we are satisfied that they cannot be regarded as such payments in this case.

The notes not having been taken in payment when given, their

subsequent negotiation would not have been affected by the plaintiff's right, if they had not been paid, to take them up at maturity, cancel or redeliver them to the defendant and enforce his lien claim precisely as if they had not been given. *Davis* v. *Parsons*, 157 Mass. 584; *McLean* v. *Wiley*, 176 Mass. 233.

But, even if these notes had been taken by the plaintiff as payment on account of his lien claim, it would not affect the result. The payments which were applied, in the case of the first one in full, and as to the second one to the extent of one-half, were not made by the owner to the plaintiff, they were payments made by the defendant to the plaintiff. When the architect gave certificates that the defendant was entitled under his contract to these two payments of $1000 each, and those certificates were indorsed by the defendant to the plaintiff, with orders from the defendant to pay the amount to the plaintiff, and these amounts were paid upon the certificate and in pursuance of the orders, the effect was for the owner to pay the defendant these amounts and for the defendant to pay the plaintiff the same. Whether or not the owner under its contract with the defendant had the right to use the money due the contractor for the purpose of satisfying the lien claims of those who furnished either labor or material, we do not know, because the contract is not made a part of the case, but whether they had the right or not they did not exercise it in this case. These payments upon the order of the defendant were equivalent to payments made directly to him, and this was undoubtedly recognized by the treasurer because he charged these amounts to the defendant. The payments of these two sums, therefore, were in substance and effect made by the defendant to the plaintiff, and the application of the first sum and one-half of the second sum to the payments of these two notes, was, as found by the court below assented to by the defendant. No one can have a better right to determine as to the application of payments than the persons making and receiving the same, when they have agreed as to such application nothing further remains to be done. So that if these two notes had been taken in payment, pro tanto, of the plaintiff's lien claim, still the plaintiff had a perfect right to apply this money to the payment of these notes, because the person making the payment assented thereto.

It follows, the defendant having already been defaulted, that the plaintiff is entitled to a lien judgment against the building and land attached for the sum of $775.37, and interest from the date of the writ.

Judgment for plaintiff as above.

STATE OF MAINE *vs.* IRVING L. MCINTOSH.

Androscoggin. Opinion December 31, 1903.

Intox. Liquors Common Nuisance,—when not. *Evidence. R. S. (1883), c. 17, § 1.*

One or more unlawful sales of intoxicating liquors in a place does not necessarily and as a matter of law make that place a common nuisance; the place must be habitually, commonly used for the purpose before it becomes a common nuisance.

Exceptions by defendant. Sustained.

This was an indictment under R. S. (1883), c. 17, § 1, wherein the defendant was charged with keeping and maintaining a liquor nuisance in the town of Lisbon between October 1st, 1902, and the date of the indictment. The intoxicating liquors in question consisted of six dozen bottles of Jamaica Ginger found on the defendant's premises. The defendant during the time covered by the indictment was the proprietor of a store in the village of Lisbon Falls connected with which was a billiard and pool room. His stock of goods consisted of tobacco, cigars, confectionery, fruit, nuts, soda beers, canned goods, patent medicines of various kinds, and three brands of Jamaica Ginger, viz., Sanford's, Gilt Edge, and Anchor Mills, the last named being the particular brand seized by the officers and carried in materially larger quantities than the others.

The analysis of this brand was found to be as follows:

Total solids	11.70%
Resin	.02%
Fixed oil	Trace.
Volatile oil	.066%
Residue, caramel and sugar extractive.	
Alcohol	44.90
Water sufficient to make	100.%

The evidence tended to show that the compound contained the full medicinal strength of the ginger.

There was evidence tending to show that this brand of Jamaica Ginger contained only a trace of resin, while the brands generally sold and used for medicinal purposes contained a considerable proportion of resin, which made it practically impossible to use them as a beverage, the resin being the irritant which exists in the usual brands. The evidence of the defense, however, tended to show that all of the various brands on the market could be used as a beverage.

The evidence further tended to show that Jamaica Ginger is a common article of commerce and is sold by nearly all druggists and grocers as a medicine, it being a common household remedy; that the standard test Jamaica Ginger, as provided by the United States Pharmacopoeia formula, contains 94 per cent of alcohol, and that the brands and qualities ordinarily sold by druggists and grocers contain from 40 per cent to 60 per cent of alcohol.

There was evidence tending to show that this compound was kept and sold by the defendant, but there was no direct evidence that it was sold or kept to be sold as a beverage, the defendant claiming that what was sold was sold in the ordinary course of business as a medicine. There was evidence, however, tending to show that empty bottles, in considerable numbers, similar in shape and in markings to those containing the Jamaica Ginger seized by the officers were found some rods from the defendant's store, but the evidence also tended to show that the place where these empty bottles were found was no nearer to the defendant's store than to other stores, in one of which similar ginger had been sold.

There was evidence tending to show that all of the various brands of Jamaica Ginger on the market were intoxicating if drank in sufficient quantities.

The presiding justice, among other things, instructed the jury as follows: "You will inquire whether from all the facts and circumstances in this case you are satisfied beyond a reasonable doubt that he (the defendant) has sold any of that ginger between the first day of October and the date of this indictment. If so, then I instruct you that he is guilty of keeping a nuisance under the indictment."

The defendant's counsel requested the presiding justice to instruct the jury, as follows, which he declined to do:—

"If the Jamaica Ginger in question was sold or kept to be sold, given away, drank or dispensed by the defendant as a beverage, the jury should convict, but if it was kept or sold only as a medicine, they should acquit, although the compound might be intoxicating."

To this instruction and refusal to instruct the defendant excepted. The entire charge was made a part of the exceptions.

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

Counsel cited: *Com.* v. *Ramsdell*, 130 Mass. 68, 69; *Com.* v. *Hallett*, 103 Mass. 452; *James* v. *The State*, 21 Tex. App. 353, 355; *State* v. *Laffer*, 38 Iowa, 426; *Intox. Liquor Cases*, 25 Kan. 751, 767; *State* v. *Wilson*, 80 Mo. 303, 307; *State* v. *Shaw*, 31 Maine, 522, 523; *State* v. *Eaton*, 97 Maine, 289.

R. W. Crockett and R. F. Springer, for defendant.

Counsel cited: *State* v. *Stanley*, 84 Maine, 555; *Com.* v. *Canny*, 158 Mass. 210; *State* v. *Haymond*, 20 W. Va. 18, 43 Am. Rep. 787; *King* v. *State*, 58 Miss. 737, 38 Am. Rep. 344.

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

WISWELL, C. J. The respondent was tried upon an indictment charging him with maintaining a common nuisance under R. S. (1883), c. 17, § 1.

In the course of his charge the presiding justice instructed the jury, in substance, that if they were satisfied beyond a reasonable doubt that the respondent had sold any intoxicating liquor during the period covered by the indictment, he would be guilty of maintaining a nuisance under the indictment, to which instruction an exception was seasonably taken. The respondent having been found guilty, brings the case to the law court upon this and other exceptions.

The instruction complained of was undoubtedly erroneous. One or more unlawful sales of intoxicating liquor in a place does not necessarily, and as a matter of law, make that place a common nuisance. The place must be habitually, commonly used for the purpose before it becomes a common nuisance. *State* v. *Stanley*, 84 Maine, 555.

We have examined the whole charge, which is made a part of the exceptions, to see if this instruction was not so limited and explained in other parts of the charge as to prevent any danger of a misconception upon the part of the jury as to what constituted the offense charged by the indictment. But while the offense was clearly and properly explained in other portions of the charge, we think that this instruction was given as a separate and independent proposition to such an extent that the jury would be warranted in believing that a single unlawful sale of intoxicating liquors by the defendant in his shop would make that shop a common nuisance under the statute, and the respondent guilty of maintaining such nuisance.

As this disposes of the case, it is unnecessary to consider the questions raised by the other exceptions.

Exceptions sustained.

ALICE E. FLEMING *vs.* WILLIAM COURTENAY, Admr.

Lincoln. Opinion December 31, 1903.

Bankruptcy. Bankrupt Act, March 2, 1867. *Assignee*, What passes to him,—and what remains in bankrupt. Right to reject onerous property. *Practice. Amendment*, Substitution of new plaintiff not allowable.

All assets and estate of a bankrupt, not exempt, whether mentioned in the bankrupt's schedules or not, pass to an assignee in bankruptcy; but an assignee may refuse to take possession of onerous properties or such as will be burdensome rather than profitable to the estate, subject undoubtedly to the control of the bankruptcy court.

An assignee in bankruptcy is required to elect within a reasonable time whether or not he will take any particular property of the estate, and if within such reasonable time he does not elect to take the particular property, it is deemed an election to reject.

When he elects to reject, or when it must be presumed that such has been his election, title to the asset, whatever it is, remains in the bankrupt.

Held; that the forbearance upon the part of the assignee to claim the asset here in question during the time that he was assignee and for twenty-two years thereafter, in connection with the other acts stated in the opinion show a deliberate intention upon his part to reject this particular asset of the bankrupt's estate.

Also; that the action of the District Court sitting in bankruptcy in making the decree of sale under which the plaintiff claims title to cannot be regarded as an adjudication to the contrary, since no reference was made to this claim in the petition for license to sell or to any circumstances in regard to it; and the court had no means of knowing that the assignee sought authority to sell an asset which he had repudiated twenty-two years before, and since, no notice having been given upon the petition, there could have been no adjudication of this question.

There is no more identity between a person suing as executor upon a cause of action accruing to his estate, and the same person suing in his individual capacity upon a cause of action accruing to himself, than there is between two entirely different persons. To allow the plaintiff to amend her writ by suing as executrix of the bankrupt, and by declaring upon a cause of action accruing to the estate, would be to allow the substitution of a new plaintiff in the place of the single plaintiff who brought the suit. This is not allowed by the statutes of this State in relation to amendments.

See *Fleming* v. *Courtenay*, 95 Maine, 128.

On report. Judgment for defendant.

This was an action of debt, begun July 1, 1899, and tried in the Supreme Judicial Court for Lincoln County in the October term, 1902, and reported by the justice presiding to this court for determination upon so much of the evidence as was legally admissible; this court to have jury powers and to determine questions of fact and to render final judgment.

The facts are stated in the opinion.

O. D. Castner, Harvey N. Shepard and Enoch Foster, for plaintiff.

The claim of Mr. Lawrence against the United States, though not suable in ordinary course of justice, was a right assignable to Mr. Maynard, even before the United States had taken any steps towards securing to the former compensation for his loss. *Blaauwpot* v. *Da Costa,* 1 Eden, 130; *Randall* v. *Cockran,* 1 Ves. Sen. 98. The claim of Mr. Maynard against Mr. Lawrence, though contingent upon recovery from the United States, passed upon the bankruptcy of Mr. Maynard to his assignee, Mr. Weston. *Hunter* v. *U. S.* 5 Peters, 175; *Milnor* v. *Metz,* 16 Peters, 221; *Erwin* v. *U. S.* 97 U. S. 392. Whatever an administrator would take in case of intestacy will pass to an assignee in bankruptcy. *Williams* v. *Heard,* 140 U. S. 529. Claims founded on contract pass by assignment regardless of whether payment can be enforced. *Phelps* v. *McDonald,* 99 U. S. 298. As an assignment is required to be made in all cases as a matter of course, the courts in a collateral action will assume that assignment has been made. *Swepson* v. *Rouse,* 65 N. C. 34. If the right of the assignee to sue is not put in issue by any of the pleas, it is not incumbent to prove the assignment. *Zentzinger* v. *Ribble,* 36 Md. 32. If a party permits the transcript from the records of the bankrupt court to establish the presumption of the execution of an assignment, without an objection as to the non-production of the deed, he cannot raise that question for the first time in the appellate court. *Crayton* v. *Hamilton,* 37 Tex. 269. The appointment of an assignee may be established by proof that he acted as assignee, without producing the record of his appointment, in a controversy between the purchaser and third

parties. *Arnold* v. *Leonard*, 20 Miss. 258. Thereafter Mr. Maynard had no control or power of disposition over the claim. *Brigham* v. *Home L. Ins. Co.*, 131 Mass. 319. Thereafter any suit upon this claim must be by the assignee and could not be by Mr. Maynard. *Hall* v. *McPherson*, 3 Bland (Md.) 529; *Young* v. *Willing*, 2 Dall. 276. The right of action vested in Mr. Weston, although the breach of the contract did not occur until after the bankruptcy. *Gibson* v. *Carruthers*, 8 M. & W. 321. And even though the property or claim was not scheduled with the other assets. *Planters' Bank* v. *Conger*, 12 Smed. & M. (Miss.) 527; *Holbrook* v. *Coney*, 25 Ill. 447; *Goreley* v. *Butler*, 147 Mass. 8, is an interesting and important decision in point.

The adjudication of the Court of Claims does not decide the legal and equitable ownership of the money; it only decides upon the amount and validity of the claim as against the United States, sets apart and identifies the fund for the benefit of whoever ultimately may prove entitled to it, and leaves the rights of all persons claiming to be entitled to the sum awarded to the ordinary course of proceedings in the established courts. Such rights pass to an assignee in bankruptcy or insolvency under an assignment earlier in date than the act providing for the payment of the claim. *Heard* v. *Sturgis*, 146 Mass. 552; *Comegys* v. *Vasse*, 1 Peters, 193. One-half the money when paid by the United States belonged to Mr. Maynard previous to his bankruptcy and to Mr. Weston subsequently thereto, and to the plaintiff after the sale to her, although the Act of Congress and the judgment of the Court of Claims are subsequent to the bankruptcy. *Leonard* v. *Nye*, 125 Mass. 455. The conveyance by Mr. Weston under a decree of court to the plaintiff is valid. *Wilson* v. *Winslow*, 145 Mass. 339. A sale of all the bankrupt's right of property gives the purchaser all the rights of action which the assignee could exercise in respect of such property. *Williams* v. *Vermeule*, 4 Sandf. Ch. 388. The sale of the property by the assignee for a nominal consideration is an objection that cannot be raised in an action by the purchaser to recover the property. *Stevens* v. *Hauser*, 30 N. Y. 302. The purchaser of a chose in action from the assignee may sue in his own name,

Mims v. *Swarz*, 37 Tex. 17. The money awarded by the Court of Claims is capable of passing by an assignment from Mr. Lawrence in any form recognized by law, though made before the award. *Bachman* v. *Lawson*, 109 U. S. 659.

Robert Cushman and J. E. Moore, for defendant.

(1). The contract of Dec. 12, 1865, in suit, does not apply to or cover the judgment of the Court of Claims based on the Act of Congress of Oct. 1, 1890, for the relief of the administratrix of the estate of George W. Lawrence. *Moran* v. *Prather*, 23 Wall. 50; *Shore* v. *Wilson*, 9 Cl. & F. 555; *Reed* v. *Merchants' Mutual Insurance Company*, 95 U. S. 23; *Charter* v. *Charter*, L. R. 7 H. L. 364; *Stringer* v. *Gardner*, 4 De G. & J. 468; *Munsell* v. *Lewis*, 4 Hill, 635; *Kingsbury* v. *Mattocks*, 81 Maine, 317; *Heard* v. *Sturgis*, 146 Mass. 545; *Dockery* v. *U. S.* 26 Ct. Cl. 148; *Emerson* v. *Hall*, 13 Pet. 409. (2). The contract in suit is void under the United States statutes (10 Stat. 170). *Spofford* v. *Kirk*, 97 U. S. 484; *Hobbs* v. *McLean*, 117 U. S. 567; *Ball* v. *Halsell*, 161 U. S. 72; *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 560; *Butler* v. *Goreley*, 146 U. S. 303; *Bailey* v. *U. S.* 109 U. S. 432; *St. Paul and Duluth R. R. Co.* v. *U. S.* 112 U. S. 733; *Flint and Pere Marquette R. R. Co.* v. *U. S.* 112 U. S. 737; *Hobbs* v. *McLean*, 117 U. S. 567. (3). The plaintiff has no title. *Sessions* v. *Romadka*, 145 U. S. 37; *Nash* v. *Simpson*, 78 Maine, 142; *Lancey* v. *Foss*, 88 Maine, 215; *Beall* v. *Dushane*, 140 Pa. St. 439; *Taylor* v. *Irwin*, 20 Fed. Rep. 615; *American File Co.* v. *Garrett*, 110 U. S. 288; *Sparhawk* v. *Yerkes*, 142 U. S. 1; *Dushane* v. *Beall*, 161 U. S. 515, 516; *Streeter* v. *Sumner*, 31 N. H. 559; *Smith* v. *Gordon*, 6 Law Rep. 313, Fed. Cases, No. 13052; *Reynolds* v. *Crawfordsville*, 112 U. S. 405; *Glenny* v. *Langdon*, 98 U. S. 20, 31; *Laughlin* v. *C. & C. Canal & Dock Co.*, 65 Fed. Rep. 441; *Amory* v. *Lawrence*, 3 Cliff. 523; *Page* v. *Waring*, 76 N. Y. 463; *South Staffordshire Ry. Co.* v. *Burnside*, 5 Ex. 129; *Ex parte Davis*, 3 Ch. Div. 463; *Dewey* v. *Moyer*, 16 N. B. R. 1; *Frazier* v. *Desha's Admr.*, 40 So. W. Rep. 678; *Colie* v. *Jamison*, 13 N. B. R. 1; *In re Hoyt*, 3 N. B. R. 55; *Ferguson* v. *Dent*, 24 Fed. Rep. 414; *Boyd* v. *Olvey*, 82 Ind. 294;

King v. *Remington*, 36 Minn. 15; *Page* v. *Waring*, 76 N. Y. 463; *Jones* v. *Pyron*, 57 Tex. 43; *Herndon* v. *Davenport*, 75 Tex. 462; *Burton* v. *Perry*, 146 Ill. 71; *Steevens* v. *Earles*, 25 Mich. 40; *Peery* v. *Carnes*, 86 Mo. 562; *King* v. *Remington*, 36 Minn. 32; *Conner* v. *Southern Express Co.*, 9 N. B. R. 138; *Sessions* v. *Romadka*, 145 U. S. 37; Dicey on Parties, p. 221, rule 40. (4). Alice E. Fleming is not the proper party plaintiff. Co. Litt. 214a, 266a; *Carleton* v. *Bird*, 94 Maine, 182; *Rogers* v. *Union Stone Co.*, 134 Mass. 31; *Leach* v. *Greene*, 116 Mass. 534; *Hay* v. *Green*, 12 Cush. 282; *Lancaster* v. *Knickerbocker Ice Co.*, 153 Pa. St. 427.

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

WISWELL, C. J. On November 3, 1863, George W. Lawrence, of whose estate the defendant is administrator de bonis non, entered into a contract with the United States government to construct, according to plans and specifications, an iron clad steam battery or monitor, afterwards called the "Wassue." The contract price was $386,000, but it was stipulated in the contract that the government might at any time during the progress of the work make such alterations and additions to the plans and specifications as might be deemed necessary or advisable, and should pay therefor a fair and reasonable rate.

Upon the same day of this contract with the government, Lawrence made a contract with James A. Maynard, now deceased, and under whom the plaintiff claims by virtue of an assignment from his assignee in bankruptcy, which title will be later referred to, whereby the parties to this last contract agreed to jointly construct this monitor according to the plans and specifications to be furnished by the government. Provisions were made in this contract in relation to the services to be performed by each of the parties and as to the compensation of each therefor and for a division of the profits of the enterprise, which are not now important because of a subsequent contract in relation to a settlement between the parties of all matters growing out of the construction of this monitor.

The construction of the vessel was very much delayed, for various reasons, but it was finally completed, delivered to, and accepted, by the government on Oct. 4, 1865. This delay was at least partially caused by the changes in and additions to the plans and specifications made by the government, for which large extra compensation was claimed and received.

On Dec. 9, 1865, an informal agreement of settlement was made between these parties, but this became superseded by a formal agreement under seal made between them on December 12, 1865, whereby Lawrence was to immediately pay Maynard the sum of eight thousand dollars in cash; it provided for a division of tools and materials between them; Lawrence was to pay all indebtedness incurred by them in the construction; the contract also contained this clause: "And the said Lawrence further agrees to pay to the said Maynard one-half of whatever sum he may receive from the United States on final settlement for said monitor, over and beyond the sum of five hundred & forty-six thousand dollars, including all sums already received."

By a letter dated May 1, 1867, Lawrence informed Maynard that he had at that time received on the contract the sum of $543,721.79, and for gun carriages $3500, making a total of $547,221.79, from which he claimed that there should be deducted his personal expenses and other expenses incurred in obtaining the latter payments, amounting to $1148 leaving a balance of $546,073.79. It is claimed that through some inadvertence the sum stated to have been received for the gun carriages was $100 in excess of the sum actually received, and that consequently Maynard at that time was not entitled to receive anything from Lawrence, if it were proper to deduct the expenses incurred, or, if the expenses should not be deducted that he was at that time only entitled to receive, at most, one-half of $1121.79, the excess over the sum stated in the clause of the contract quoted. Upon the part of the plaintiff claim is made that Lawrence had in fact at that time received a larger amount than reported, but in view of our conclusion it is unnecessary to consider these contentions.

Lawrence died November 18, 1887, and his widow, Thankful M.

Lawrence, was appointed administratrix of his estate in the month of December following. The administratrix subsequently applied to Congress for relief and for additional compensation for the construction of this monitor. After many disappointments and the failure of both houses to pass a bill for her relief during the same Congress, both houses finally concurred in the passage of an act, approved October 1, 1890, wherein it was provided that "the claims of George W. Lawrence for further compensation for the construction of the United States monitor 'Wassue' might be submitted to the Court of Claims."

In pursuance of this Act of Congress the administratrix, on October 24, 1890, filed in the Court of Claims of the United States her petition to be allowed additional compensation for the construction of the monitor, which, she claimed in her petition, the estate was entitled to by reason of the many changes made by the government in the plans and specifications, the failure of the officials of the department to seasonably furnish such plans and specifications as they were required, and on account of other delays caused by the department officials.

While her claim was pending before Congress the administratrix made a contract with one McKay, wherein she agreed to give him the exclusive control of the prosecution of this claim before Congress or in the courts, and to pay him as compensation for his services fifty per cent of all sums collected. While the claim was pending in the Court of Claims a new agreement was made whereby his compensation was increased to sixty per centum.

On February 15, 1897, the Court of Claims filed an opinion in the case and ordered judgment for the claimant for the sum of $36,385.08, and on July 23, 1897, two treasury warrants, one for $14,554.04 and the other for $21,831.04, were issued, both payable to the order of the defendant as administrator de bonis non of George W. Lawrence, deceased, the administratrix having resigned and the defendant having been appointed in the meantime. It will be noticed that the smaller of these warrants was for forty per cent, and the larger for sixty per cent of the judgment of the Court of Claims, the two aggregating the amount of the judgment. The smaller of these two warrants was collected by the defendant, while the larger

was indorsed over to McKay in accordance with the agreement that he should receive sixty per cent of the amount collected as compensation for his services.

This action is to recover of the estate of Lawrence one-half of the whole amount received by him in his lifetime and of the amount awarded to his estate by the Court of Claims, in excess of $546,000 under the agreement of settlement of December 12, 1865.

A great many objections are urged against the maintenance of this suit, some of which go to the merits of the cause, while others are more or less technical in their nature. As we feel constrained to decide that for one reason, at least, the action cannot be maintained, it is unnecessary to consider the numerous objections to the maintenance of the action, other than the one, which, we think, must be sustained.

This is as to the title of the plaintiff to the claim in suit and her right to maintain this action. In relation to this question the following facts are important: Upon May 19, 1876, James A. Maynard then of Newton, Massachusetts, was adjudged a bankrupt by the United States District Court, for the District of Massachusetts, upon his voluntary petition; on June 10, 1876, Thomas Weston, Jr., of Newton, Massachusetts, was appointed assignee and on the 13th of that month accepted the trust; on December 5, 1876, the bankrupt petitioned for his discharge, stating in his petition "that no assets had come into the hands of the assignee;" one creditor only proved his claim and that was for a sum less than twenty dollars." On December 30, 1876, the assignee presented his account for settlement, showing some small disbursements for officers' fees and for the publication of notices, and also showing that he had received "no assets or property of any kind." This was accompanied with a petition asking for the allowance of such account, in which he says, "that as such assignee he has conducted the settlement of the said estate."

Upon this petition the assignee's account was examined, found correct and allowed, and it was ordered, "that the said assignee be discharged according to the provisions of the twenty-eighth section of the Bankrupt Act of March 2, 1867." On February 2, 1877, the

bankrupt received his discharge. During the proceedings, the date does not appear, the assignee made a declaration that he had been unable to find any assets, goods or credits belonging to the estate, and that none had come to his knowledge or possession.

On June 28, 1899, something over twenty-two years after the estate of Maynard in bankruptcy had been finally closed, and after the bankrupt had received his discharge, and the assignee had presented and settled his final account and had been discharged from the trust, the assignee presented to the District Court of the United States for the District of Massachusetts, a petition setting forth the bankruptcy of Maynard in 1876, and his appointment as assignee, and, saying, "that there were no assets of any value in said estate that came to the possession or knowledge of said assignee or petitioner;" and, "that your petitioner has now been offered by Mrs. Alice E. Fleming of Boston in said District, a daughter of said deceased bankrupt, $100 in cash for all of the assets of every name and nature belonging to the estate of the said James A. Maynard;" and asking that he be authorized by a decree of the court to make sale of all of such assets to the said Alice E. Fleming for the sum of one hundred dollars in cash. Upon the same day, without any notice upon the petition, a decree was filed authorizing Weston to sell and convey to Alice E. Fleming "all of the assets of every name and nature belonging to the estate of the said bankrupt for the sum of one hundred dollars cash, and to make, execute and deliver a proper deed conveying the same to said purchaser." This decree was signed as follows:

"By the Court,

F. S. FISKE, Deputy Clerk."

Upon the same day as the date and filing of the last petition and of the decree thereon, Weston, in pursuance of the decree made a bill of sale or assignment to this plaintiff of "all of the assets of every name and nature belonging to the estate of the said bankrupt."

This is the title under which the plaintiff sues, the action being in her own name, in her individual capacity, and a copy of the bill of sale or assignment having been filed with the writ when the action was entered in court. The question is whether or not under the foregoing circumstances, Weston, on June 28, 1899, at the time

of the transfer and assignment by him to the plaintiff had any title to this claim against the estate of Lawrence, which he could assign to the plaintiff, and upon which she could maintain an action in her own name. We are of the opinion that this admits of only one answer, and that in the negative, and are constrained to hold that this action cannot be maintained.

It is, of course, true that by virtue of the bankruptcy proceedings this unliquidated claim against Lawrence or his estate, as well as all other assets and estate of the bankrupt, not exempt, whether mentioned in the bankrupt's schedules or not, passed to the assignee; but it is equally clear and well settled by a long line of decisions of the Federal Courts that an assignee in bankruptcy may refuse to take possession of onerous properties or such as will be a burden instead of a profit. As shown by the deposition of Weston this unliquidated claim, although not mentioned in the bankrupt's schedules, was known to him during the time that he was assignee. He testifies that he talked the matter over with Mr. Maynard, but that there was no money to press the claim and that there seemed to be no occasion for him to do so as there was but one claim proved against the estate, and that very small. Again, he testifies in answer to an interrogatory: "My impression is that I made some inquiries about it (this claim) and found that it would be expensive and be attended with a great deal of trouble and time, and I think that I found out that it would be resisted, and I did not think it was worth while under the circumstances for me to do anything about it. I can't say that I dropped it. That's all that I did."

It is not only well settled, as above stated, that an assignee may refuse to take possession of onerous properties, or such as would be burdensome instead of profitable to the estate, subject undoubtedly to the control of the court, but also that an assignee in such a case is required to elect, within a reasonable time, whether or not he will take any particular property of the estate; and that if within such reasonable time he does not elect to take the property, it is deemed an election to reject it. When he elects to reject, or when it must be presumed that such has been his election, the asset, whatever it is, remains in the bankrupt. This doctrine was early stated in this

country in *Smith* v. *Gordon*, 6 Law Rep. 317—and in *Amory* v. *Lawrence*, 3 Clifford's Reports, 523, and has since been universally followed. In *Dushane* v. *Beall*, 161 U. S. 515, the Chief Justice stated the doctrine in this way: "It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefiting the estate; and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course." And again, in the same case: "If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in *Smith* v. *Gordon*, he, with such knowledge, 'stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto." See also *Nash* v. *Simpson*, 78 Maine, 142, and *Lancey* v. *Foss*, 88 Maine, 215. A further citation of authorities would not be useful.

In this case, although the assignee had information in regard to the existence of this unliquidated claim, for more than twenty-two years he neglected to assert any title thereto. If nothing else appeared, the irresistible inference from his neglect to affirmatively assert his claim, for these many years, would be that he had elected not to accept this asset of the estate, believing it to be burdensome and unprofitable. But much more does appear confirmatory of this inference, if not sufficient to show a definite declaration or distinct action upon his part not to accept the claim. Although having knowledge of its existence he made declaration that he had been unable to find any assets, goods or credits belonging to said estate and that none had come to his knowledge or possession. He filed and settled his final account showing disbursements but no assets or property of any kind. In his petition for the allowance of this account, he states that, "he has conducted the settlement of the said

estate." He allowed the estate to be finally closed and received a discharge from his office of assignee, while this claim was in existence. He testified that he came to the conclusion, after investigation, that it was not worth while to attempt to enforce the claim.

In all of these ways he affirmatively showed an election not to accept this asset of the estate, because it was burdensome and supposed to be unprofitable. Even after the lapse of more than twenty-two years, during which time the bankrupt died and the Bankruptcy Act of 1867, was repealed, when, on the twenty-eighth of June, 1899, he petitioned for leave to sell all of the assets of the estate for the sum of one hundred dollars, he states in that petition, "that he entered upon his duties as such assignee and duly discharged all of the duties of said trust," and again, "that there were no assets of any value in said estate that came to the possession of (or) the knowledge of said assignee or petitioner."

It is not necessary to decide whether or not an assignee in bankruptcy, who has received his discharge as such because the estate has been closed, can, thereafter assert title to a portion of the property of the bankrupt,—and enforce or sell the same. We are unable to perceive how a person, who takes property in a fiduciary capacity can have any such right or title after he has performed the duties of and has been discharged from the trust, and various cases have been cited which hold that after the expiration of his trust he has no such right or title. But, in any event, the fact that an assignee does not assert his right to an asset of a bankrupt estate during the time that he holds the trust and that the estate is closed and he is discharged from the trust without any such assertion on his part, is strong evidence of his election not to accept. So that, in this case, we not only have the forbearance of the assignee to take any action in the assertion of his claim, during the time that he was assignee and for more than twenty-two years afterwards, but we also have the positive acts of the assignee above referred to, which clearly and irresistibly show, in our opinion, a deliberate intention to reject this particular claim belonging to the bankrupt's estate.

We do not think that the action of the District Court of the District of Massachusetts in making the decree referred to, can be

regarded as an adjudication to the contrary. No reference was made in this petition to this claim, or to any circumstances in regard to it, the court had no means of knowing that the assignee sought authority to sell an asset which he had repudiated twenty-two years before, and in fact, the assignee himself apparently was not aware that a claim of this magnitude, or of any value, existed, because in that latter petition he says that there were no assets of any value which came to his possession or knowledge. No notice was given upon this petition, there could have been no adjudication of this question; the petition, the decree and the assignment were all filed and made upon the same day. Neither do we think that it is any answer to this result that in this case, until after the judgment of the Court of Claims, this claim was uncertain and unliquidated. This contingent claim with all of its uncertainties might have been sold by the assignee for what it was worth, or for what it would bring, during the time that he was assignee.

It follows that the title to this claim against the Lawrence estate, which the assignee refused to take, remained in the bankrupt. See the cases above cited. And, upon his death, went to his personal representatives. It is suggested by the counsel for the plaintiff that if the court should decide that the action could not be maintained by the plaintiff in her individual capacity, that she was in fact the executrix of the will of James A. Maynard and that the writ might be amended by making her a party plaintiff in that capacity. Unfortunately this cannot be done. Our statutes in relation to amendments are very liberal and allow the summoning in of additional defendants, or the coming in of additional plaintiffs, and even the striking out of one or more plaintiffs, when there are two or more, but they do not allow the substitution of one party plaintiff or defendant for another. In *Glover Company* v. *Rollins*, 87 Maine, 434, it was decided that the statutes do not authorize the substitution of a new defendant for the only one originally named in the writ. In *Duly* v. *Hogan*, 60 Maine, 355, it was decided that this could not be done indirectly, by first summoning additional defendants, and then discontinuing as to the original defendant. In *Jones* v. *Sutherland*, 73 Maine, 157, 158, it was decided that a writ could not be

amended by inserting the name of a plaintiff when there was no plaintiff named therein before.

There is no more identity between a person suing as executor, upon a cause of action accruing to his estate, and the same person suing in his individual capacity, upon a cause of action accruing to himself, than there is between two entirely different persons. It is true, that in *Bragdon* v. *Harmon*, 69 Maine, 29, where a plaintiff was described in the writ as executor, the court held that an amendment could be allowed by striking out the words "executor, etc."; but the reason of this, as expressly stated in the opinion, was because the cause of action was described as one accruing to the plaintiff in his own right, and consequently the words allowed to be stricken out were simply descriptio personae. That case is no authority for the power of the court to allow an amendment whereby a new plaintiff would be substituted, or even the same person as plaintiff but in an entirely different capacity. In this very case, when it came to the law court before upon exceptions to a ruling on a demurrer to the defendant's plea in abatement, (95 Maine, 128,) it appeared that the plaintiff had joined in the same writ, counts in which the cause of action was alleged as accruing to the estate, and other counts in which the cause of action was alleged as accruing to her individually. It further appeared that she was not executrix at that time. But, inasmuch as the counts alleging that the cause of action accrued to her individually were sufficient, with a slight amendment, she was allowed to amend her writ by striking out the counts alleging that the cause of action accrued to the estate which she represented and by making the slight amendment necessary in the counts declaring upon the cause of action in her own right, upon the authority of *Bragdon* v. *Harmon*, supra. This having been done, the action then became entirely an action in her own name. In *Winch* v. *Hosmer*, 122 Mass. 438, the court, in construing the Massachusetts statutes in relation to amendments, somewhat broader than ours, held that these statutes "permit the substitution of a new plaintiff," but this is contrary to the past and present construction of our statutes upon the subject by this court.

The case having come to the law court upon a report of the

evidence, our decision is, that, upon the foregoing findings of fact, and for the reasons above given, the entry must be,

Judgment for defendant.

CARISTE BERGERON, Applt. from decree of Judge of Probate,

ESTATE OF CAROLINE COTE.

Androscoggin. Opinion January 4, 1904.

Probate Court, Power to revoke decrees. *Assignment,* of distributive shares. *Appeal,* vacates a decree. *R. S.* (*1883*), *c. 63*, § *25*.

After a decree of distribution has been inadvertently made by the Probate Court, containing manifest errors of fact which were not considered or determined by the court, that court at a later term, but before the decree has been in any way acted upon, can annul and revoke such former decree on account of the manifest errors and mistakes contained therein, upon the application of some person interested and after notice to all others interested.

After a decree of distribution has been inadvertently made by the Probate Court, containing manifest errors and mistakes in relation to the amounts to be distributed and the distributive shares to which those interested were entitled, a new petition by the administrator for an order of distribution, in which he sets forth the undisputed facts in regard to the persons entitled to a distributive share and the amount to be distributed, and which differs entirely from the former petition and decree, must be regarded as containing by necessary implication so clear a prayer for the revocation of the previous decree, as to have the effect of such an application.

The question of the validity of an alleged assignment of his distributive share by a person entitled thereto, does not arise either in the Probate Court or in the Supreme Court of Probate upon the question of distribution. This question must be settled in the common law courts, and the decree of distribution is to be made irrespectively of any such alleged assignment.

Upon the issue of fact raised by the first reasons of appeal, it is considered by the court that there is a clear preponderance of evidence that Magloire

Cote was legally married to the deceased Caroline Cote and was her husband at the time of her death, and is consequently entitled to the distributive share decreed to him by the judge of probate.

See next case, *Drew, Judge of Probate* v. *Provost*, p. 422.

On report. Appeal from Probate Court dismissed. Decree in probate affirmed.

Appeal from the Probate Court, Androscoggin County, to the Supreme Judicial Court sitting in probate, and reported by the presiding justice to the law court for determination upon the reported evidence. The right was reserved to each party to make any objection in the law court to the admissibility of any of the evidence so reported, as if made at the production of the same in the court at nisi prius.

Other facts appear in the opinion.

It was admitted that Caroline Cote died at Auburn, Androscoggin County, on the 24th day of May, 1898, and that thereafterwards the defendant, Regis Provost, was duly appointed administrator upon her estate by the Probate Court, for that county, at the September term, 1898.

At the July term, 1900, Magloire Cote, claiming to be the husband of the deceased, Caroline Cote, filed a petition for distribution, upon which order of notice was made by the court under its general order of notice returnable at the August term, 1900, at which term without hearing and without the presence of any of the parties the Judge of Probate made an order of distribution, as shown by his order upon the petition. The petition, order of distribution and so much of the general order of notice as is applicable to this matter were to be printed and made a part of the case.

It was admitted that no appeal was ever taken from this order.

It was admitted that at the September term, 1900, the administrator filed a petition for distribution of the funds in his hands upon which notice was duly ordered returnable at the October term of the court. This latter petition and so much of the general order as is applicable thereto were printed and made a part of the case.

During a term of the Probate Court held at Auburn within the County of Androscoggin, on the 19th day of December, 1900, the

court made a decree of distribution upon the administrator's petition, and as a part of the said order made this order, as follows:

"The order of distribution of said estate made August 14th, 1900, on the petition of Magloire Cote, having been inadvertently made without hearing, and it appearing that the said administrator has not made any distribution, it is ordered and decreed that said order of distribution be, and is hereby revoked and annulled."

This decree was signed by the judge of probate and was made a part of the case.

Appeal was duly taken from this latter decree (but not from the order attempting to annul the previous decree of distribution) and reasons filed as required by law, and appeal entered at the January term of the Supreme Judicial Court for Androscoggin County; which appeal, and the reasons therefor were made a part of the case.

The evidence relating to the marriage, etc., of Magloire Cote is omitted here.

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

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for Cote.

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

WISWELL, C. J. At the July term, 1900, of the Probate Court for Androscoggin County, one Magloire Cote, claiming to be the husband of Caroline Cote who had died in 1898, and upon whose estate administration had been granted, filed a petition for distribution of the funds in the possession of the administrator, not necessary for the payment of debts and the expenses of administration, nor specifically bequeathed, alleging that the amount to be distributed was the sum of $3561.60 and that he as husband was entitled to a distributive share of one-half, and that three persons named as brothers and that one named as a child of a deceased sister were each entitled to one-fourth of the remaining half. Upon this petition for distribution notice was duly ordered and made, and at the August term following the judge of probate made a decree of distribution based upon and in accordance with the prayer of this

petition. The decree was made without a hearing and without the presence of any of the persons interested.

This decree was admittedly erroneous in two important respects: the amount, stated in the petition and decree to be distributed, was larger than the sum in the administrator's hands and in both the petition and decree one brother was named twice under different Christian names, so that if the petitioner was the husband of the deceased, which is one of the disputed issues in the case, and therefore entitled to one-half of the estate, the two surviving brothers and the daughter of the deceased sister were each entitled to a distributive share of one-third rather than one-fourth of the remaining one-half.

At the September term of the Probate Court for that county the administrator filed a petition for distribution, setting forth the correct amount in his hands for distribution, correctly naming the two brothers and the daughter of the deceased sister as persons entitled to distributive shares and stating that Magloire Cote claimed to be the husband of the deceased and as such entitled to a distributive share. Upon this petition after due notice of the hearing, the judge of probate made a new decree of distribution in which he decreed that Magloire Cote was the husband and as such entitled to one-half share and that the two brothers and daughter of the deceased sister were each entitled to a distributive share of one-third of one-half of the amount remaining to be distributed. In this last decree the following language is used: "The order of distribution of said estate made August 14, 1900, on the petition of Magloire Cote, having been inadvertently made without a hearing, and it appearing that the said administrator had not made any distribution, it is ordered and decreed that said order of distribution be and is hereby revoked and anulled." From this decree one of the parties interested, a brother of the deceased, appealed to the Supreme Court of Probate, giving two reasons of appeal as follows:—

"1st. Because the said Magloire Cote was not the husband of the said Caroline Cote at the time of her decease.

2nd. Because the said Magloire Cote previous to the date of said decree had assigned in writing all of his right, title and interest in

and to the estate of the said Caroline Cote to the said Cariste Bergeron and for the above reasons said Magloire Cote should not be made a party to said distribution."

Upon the issue of fact raised by the first reason of appeal, it is sufficient to say that in our opinion there is a clear preponderance of evidence in support of the proposition that Magloire Cote was legally married to the deceased Caroline Cote and that, although they had not lived together many years previous to her death, no divorce had ever been granted to either of them; he was consequently the husband of Caroline at the time of her decease and entitled to the distributive share decreed him by the judge of probate.

For the reasons stated in *Knowlton* v. *Johnson*, 46 Maine, 489, and re-affirmed in *Tillson* v. *Small*, 80 Maine, 90, the question of the validity of the alleged assignment by the husband does not arise either in the Probate Court or in the Supreme Court of Probate upon the question of distribution. This question must be settled in the common law court, and the decree of distribution is to be made irrespectively of any such alleged assignment.

But another, and perhaps much more important question is presented by the facts above set forth, viz: whether or not the Probate Court after it has once made a decree of distribution, can at a later term, but before the decree has been in any way acted upon, upon the application of some person interested and after notice to all persons interested, annul and revoke that decree on account of manifest errors and mistakes, contained therein, and as to which there was no hearing and actual determination by the court, and make a new decree, as to the same property to be distributed, correcting those manifest errors of facts contained in the former decree. We think that a Probate Court has an inherent power to correct such manifest errors and mistakes of facts contained in its own former decree, when it can be done without prejudice to any person who has acted upon such decree. If it does not have this power, great injustice and irreparable injury would occasionally be done in cases, of which the one at bar affords an example. True, such errors might be corrected in the Supreme Court of Probate upon an appeal, but an appeal must be taken within a very limited time after the decree

below had been made; a remedy also is provided by R. S. (1883), c. 63, § 25, whereby any person who has neglected to take his appeal within the prescribed time may, under certain circumstances, apply to this court for permission to do so; but even this application must be made within one year after the decree below is made.

In this case, as we have seen, the first decree ordered the distribution of a larger sum of money than was in the administrator's hands; it ordered the payment to a niece and to one brother of the deceased of one-eighth of the estate each, when each was entitled to one-sixth, it directed the payment to another brother, under two names, of one-fourth of the estate, when he was only entitled to one-sixth. As to these mistakes there is no question or dispute; at the present time no method is provided by statute whereby these errors can be corrected in the Appellate Court. It cannot be possible that our system of probate law is subject to the reproach, that such a decree, inadvertently made, must be allowed to stand and cannot be corrected either by the court which made it or by any other. And this case is by no means an isolated one, for in the proceedings of all courts inadvertent errors and mistakes will sometimes occur, frequently without the fault of any of the parties. The power to correct mistakes of this kind in its decree, before such decrees have been acted upon must necessarily exist in the court that made them, and such a power is essentially necessary for the promotion of justice.

We do not believe that any danger can result from the establishment of the doctrine that this power is vested in the Probate Court. There is no reason to apprehend that such a power may be unjustly exercised. It is vested in the same court which is intrusted with the original jurisdiction over all such matters. And every action of the Probate Court in modifying or revoking a decree previously made is subject to the right of appeal by any person aggrieved to the Supreme Court of Probate. We do not hold that a Probate Court can, after the term it was made, annul or modify a decree as to a matter which was passed upon and determined in the making of such decree, or that even such a decree as this would not be ample protection to any person who had acted upon it, but simply that before a decree has been acted upon, upon application by a person interested and after

notice to all persons interested, that the Probate Court may annul or modify a previous decree containing manifest errors and mistakes, inadvertently made and which were not considered by the Probate Court and determined by it.

These views are fully sustained by the case of *Waters* v. *Stickney*, 12 Allen, 1, 15, frequently affirmed by the Massachusetts court, and in the exhaustive opinion of which a great many authorities are reviewed. The language of the court giving its conclusion upon the question is so appropriate that we quote it. "In the face of these authorities it is impossible to deny the power of a court of probate to approve a subsequent will or codicil, after admitting to probate an earlier will by a decree the time of appealing from which is past; or to correct errors arising out of fraud or mistake in its own decrees. This power does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction; but renders that jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive upon other courts. There is no reason to apprehend that such a power may be unjustly exercised. It is vested in the same court which is intrusted with the original jurisdiction over all probates and administrations. No decree admitting a later instrument to probate, or modifying or revoking a probate already granted, can be made without notice to all parties interested; every party aggrieved by the action of the probate court has the right of appeal to this court; and an application of this nature, when one will has already been proved, would never be granted except upon the clearest evidence. The new decree would not necessarily avoid payments made or acts done under the old decree while it remained unrevoked."

See also *Gale* v. *Nickerson*, 144 Mass. 415 and *Cousens* v. *Advent Church*, 92 Maine, 292.

It is true that in this case there was no direct application to the Probate Court in terms to revoke or modify this former erroneous decree, but the petition of the administrator, in which he asks for an order of distribution of the same fund and in which he sets forth the

undisputed facts in regard to the persons entitled to a distributive share, differing entirely from the former petition and decree, and the claim of Magloire Cote, that he was the husband of the deceased, must be regarded as containing by necessary implication so clear a prayer for the revocation of the previous decree, as to have the effect of such an application. Upon this petition due notice was ordered and given and a hearing had.

We are, therefore, of the conclusion that the decree appealed from, including the revocation of the previous decree was within the power of the Probate Court, and that the appeal cannot be sustained upon either of the reasons for appeal given.

Appeal dismissed with costs against the appellant.
Decree of Probate Court affirmed.

FRANKLIN M. DREW, Judge of Probate,

vs.

REGIS PROVOST, and others.

Androscoggin. Opinion January 4, 1904.

Probate Court, Decree of Distribution Annulled,—No action for distributive share.

After a decree of distribution made by the Probate Court has been annulled by that court, which annulment, under the circumstances of the case was within the power of that court, as decided in the preceding case, an action brought after the decree had been annulled to recover a distributive share under that decree, cannot be maintained.

See case ante p. 415. *Bergeron, Applt., Estate of Caroline Cote.*

On report. Plaintiff nonsuit.

Debt on administrator's bond to recover the distributive share of Magloire Cote, husband of Caroline Cote, his wife.

The facts will be found in previous case, p. 415.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for Cote.

Counsel cited: R. S., c. 63, § 25; *Bradbury* v. *Jefferds,* 15 Maine, 215; *Williams, Judge, etc.,* v. *Cushing,* 34 Maine, 375; *Clark, Adm'r,* v. *Pishon,* 31 Maine, 503; *Sturtevant* v. *Tallman,* 27 Maine, 79; *Whitiker* v. *Bliss,* R. I. Sup. Court; *Pettee* v. *Wilmarth,* 5 Allen, 144; *Pierce* v. *Prescott,* 128 Mass. 140, and cases cited; *Knowlton* v. *Johnson,* 46 Maine, 489, is not in issue here.

J. G. Chabot; D. J. McGillicuddy and F. A. Morey, for defendant.

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

WISWELL, C. J. This is an action brought by the Magloire Cote, referred to in the opinion in the previous case, in the name of the judge of probate against the administrator of his deceased wife's estate, to recover the distributive share decreed him by the first order of distribution referred to in the previous case.

The decision of that case is decisive of this. This action was brought on Dec. 21, 1900. At that time the decree upon which this action was based had been annulled and revoked by the judge of probate who made the decree, for the reasons stated in the last case, which act, as has been decided, was within the power of the Probate Court.

Neither could the action be maintained upon the second decree, because at the time it was commenced an appeal had been taken from that decree to the Supreme Court of Probate, which appeal stayed the decree pending the decision of the appeal. That appeal now having been decided, the plaintiff in this case can, of course, commence a new action to recover his distributive share if the administrator should fail to comply with the order of distribution which has been affirmed by the appellate court.

In accordance with the stipulation of the report, the entry will be,

Plaintiff nonsuit.

STATE OF MAINE *vs.* JAMES E. CREIGHTON.

Lincoln. Opinion January 16, 1904.

Assault. Indictment. Pleading. R. S. (1883), c. 118, § 28, declaratory of common law.

The statute defining the offense of assault R. S. (1883), ch. 118, § 28, is merely declaratory of the common law and requires no additional allegations in an indictment.

Exceptions by defendant. Overruled.

This was an indictment of the defendant for assault and battery under R. S., c. 118, § 28.

Before pleading thereto, the defendant first having reserved and been granted the right to plead over in case the indictment should be held sufficient, demurred to the indictment, which demurrer was joined and a hearing had.

The presiding justice overruled the demurrer, granting at the same time special leave to the defendant to plead over in case the demurrer was not ultimately sustained, to which ruling the defendant excepted.

INDICTMENT.

LINCOLN, ss.

At the Supreme Judicial Court, begun and holden at Wiscasset, within and for the County of Lincoln, on the fourth Tuesday of October in the year of our Lord one thousand nine hundred and three.

The grand jurors for said State upon their oath present, that James E. Creighton of Thomaston in the County of Knox, at Waldoboro in said County of Lincoln, on the seventeenth day of October, in the year of our Lord one thousand nine hundred and three, in and upon Brinton H. Penwarden of Casco in the County of Cumberland, State aforesaid, an assault did make and him, the said Penwarden did then and there beat, wound and ill-treat, and other wrongs to the said Penwarden then and there did to the great injury of him, the said Penwarden, against the peace of said State and contrary to the from of the statute in such case made and provided.

John W. Brackett, County Attorney, for State.

Counsel cited: *State* v. *Ham*, 54 Maine, 194; *Com.* v. *Kirby*, 2 Cush. 577, 1 Bishop's New Crim. Prac. §§ 599, 601, 2 Ib. § 55; 1 Whar. Crim. Law, § 413, and cases; R. S., c. 131, §§ 4, 12.

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

The indictment is framed upon the statute and sets out no offense.

Counsel cited: *State* v. *Goddard*, 69 Maine, 182; Arch. Crim. Plead. *41, *50; *State* v. *Philbrick*, 31 Maine, 401; *State* v. *Leavitt*, 87 Maine, 80, and cases; *State* v. *McKenzie*, 42 Maine, 393; *State* v. *Collins*, 48 Maine, 217; *State* v. *Skolfield*, 86 Maine, 152; *State* v. *Hussey*, 60 Maine, 410; *State* v. *Stevenson*, 91 Maine, 112; *State* v. *Wright*, 52 Ind. 308; *Cranor* v. *State*, 39 Ind. 65; *State* v. *Hubbs*, 58 Ind. 416; *Adell* v. *State*, 34 Ind. 545; Heard Crim. Plead. 254; *State* v. *Hart*, 34 Maine, 40; *State* v. *Leonard*, 47 Maine, 429.

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

EMERY, J. The respondent demurs to the indictment against him for assault and battery, and shows for cause of demurrer (1) that the indictment does not describe the act charged as "unlawful;" and (2) that it does not describe the act as done in a "wanton, wilful, angry or insulting manner, having an intention and existing ability to do some violence;" these being words contained in the statute defining the offenses of assault and of assault and battery. R. S. (1883), c. 118, § 28.

The words omitted are not necessary to the validity of the indictment. They are all implied in the word "assault." The statute is merely declaratory of the common law. It adds nothing to the common law definition of assault, and requires no additional allegations in an indictment. *Cent. Dict.*; 3 Bl. Com. 120; *Hays* v. *The People*, 1 Hill, 351; *U. S.* v. *Lunt*, 1 Sprague, 311; *State* v. *Dearborn*, 54 Maine, 442.

Exceptions overruled. Respondent to plead anew as per stipulation.

MICHAEL O'NEIL

vs.

JOHN H. FLANNAGAN AND CITY OF PORTLAND, Trustee,

FRED H. JOHNSON, Claimant.

Cumberland. Opinion January 26, 1904.

Contracts, Void by statute—Alderman interested. *Trustee Process. R. S. (1883), c. 3, § 36.*

A contract in which a member of a city government is interested, directly or indirectly, is void by R. S. (1883), c. 3, § 36.

Held; that such a contract being void the city is under no liability to such persons, and is not liable to trustee process.

Exceptions by plaintiff. Sustained.

Trustee suit upon account annexed in the Superior Court for Cumberland County, and in which the funds attached were claimed by Fred H. Johnson, an alderman of the City of Portland.

The case was submitted to the presiding justice without a jury, the parties reserving the right to except.

At the hearing upon the disclosure, the parties made the following agreement:

"That the statements made in the trustee disclosure and in the claim filed by Mr. Johnson are true; that at the time the contract between Flannagan and the City was made and entered into, and at the time when the assignment of the proceeds of that contract was made by Flannagan to Johnson, Johnson was acting as an alderman of the City of Portland; that the assignment from Flannagan to Johnson was drawn under the direction of Edwin L. Dyer who acted in that transaction as the attorney for Mr. Johnson in drawing the assignment, and who was also filling the office of city clerk."

Upon the disclosure, and these admissions, the court ruled as matter of law, that the claimant had established his right to the funds in

the possession of the trustee, and that the trustee should be discharged.

D. A. Meaher, for plaintiff.
H. J. Conley, for Flannagan.
Scott Wilson, for trustee.
A. W. Coombs, for claimant.

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

STROUT, J. Flannagan had a contract with the City of Portland to build a sewer. To protect the city, he gave it a bond with the American Bonding and Trust Company as surety, to perform his contract. To obtain this surety, Flannagan and Johnson, the present claimant, gave the surety company their bond to protect it from loss on its bond to the city. In consideration of this liability, Flannagan assigned to Johnson the moneys to be received by Flannagan upon performance of his contract with the city. Flannagan failed to perform, and thereupon by arrangement of all parties Johnson completed Flannagan's contract at a total expense much larger than the contract price for building the sewer.

Johnson was at that time an alderman of Portland. When the writ was served on Portland, as trustee, there was due four hundred dollars under the Flannagan contract, but this amount resulted from work done by Johnson, after Flannagan had failed to perform and abandoned all attempt to fulfill his contract. Johnson claims this amount under assignment from Flannagan.

Revised Statutes of 1883, c. 3, § 36, provides,—"No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government, while he is a member thereof; and contracts made in violation hereof are void."

Johnson's liability upon his bond to the surety company made him interested in Flannagan's contract, to have it performed and accepted by the city. This interest attached at the inception of the contract, which is tainted by it. It is clearly within the inhibition of the recited statute. The provision is a wise one, and tends to honest

dealing, and exclusion of motive for improper practices harmful to the community. It should be applied without evasion to all contracts falling within its provisions. So applying it, the result necessarily follows that the city's contract with Flannagan was absolutely void. *Goodrich* v. *Waterville*, 88 Maine, 39.

The contract being void, the city was never under any legal liability upon it.

If Flannagan had completed the work contemplated by the contract, and it had been accepted and used by the city, it may be possible that he could recover compensation upon the quantum meruit. If so, neither the plaintiff in this case nor Johnson are aided, as Flannagan never completed the work, and the amount due, according to the terms of the contract, is for work done by Johnson after Flannagan had abandoned it,—and Johnson's illegal connection with the contract barred him of all claim.

The attempted assignment to Johnson of the amount due under the contract is of no avail, because the contract itself being void, nothing was legally due under it.

The ruling below, that Johnson had established his right to the fund, cannot be sustained, but the decision that the trustee be discharged was correct.

Exceptions to the ruling that Johnson was entitled to the fund sustained. Trustee discharged.

STATE *vs.* LAFOREST KNOWLES.

SAME *vs.* FRED D. BARTLETT.

Franklin. Opinion February 12, 1904.

Indictment. Evidence,—Prior conviction. Impeaching witness' credibility by his admissions on cross-examination.

In a criminal case the sentence is no part of the conviction.

It matters not whether the guilt of the accused has been established by plea or by verdict of guilty. When no issue of law or of fact remains to be determined, and there is nothing to be done except to pass sentence, the respondent has been convicted; and the record of that conviction, or the docket entries where no extended record has been made, are admissible to prove such conviction.

For the purpose of impeaching his credibility the conviction of a witness may also be proved by his own admission upon his cross-examination.

Exceptions by defendants. Overruled.

Indictments for burglary in the night time.

The respondents were each indicted for breaking and entering the dwelling-house of one John Vehue in the night time, a person being then and there lawfully therein, with intent, etc., and then and there in said dwelling-house, sixty pounds of pork of the value of six dollors, etc., did take, steal and carry away, etc., on the eighteenth day of April, 1903. The two indictments were the same except the names of the parties. Both parties were tried together by agreement.

Fred D. Bartlett, one of the respondents who was a witness, was asked by the County Attorney if he had ever been convicted of crime before, which was objected to, but the court overruled the objection and directed him to answer.

Said Bartlett, also against objection of the respondents, was required by the County Attorney to give his version of the talk he had with the officer who arrested him, after he was indicted, in regard to his pleading on his trial.

Byron M. Small, Clerk of Courts, against objection, was allowed to introduce his docket entries and also the complaints in two crim-

inal prosecutions (one against each of the respondents) which had been commenced before the Municipal Court and brought into the S. J. Court by appeal at the May Term, 1903; said minutes showing that said cases were appealed and brought into this court, wherein the respondent in each case retracted his plea and pleaded guilty; thereupon each case was continued for sentence, and each defendant recognized without sureties. No extended record of these cases had been made. To the point first and last above named the presiding justice instructed the jury that such evidence could only affect the credibility of the parties convicted.

To these instructions and directions the defendants took exceptions.

H. S. Wing, County Attorney, for State.

H. L. Whitcomb, for defendants.

In all cases the best evidence is required.

It is an indispensible rule of law that evidence of an inferior nature, which supposes evidence of a higher in existence, and which may be had, shall not be admitted. *Com.* v. *Kinison*, 4 Mass. 646; *Barnard* v. *Flanders*, 12 Vt. 657; *Willard* v. *Whitney*, 49 Maine, 235.

The fact that a witness has been in the house of correction cannot be proved by cross-examination of the witness, but must be proved by the record of his conviction. *Com.* v. *Quin*, 5 Gray, 478.

It has been repeatedly held that the fact an appeal was taken, can only be shown by the record of the lower court. *Moore* v. *Lyman*, 13 Gray, 394; *Sayles* v. *Briggs*, 4 Met. 421; *Wells* v. *Stevens*, 2 Gray, 115; *Lund* v. *George*, 1 Allen, 403.

The case of *State* v. *Carson*, 66 Maine, 116, is directly in point. In that case Mr. Justice LIBBEY says, "A party to a suit may be a witness. If a witness, his examination must be conducted under the same rules that are applicable to the examination of any other witness. To impeach his credibility, it is not competent to prove by other witnesses that he has committed other crimes than the one with which he is charged; nor is it competent to do the same thing by cross-examination." That case shows that the evidence was incompetent for the purpose of impeaching the credibility of the witness, because it could be shown in no other way than by the record of the

convictions, or a duly authenticated copy thereof, and Justice LIBBEY cites, *Holbrook* v. *Dow*, 12 Gray, 357.

Nor was the evidence competent as tending to prove the crime for which the prisoner was on trial. *Com.* v. *Thrasher*, 11 Gray, 450.

In *State* v. *Pike*, 65 Maine, 111, a witness for the State testified on cross-examination that he had been confined in jail. Then in answer to a question from the prosecuting officer, against objection, said it was for "getting tight."

The court in that case say, "For ought that appears, he may have been confined by a police officer, without any trial or sentence;" and the exception was overruled.

But in the case at bar, the party was asked if he had ever been *convicted* of crime before; i. e. whether he had ever been found guilty by a court of committing an offense.

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

POWERS, J. The respondents were severally indicted for burglary and tried together by agreement. The exceptions present two questions which are insisted upon in argument.

I. Against objection the docket entries and also complaints in two criminal prosecutions, one against each of the respondents, which had been commenced before the Municipal Court, and brought into the Supreme Judicial Court by appeal, were introduced by the State to affect the credibility of the respondents. The docket entries show that the cases were appealed and brought into this court, where the respondent in each case retracted his plea and pleaded guilty, and thereupon each case was continued for sentence and each defendant recognized without sureties. No extended record of the cases had been made.

It is settled that the sentence is no part of the conviction. It matters not whether the guilt of the accused has been established by plea or by verdict of guilty. When no issue either of law or fact remains to be determined, and there is nothing to be done except to pass sen-

tence, the respondent has been convicted; and the record of that conviction, or the docket entries where no extended record has been made, are admissible against him to prove such conviction. *State* v. *Elden*, 41 Maine, 165; *State* v. *Neagle*, 65 Maine, 468; *State* v. *Hines*, 68 Maine, 202.

II. The respondent Bartlett was a witness in his own behalf, and upon cross-examination was asked by the county attorney if he had ever been convicted of crime. Objection was made, but the presiding justice overruled the objection and directed the respondent to answer, and in his charge instructed the jury that the evidence thus elicited could only affect the credibility of the party convicted.

Whether to impeach his credibility the conviction of a witness may be proved by questioning him on cross-examination, has been variously decided by different judicial tribunals. Formerly, when conviction of an infamous crime rendered a witness incompetent, it was universally held that for that purpose the conviction could be proved by the record alone. In many of those jurisdictions, however, where the conviction of crime no longer affects the competency but simply goes to the credibility of the witness, there has been a tendency, sometimes by legislative enactment and sometimes by judicial decision, to broaden the sources of evidence and permit the conviction to be shown by cross-examination of the witness himself. In a technical sense, the record may be the best evidence and the rule of primariness may require its production. This general rule, however, is of no great value unless in its application to the subject under consideration, it is necessary for the interests of justice to avoid error, exclude falsehood, and promote the truth. It can hardly be claimed that a record of conviction is any more convincing to the mind, or less liable to error, than is the witness' own admission of the fact under oath. He may well be presumed to know what the truth is. There is very little possibility of his being mistaken as to the fact of the conviction and none as to the identity of the party convicted. He has every inducement of self-interest to protect his good name and reputation, and it is inconceivable that he will falsely accuse himself. In many cases also the prompt and proper administration of justice requires the

acceptance of a broader and more liberal rule of evidence. The opposing party frequently has no knowledge that the witness is to testify until he takes the stand. It may then be too late to obtain a record of his conviction from other courts or counties, or even from distant states, without delaying the trial. Even if possible to obtain it, its production may be accompanied by great expense. Why should this burden be imposed upon a party seeking to impeach the credibility of the witness, if the witness himself is willing to admit the fact sought to be proved? If he does not admit it, it must then be proved by the record and the record is conclusive. If he does admit it, it would seem only reasonable to explore the source of evidence which is ready at hand rather than to seek for that which is far away and which it may require considerable time and money to produce, when there is apparently as little liability of error in the one source of evidence as in the other. Reason is the life of the law. Cessante ratione legis cessat ipsa lex. The all-important thing to be proved is the fact of conviction. As to the form of proof, it is sufficient if it be reasonably free from the possibility of error. To hold that we cannot receive as evidence the witness' own admission of a fact which he has every inducement of self-interest to deny, an admission which can be wrung from him by the all compelling power of truth alone, is to exalt the shadow above the substance, to return to the reasoning and results of the earlier and darker period of the law's development rather than to those which have obtained and prevailed in modern and more enlightened times.

We believe the result here reached to be fully sustained by authority as well as reason. In 1 Greenleaf's Ev. 16 ed. § 461 b, it is said that, "the propriety of proving the conviction by cross-examination has come in most jurisdictions to be conceded." Another eminent writer says: "In this country there has been some hesitation in permitting a question, the answer to which not merely imputes disgrace, but touches on matters of record; but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer. Wharton Cr. Ev. § 474. In 82 Am. St. Rep. 36 in an exhaustive and learned note to *Lodge* v. *State*, 122 Ala. 97, on the evidence admissible as bearing on the credibility of a witness,

the editor says that "the weight of authority clearly sustains the right to show such conviction by cross-examination." The following are some of the cases in which a different view has been entertained: *Com.* v. *Quin*, 5 Gray, 478; *Hall* v. *Brown*, 30 Conn. 551; *Newcomb* v. *Griswold*, 24 N. Y. 298; *Kirschner* v. *State*, 9 Wis. 140. Our own conclusion is supported by the following among many cases in which the precise point here involved has been passed upon. *State* v. *Ellwood*, 17 R. I. 763; *McGovern* v. *Smith*, 75 Vt. 104, 53 Atl. Rep. 326; *State* v. *Babcock*, (R. I. 1903), 55 Atl. Rep. 685; *McLaughlin* v. *Murch*, 80 Md. 83; *Wilbur* v. *Flood*, 16 Mich. 41; *Clemens* v. *Conrad*, 19 Mich. 170. In the latter case Cooley, C. J., said: "We think the reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand and is questioned concerning it, with a view to sifting his character upon the cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight, that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed upon the stand with no opportunity for the opposing party to produce the record evidence of their infamy, is always palpable and imminent."

It is claimed that the question here presented is no longer an open one in this State, but has been settled in support of the respondent's contention. A careful examination of the cases relied upon, while they may contain some dicta favorable to the respondent's contention, shows that the question here raised has not before received the full consideration of this court. *State* v. *Damery*, 48 Maine, 327, arose before the enactment of c. 53 P. L. 1861, and it was then held in accordance with all the authorities, both before and since, that the record was the only evidence to establish the incompetency of a witness upon the ground of infamy. *State* v. *Watson*, 63 Maine, 128, held simply that under R. S. 1871, c. 82, § 94, which is the same provision that has been in force ever since 1861, making a conviction affect simply the credibility and not the competency of the witness, the record of the conviction was admissible although that conviction may not have been for an infamous crime. It is worthy

of notice that in this case the court remarked "that statute had its origin in the out-growth of the modern idea that the sources of evidence should be enlarged." When the same case was again before the court, *State* v. *Watson*, 65 Maine, 74, the question decided was that the record was admissible when the accused testified in his own behalf, notwithstanding he had introduced no evidence of his previous good character. In *State* v. *Pike*, 65 Maine, 114, the inquiry was as to the nature of the offenses for which the witness had been confined in jail. The objection was that the record of the court which sentenced him to jail was the only proper evidence to prove the offense for which he was confined. The court, without discussion or consideration of the point presented by the exceptions in the case at bar, overruled the exception on the ground that it nowhere appeared that the witness had been confined in jail by virtue of the sentence of any court. Whether a record twenty-seven years old was admissible was the only question considered in *State* v. *Farmer*, 84 Maine, 436. In *State* v. *Carson*, 66 Maine, 116, it was sought to show upon cross-examination, not that the accused had been formerly convicted, but that he had committed various offenses. This had no tendency to prove a conviction of the accused, and was plainly incompetent for the purpose of impeaching his credit under the well settled rule that it is not competent to impeach the credit of a witness by showing that he has committed particular acts of alleged misbehavior and dishonesty in relation to matters foreign to all the issues involved in the trial. Such evidence whether it come from the accused or from other parties, is entirely outside the issues involved in the case. The question discussed in the opinion of the court in the last named case related entirely to the commission of other offenses, and the question of conviction was not raised.

As we are free, therefore, to follow the dictates of our own reason, and the result reached is not opposed to any previous decision of this court, but is fully sustained as we believe by other courts of the highest authority, we hold that when the respondent Bartlett offered himself as a witness in his own behalf his previous conviction might be shown by his own cross-examination. In both cases,

Exceptions overruled.

A. L. & E. F. GOSS COMPANY

vs.

JOHN A. GREENLEAF, and another, and LAND & BUILDING.

Androscoggin. Opinion February 15, 1904.

Mechanic's Lien, none on public buildings. Public Library. *Statutes*, — interpretation of; when public not bound. *Action at law* not convertible into equity.

R. S. (1883), c. 84, § 30; c. 91, § 30; Stat. 1893, c. 217, § 8. Spec. Laws, 1901, c. 266.

1. In construing statutes it is to be assumed that the legislature in framing statutes and settling their phraseology does so with reference to established canons of statutory interpretation.
2. It is an established canon of statutory interpretation that the State, the public, is not to be considered as within the purview of a statute unless expressly named therein, however general and comprehensive the language otherwise.
3. As a corollary, public buildings, buildings constructed by the State or by a political subdivision of the State for public purposes and not for pecuniary profit, are not to be considered as within the purview of a statute imposing a lien on buildings in certain cases unless they are expressly named as included.
4. In the statute of this State known as the Mechanic's Lien Law, and imposing liens in certain cases on "a house, building or appurtenances" R. S. (1883), c. 91, § 30, et seq.—public buildings are not named as included, and hence no lien is imposed by that statute on such buildings.
5. To constitute a building a public building, it is not necessary that it be erected or purchased by legislative command, or be used solely for the performance of governmental functions. A building voluntarily erected by a town, under legislative permission merely, to be held and used for a free public library, is a public building and exempt from the operation of the lien statute above cited.
6. The fact that the building was erected by a town under legislative permission entirely from funds donated to the town by other parties for that purpose, does not make the building any less a public building, or subject it to the lien statute.
7. An action at law brought under the lien statute to enforce a lien on such a building will not be converted, even under statute of 1893, c. 217, § 8, into a suit in equity to reach the donated funds remaining in the treasury of the town.

8. The rules for the interpretation of statutes are the same in equity as at law.

On report. Lien claim on public library denied.

This was an action on the case to recover the sum of $838.23 with interest, for labor and materials furnished in the plumbing, heating and gas piping of the Carnegie Library in Lewiston, Maine, by the A. L. & E. F. Goss Company, sub-contractors, therefor under Greenleaf & Doring who were the contractors for the erection of said library building. The funds for its construction were furnished by Andrew Carnegie, and the lot upon which the building was erected was purchased by the City of Lewiston under the stipulation that Mr. Carnegie was to furnish fifty thousand dollars for the construction of the building, provided the City of Lewiston should purchase a lot and appropriate the sum of five thousand dollars annually for the maintenance and increase of the library.

These conditions were accepted and a building commission elected, authorized and empowered by concurrent vote of the city council as follows: "to proceed to build as soon as may be, upon the site selected therefor, the library for which Andrew Carnegie has devoted the sum of fifty thousand dollars, at a cost, however, not to exceed said sum of fifty thousand dollars, and to this end the commission may employ architects, adopt plans, make contracts for labor and materials and do all other things they deem reasonable and necessary to build, furnish, finish and finally complete said building, the expense of the same to be paid from the Carnegie fund."

In accordance with this vote the commission selected an architect, made a contract for the construction of the library building with Greenleaf and Doring; and as a sub-contractor, under Greenleaf and Doring, the plaintiff furnished the labor and materials sued for. After these were furnished by the plaintiff and after the building was finished, the payment of claims, among which was that of the plaintiff, was delayed by the commission until Greenleaf and Doring first assigned and thereafter were adjudged bankrupts upon their own petition.

It was claimed that this fund, specifically appropriated by Mr. Carnegie for the construction of the library building, should go into

the general fund to be distributed among the entire credit list of Greenleaf and Doring, and that the building known as the Carnegie Library shall be constructed partially, at least, by a contribution from the plaintiff.

The defense urged was, that this is a public building and that as a consequence, under the statutes of Maine, no mechanic's lien could attach thereto.

Other facts appear in the opinion.

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

1. The wording of the statute is so plain, it would be unjust to hold that there is no lien upon this building, which is not a public building in the same sense as a jail, city building or school house, which are so indispensable to the proper conduct of municipal affairs; or that the enforcement of a lien thereon by seizure on execution would so seriously impair the conduct of municipal business as to make this course contrary to public policy. When the original statute was passed in 1821, it was intended by the legislature to apply to all buildings, whether public or private. And it certainly would be a hardship if the court should now, for the first time, construe this statute so as to apply to private buildings only, when the words of the statute, taken in their ordinary signification are plainly the other way.

2. If the court find that a lien cannot be maintained against the building itself for the reason that its maintenance is against public policy, then we urge that the court has the authority to subrogate us to the rights of Greenleaf and Doring to so much of the fund now in the possession of the City of Lewiston as has not been already absorbed in the construction of said building, and make this fund the subject of a lien for the payment of the amount due the plaintiff.

A lien either upon the building or the unexpended fund should be maintained; an interpretation of the law otherwise would be a sword rather than a shield to the mechanic who performs labor or furnishes materials upon a public building under conditions similar to those in this case.

Counsel cited: *Durling* v. *Gould,* 83 Maine, 134; *Ouelette* v.

Pluff, 93 Maine, 168; *Shaw* v. *Young*, 87 Maine, 271; *Morse* v. *School District No. 7 in Newbury*, 3 Allen, 307; *Lessard* v. *Inhabitants of Revere*, 171 Mass. 294; *Noonan* v. *Hastings*, 101 Ky. 312, 72 Am. St. Rep. 419; *Wilson* v. *School District*, 17 Kan. 104; *McKnight* v. *Parish of Grant*, 30 La. Ann. 361, 31 Am. Rep. 226; *Perry* v. *Board of Missions, etc., of Albany*, 102 N. Y. 99; *Foster & Co.* v. *Fowler & Co.*, 60 Pa. St. 27.

Geo. C. Wing and Reuel W. Smith, for defendants.

Geo. S. McCarty, City Solicitor, for land and buildings.

Counsel cited: Jones on Liens, § 577; Dillon Mun. Corp. 4th ed. § 577; Boist Mechanics' Liens, § 208; Phillips Mechanics' Liens, 3d. ed. § 179; *Board of Commissioners* v. *O'Conner*, 86 Ind. 531, 44 Am. Rep. 338; *Leonard* v. *Brooklyn*, 71 N. Y. 498; *Fatout* v. *School Comm'rs*, 102 Ind. 232; *Board, etc.*, v. *Norrington*, 82 Ind. 190; *Lowe* v. *Howard County*, 94 Ind. 553; *Lessard* v. *Revere*, 171 Mass. 294, and cases there cited. *Hovey* v. *Town of East Providence*, 17 R. I. 80, 81, 9 L. R. A. 156.

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

EMERY, J. The City of Lewiston was authorized by the legislature, in ch. 266 of Special Laws of 1901, to acquire land and erect a building thereon to "be forever held by said city for the purpose of . . . maintaining a free public library in said Lewiston." Under this authority the city acquired a lot of land and contracted with a firm of building contractors for the erection thereon of a suitable building for that purpose. The building was erected, but the contractors became adjudicated bankrupts and were unable to pay the plaintiff for labor and materials furnished in the erection of the building. The plaintiff claims in this action that it has a lien on the building and land for the labor and materials so furnished under the statute known as the mechanic's lien law, R. S. (1883), c. 91, § 30, et seq. That statute imposes a lien for labor and materials furnished "in erecting, altering, moving or repairing a house, building or appurtenances, by virtue of a contract with or by consent of the

owner, . . . (on the building) and on the land on which it stands, . . . to be enforced by attachment." After a judgment sustaining a lien claim, the land and building are to be seized upon execution and sold, or levied upon by extent, as in other cases of judgment and execution.

I. Assuming all the steps necessary to enforce the lien to have been taken, the first question presented is simply one of statute law,—of statutory interpretation, viz: In enacting the lien statute above quoted did the legislature intend it to apply to and include a building erected by a municipality under legislative authority to be forever held for the purpose of maintaining a free public library?

It is to be assumed that the legislature in framing statutes and settling their phraseology does so with reference to established canons of statutory interpretation. One of the oldest and most universal of these canons is that the crown, the state, the people, the public, is not to be considered as within the purview of a statute unless expressly named therein, however general and comprehensive the language. "The King is not bound by any statute if he is not expressly named to be so bound." Broom's Leg. Max. 57. "The most general words that can be devised (for example, any person or persons, bodies, politic or corporate) affect not him (the King) in the least if they may tend to restrain or diminish any of his rights or interests." Lord Coke in the *Magdalen College case*, 11 Coke, 74, quoted in *Dollar Savings Bank* v. *U. S.* 19 Wall. 239. The U. S. Supreme Court in that case, after quoting the above, went on to say: "It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of parens patriæ, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution." An illustration may be seen in R. S. (1883), ch. 84, § 30. In that statute it is provided that "executions against a town shall be issued against the goods and chattels of the inhabitants thereof, and against the real estate situated therein, whether owned by such town or not." This language is comprehensive, but we assume no one will contend that an execution creditor of the City of Augusta can levy his execution on the State

House or Court House therein. See also *United States* v. *Herron*, 20 Wall. 251; *Cape Elizabeth* v. *Skillin*, 79 Maine, 593.

It would seem to be a necessary corollary that public buildings, buildings constructed by the State, or by a political subdivision of the State, (as a county, city, or town), for public purposes only and not for pecuniary profit, are not to be considered as included within a statute imposing a lien on "a house or building," unless they are expressly named as included. Such seems to be the almost universal judicial opinion. In Phillips on Mechanic's Liens, pp. 314, 315, it is stated, "upon public buildings there is no lien. Unless the statute expressly and explicitly provides otherwise they are exempt." For decided cases sustaining this proposition, the curious are referred to *Lessard* v. *Revere*, 171 Mass. 294, and cases there cited; to cases cited in *First Nat'l Bank of Idaho* v. *Malheur County*, (Or.) 35 L. R. A. 141, and note; and to cases cited in 20 Am. & Eng. Ency. of Laws (2nd. ed.) pp. 295, 296.

That the library building in this case is a public building, erected and to be held and maintained solely for public purposes and not for pecuniary profit, seems too clear for argument. Its use is not limited to citizens of Lewiston. It cannot be used for any other purpose than a free public library. No revenue is possible from it. It is not the private property of the city; is no part of its assets. The city holds the title as trustee for the public. The real ownership is in the people for whose use it was erected.

It is urged, however, that there is a difference between buildings and institutions which a municipality is obliged by law to provide and maintain, and those which a municipality is permitted, but not obliged, to provide and maintain; and that even if the statute does not include the former class, it may include the latter class. There may be a difference in circumstance, but we can see none in principle. A building erected by legislative permission solely for the use of the public is as much a public building as one erected by legislative command for the same purpose. The test is in the use and ownership, not in the compulsion to provide. The same contention was evidently urged in the parallel case of *Young* v. *Falmouth*, 183 Mass. 80, (66 N. E. Rep. 419) and was expressly overruled. The court

there said: "It is true that cities and towns are not required to maintain public libraries as they are schools and highways for instance. But it is plain, we think, that money appropriated for the erection and maintenance of a free public library is appropriated for a public use. . . . Whether a use is public does not depend on whether it is compulsory, but on its nature and purpose. . . . . Towns and cities derive no gain or profit from the establishment and maintenance of free public libraries any more than they do from that of free public schools. They are established solely for the general and common good, and we cannot doubt that they come within the same principle, as instrumentalities of government, that free public schools do."

It is also argued that as the labor and materials were furnished by the plaintiff in good faith with the consent of the city and have that much enriched the city or the public, compensation should be made therefor, at least out of the building so enriched. The statute of 1893, c. 217, § 8, is invoked. It provides that "in all proceedings in the Supreme Judicial Court, under the preceding sections, when there appears to be any conflict or variance between the principles of law and those of equity, as to the same subject matter, the rules and principles of equity shall prevail." The argument is, that proceedings to enforce a lien for labor and materials furnished are equitable in their nature. The language of the court in *Shaw* v. *Young*, 87 Maine, 271, 275, is cited, viz: "The statute should be construed as making the lien co-extensive with the benefit. Its equity is thus given scope. The rules and principles of equity are now to prevail." The answer is that the question here is not one of procedure, but is the liminal one whether the plaintiff has any lien at all, enforceable by any procedure however equitably construed. In the case cited, *Shaw* v. *Young*, the court also said: "Courts will now construe them (the lien statutes) liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute." Until the lien claimant makes it clear that he is within the statute, there is no occasion for the application of the principles of equity as opposed to those of law. In determining whether a given case or person is within the scope or

meaning of a statute, there is no difference between the rules of equity and those of law. The rules for statutory interpretation as to rights apart from remedy are the same in either procedure. The court is not empowered even in equity to enlarge a statute to include persons or subject matter which the legislature, according to established canons of interpretation, did not intend it to include.

Much was said at the argument as to the injustice of leaving innocent and deserving laborers and material men without remedy against the public or municipal buildings which their labor and material had enriched. All this we think is beside the question here, which is simply this, has our legislature imposed a lien on public or municipal buildings, like this, in favor of laborers and material men? If it be true that there should be a lien on such buildings, it is for the legislature to impose it. If there should be a remedy against the municipality it is for the legislature to give it. The court should not usurp legislative powers even to avoid what may seem to be an injustice.

II. The following further facts appear in the case: Before the building was contracted for and the labor and materials furnished, Andrew Carnegie donated to the City of Lewiston $50,000 for the erection of a free public library. By vote of the city council, as well as by the terms of the gift, this sum was deposited with the city treasurer as a special fund to be known as the "Carnegie Fund," to be used solely for the purpose indicated. The city paid for the site wholly out of funds raised by taxation, but the building was erected entirely out of the "Carnegie Fund" as the building intended by the donor. There still remains in the city treasury enough of that fund to pay the full amount of the labor and materials furnished by the plaintiff in the erection of the building.

Under these circumstances, the plaintiff claims that, even if he has no statutory lien on the building, he has by force of general principles of equity a right to be paid out of the fund donated and set apart for the erection of the building, and that the court can and should enforce that right. We do not think this claim can be determined in this action, which, however much it may be equitable in its

nature, is still an action at law directed solely against the building. It is not directed against the fund. No claim upon the fund is made in any of the plaintiff's pleadings. The city, the custodian of the fund, is not named in the writ and is not a party to this action. Its appearance is only to defend the building. No judgment nor decree can be rendered against the city. The utmost the court could do would be to render judgment against the building. It is not clear that the pleadings could be legally amended, even under the law and equity act of 1893, ch. 217, so as to make the action one against the city and the fund. Such an amendment would not only entirely transform the action itself, but would change its object, purpose, and defendants. However that may be, we think there is no hardship, but much advantage, in requiring this claim to be presented in a new and appropriate procedure with proper parties and the necessary jurisdictional allegations. This is the course ordinarily followed even in suits distinctly in equity. *Shaw* v. *Monson Maine Slate Co.*, 96 Maine, 41, 45.

Since there can be at present no personal judgment against the defendants by reason of their adjudication as bankrupts, and there can be no judgment against the building by reason of its not being within the statute, the judgment must be,

Lien claim denied. Action against personal defendants continued to await bankruptcy proceedings.

MARTHA F. HOWE *vs.* WILLIAM W. COLLINS.

Franklin. Opinion February 23, 1904.

Deed, Reservation of crops on hand or to be raised. *Evidence,* in case of ambiguity admissible. *Replevin.*

In giving construction to a reservation of crops in a deed, due effect will be given, as to the intent of the parties thereto, to their contemporaneous acts and the fact that the grantor did not own the crop at the time the deed was delivered.

Held; that the expression contained in a reservation clause of a deed that the grantee, the defendant in replevin, "is to have all the hay" related to the future occupation and subsequent production of the farm, and not to the old hay then in the barns.

If such phrase in the deed, taken in connection with the reservations and provisions immediately preceding, raises an ambiguity, it may be explained by oral evidence as to what hay it applied.

On report. Judgment for plaintiff.

Replevin of ten tons of hay claimed by defendant.

The case appears in the opinion.

E. E. Richards, for plaintiff.

Frank W. Butler, for defendant.

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

STROUT, J. Replevin of ten tons of hay in the bay of the upper barn of defendant. Defendant claims title to it.

Shortly prior to July 9, 1902, defendant entered into negotiations for the purchase of a farm, the title to which stood in the name of Flora E. Hawes, daughter of the plaintiff and her husband David M. Howe. All these parties participated in the transaction. Mrs. Hawes and her parents were in the occupation of the farm. The result was a sale of the farm to the defendant. The deed bears date July 9, 1902, and was delivered on that or the succeeding day. The

deed, after describing the land conveyed, contains the following reservations and provisions, — "I reserve suitable rent and No. of rooms to live in for myself and family including my father and mother for a period of three months from the date of this instrument. Also all the products of the garden, excepting the strawberries, and them I divide with them. I also reserve three pastures for the use of the same this season, excepting the said Collins is to pasture in them two cows and two heifers. I am also to have what early fruit as I want for my own use while there, and one-half of the field crops, such as corn, beans, oats, peas and potatoes. Also the wood that is in the shed fitted for the stove, said Collins is to have what wood he needs to use until it is taken away, and said Collins is to have all the hay."

The last clause, as to hay, is the only one in controversy here. To ascertain precisely what the parties intended by this provision, it is necessary to view it from their then standpoint. There were two barns on the farm,—the one nearest the dwelling-house was called the "home barn," and the other farther away the "upper barn." At the time of the trade there was in the upper barn a quantity of old hay, and some old hay in the home barn. Before the deed was delivered, the old hay in the home barn was removed to the upper barn. This hay had been cut in 1900 and 1901 from two lots of land owned by the plaintiff, Mrs. Howe. These lots did not belong to Mrs. Hawes, and were not conveyed to the defendant. The Hawes had a horse and eight head of cattle, and about one hundred and sixty sheep. When these should come to the barn in the autumn hay would be needed. Mrs. Hawes could not sell the hay owned by Mrs. Howe without her authority, and it cannot be presumed she attempted to do so, unless upon clear evidence, which is lacking here.

All the reservations and provisions in the deed following the description of the land conveyed looked to the future use and product of the farm for that season,—a future occupation by the grantor,—future pasturing,—future product of the land, corn, etc.,—future products of the garden,—future strawberry crop,—the wood on hand for future use,—and then follows the phrase, "Collins is to have all the hay." It would seem to be clear that the parties had only in mind the product of the farm to be received, and that the hay

intended was the crop about to be gathered. The phrase appears to have been used in contradistinction from the division of crops provided for in the immediately preceding provisions. The cereal crops were to be divided, but Collins was to have the crop of hay. If more had been intended, some term, such as the old hay, or hay in the barns, would in all probability have been employed. We think, in the absence of all other evidence, than the deed itself, the fair and legal construction of the provision in the deed is, that the hay therein mentioned referred to the hay about to be cut upon the farm, and did not include the old hay in the upper barn, the product of former years.

This construction is aided by the acts of the parties after the deed was given. Mr. Howe began to haul the old hay from the upper barn on August seven. Mr. Collins' son helped about the first load. The next load was taken on August fifteen. Mr. Collins' daughter helped about that. The next load was taken on August sixteen. The defendant knew of these haulings, amounting to four or five tons, and made no objection, nor any claim of ownership. On September 25, Mr. Howe went for another load of hay from the upper barn, and was forbidden to take it. Mrs. Howe says that Collins said,—"Uncle David, what are you going to do today? What is the program today? You ain't going to haul this hay. This is mine. Don't you know that I have bought the whole?" To which Mr. Howe said,—"I was to have the old hay, and you know it, and I have hauled part of it away and you never opened your head. Why didn't you?" Collins answered,—"because I thought I wouldn't." Mr. Collins does not deny this conversation. It is beyond belief that if Collins supposed he owned the old hay, he would have allowed Howe to haul away four or five tons of it without objection. His present claim appears to be an afterthought, based upon the wording of the last clause in his deed.

But if the phrase in the deed,—"Collins is to have all the hay," taken in connection with the immediately preceding reservations and provisions, raises an ambiguity, that may be explained by oral evidence as to what hay it applied to. There was old hay, and hay being then cut from the farm. The oral evidence is convincing that

the old hay was not sold to Collins, nor intended to be,—and that all parties understood that it was not included in Collins' purchase.

Judgment for plaintiff.

ALBERT H. LYNAM, Trustee in Bankruptcy,

vs.

BELFAST NATIONAL BANK.

Hancock. Opinion February 27, 1904.

Bank,—Insolvent depositor. *Set-Off*, not allowed. Special deposit in trust. *Bankruptcy*, Title of Trustee and rights of recovery. *Bankruptcy Act, 1898*, §§ *60, 70, (e)*.

When a bank receives from a customer a deposit intended only for safe keeping to be ultimately appropriated for the benefit of all his creditors and who was known by it to be insolvent and the deposit was made in trust for that purpose, *held;* that the fund is not subject to a set-off by the bank against the depositor's account, and that the fund belongs to the depositor's trustee in bankruptcy.

The Standard Granite Company became pecuniarily embarrassed, and was insolvent on June 10, 1902. It sent to the defendant bank on that day a circular stating that it could not meet its obligations, that its property was under attachment and a keeper in possession. On June 20, 1902, a meeting of its creditors was called for June 25, and was then held, at which the bank was represented. The company there stated its hope to pay twenty per cent. A committee was then chosen to procure a discharge of the attachments, if possible, and to arrange for a common law assignment, and, failing in that, to commence bankruptcy proceedings.

Since June 20, the Granite Company has ceased to be a going concern, and all its efforts and that of the creditors had been to obtain an equal distribution of its assets. Pending these efforts it had eight hundred dollars in cash, which it deposited in defendant bank, to which it was largely indebted, but did not intend it as payment to the bank, and "did intend that it should be held for its trustee in bankruptcy when appointed," though no notice of this intention was given to the bank.

September 20, 1902, the Granite Company was decreed bankrupt, and plaintiff is its trustee.

Held; that all the circumstances satisfactorily show that this deposit was really in trust for the creditors, and that the bank had such knowledge and participation in the transaction as to render it chargeable as trustee of the fund for the creditors generally, and cannot set off its debt of the Granite Company against it; and that the plaintiff, as trustee in bankruptcy, of the Granite Company, is entitled to the fund and can recover it in this action.

Agreed statement. Judgment for plaintiff.

Assumpsit by the trustee in bankruptcy of the Standard Granite Company against the Belfast National Bank to recover a deposit of $800 made in the bank on Sept. 6, 1902, after the Granite Company had become insolvent. Date of writ, August 4, 1903.

The declaration contained a count on account annexed, a count for money had and received and also the following special count:

"Also for that the Standard Granite Company at Mount Desert, to wit, said Ellsworth, on September 6, 1902, was insolvent, and had prior thereto committed an act of bankruptcy, and being insolvent on said date made a transfer of certain of its property, to wit, the sum of eight hundred dollars, in money to the defendant corporation; and within four months after such transfer, to wit, on September 6th, 1902, a petition in bankruptcy was filed against said Standard Granite Company, in the United States District Court, for the District of Maine, and on September 20th, 1902, the said Standard Granite Company, was by said Court adjudicated a bankrupt upon said petition, and on November 5th, 1902, the plaintiff, A. H. Lynam, was duly and legally elected, appointed and qualified as trustee in bankruptcy of said Standard Granite Company. And the plaintiff alleges that the effect of said transfer of property to the defendant corporation, will be to enable the defendant corporation one of the creditors of said Standard Granite Company, to obtain a greater percentage of its debts than any other such creditors of the same class.

"And the plaintiff avers that such transfer of property by the said Standard Granite Company to the defendant corporation, was a preference under the bankruptcy law of the United States; that such preference was given within four months before the filing of said peti-

tion in bankruptcy, and that the person receiving it, and to be benefited thereby, to wit, the defendant corporation, and its agents acting therein, then and there had reasonable cause to believe that it was intended thereby to give a preference."

Plea, general issue with brief statement and set-off against this claim of past-due indebtedness of the Standard Granite Company amounting to $3,224.65.

AGREED STATEMENT OF FACTS.

This action is brought to recover the sum of eight hundred dollars deposited by the Standard Granite Company in the defendant bank on September 6th, 1902. No part of said eight hundred dollars has been drawn by or paid to the said corporation, or its trustee in bankruptcy, but the defendant bank pleads in set-off an indebtedness by the Standard Granite Company to itself, amounting to $3,224.65.

On June 12, 1902, the Standard Granite Company, being then insolvent, sent to the defendant bank a copy of a circular letter to its creditors. This circular letter, dated June 12, 1902, is annexed hereto, and marked "Exhibit 1."

On June 20, 1902, the Standard Granite Company called a meeting of its creditors to be held on June 25, 1902, at the office of A. W. King, Esquire, in Ellsworth. A copy of the circular letter calling this meeting is annexed hereto, and marked "Exhibit 2." A copy of this letter was sent to and received by the defendant bank prior to June 25, 1902.

On June 25, 1902, a meeting of the creditors of the Standard Granite Company was held at the office of A. W. King, Esquire, in Ellsworth, at which meeting the defendant bank was represented by William B. Swan, Esquire, one of its directors. At this meeting Cyrus J. Hall, president of the Standard Granite Company, presented a statement showing the insolvency of said corporation, and stating that he hoped and expected to be able to offer the creditors twenty per cent of their claim in settlement. He also stated (and this was true in fact) that the property of the Standard Granite Company was then under attachment in suits brought by two or three of its creditors. At this meeting a committee of three of the creditors was

appointed who were instructed by the meeting to secure, if possible, a discharge of said attachments and to arrange for a common law assignment to be made. Failing in this, a committee were instructed to have bankruptcy proceedings begun.

On September 4, 1902, the directors of the Standard Granite Company passed the following vote, namely: "Voted that the corporation admit in writing to its creditors its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, under the bankruptcy laws of the United States, and that the treasurer be instructed to give notice of this action to the various creditors of the company."

On September 5, 1902, the Standard Granite Company sent to the defendant bank a deposit of eight hundred dollars accompanied by a letter of that date, marked "Exhibit 3." This letter and deposit were received by the defendant bank on September 6, 1902. Prior to that time no deposit had been made by the Standard Granite Company in the defendant bank, and no check drawn by said Standard Granite Company on the defendant bank since April, 1902. There was a balance of one dollar and four cents which had been standing in the defendant bank to the credit of the Standard Granite Company since April, 1902.

If material and admissible, it is admitted that the Standard Granite Company in making such deposit did not intend it as a payment on its obligations to the defendant bank, but did intend that it should be held for its trustee in bankruptcy when appointed. No notice of any intention, however, was given to the defendant bank, except as appears by "Exhibit 3," and the deposit was credited to the account of the Standard Granite Company, and added to the balance of one dollar and four cents then standing on the books of the bank.

At the time said deposit was made, to wit, September 6, 1902, the defendant bank held the notes described in the account in set-off, and there is still due upon said notes to the defendant bank the sum of $3,224.65.

On September 12, 1902, the Standard Granite Company sent to

the defendant bank the circular letter marked "Exhibit 4" which was duly received by the defendant.

On September 6, 1902, a petition in bankruptcy was filed against the Standard Granite Company in the United States District Court for the District of Maine, and on September 20, 1902, said Standard Granite Company was, by said court, adjudged a bankrupt upon said petition.

On November 5, 1902, the plaintiff, A. H. Lynam, was duly and legally appointed and qualified as trustee in bankruptcy, of said Standard Granite Company.

On December 22, 1902, the plaintiff, as such trustee, forwarded to the defendant bank a certified copy of his appointment, and demanded payment of said sum of eight hundred dollars. This demand was refused by the defendant bank, who notified the plaintiff that it should claim an offset on its overdue notes.

The assets of said Standard Granite Company, not including said $800 deposit, amount to $2,133.14.

The liabilities of the same class, not including preferred or fully secured claims, amount to $40,000.

EXHIBIT 1.

C. J. Hall, Pres.
C. G. Ferguson, Treas.

Telegraph Address.
Ellsworth, Maine.
Forward by Telephone.

THE STANDARD GRANITE COMPANY.

HALL QUARRY, Maine, June 12, 1902.

BELFAST NATIONAL BANK.
Belfast, Me.

Dear Sirs:—

Replying to your favors;

We are sorry to inform you that the Standard Granite Company is unable to meet its obligations. We are preparing a statement of the company's financial condition, and shall then confer with the creditors, regarding the best course to be taken by the company. One attachment, with keeper, has been placed on the property which preserves all interests.

We hope that some satisfactory arrangement can be made with the creditors and trust that none of them will commence any other suits, because will only add expense and costs, thereby reducing their interests by so much.

Yours truly,
The Standard Granite Co.,
C. J. HALL, Pres.

EXHIBIT 2.

C. J. Hall, Pres. Telegraph Address.
C. G. Ferguson, Treas. Ellsworth, Maine.
Forward by Telephone.

THE STANDARD GRANITE COMPANY.

HALL QUARRY, Maine, June 20th, 1902.

BELFAST NATIONAL BANK.
Belfast, Maine.

Gentlemen:—

In accordance with its circular letter of June 12th The Standard Granite Company hereby gives notice that a meeting of its creditors will be holden at the office of Arno W. King, Esq., at Ellsworth, Maine, on Wednesday, the 25th inst. at 2 o'clock p. m., and you are invited and requested to be present.

The Standard Granite Co.,
C. J. HALL, Pres.

EXHIBIT 3.

C. J. Hall, Pres. Telegraph Address.
C. G. Ferguson, Treas. Ellsworth, Maine.
Forward by Telephone.

THE STANDARD GRANITE COMPANY.

HALL QUARRY, Maine, Sept. 5, 1902.

BELFAST NATIONAL BANK.
Belfast, Maine.

Gentlemen:—

Enclosed find deposit credit S. G. Co. $800.00.

Yours truly,
The Standard Granite Co.,
By C. J. FERGUSON.

EXHIBIT 4.

C. J. Hall, Pres.
C. G. Ferguson, Treas.

Telegraph Address.
Ellsworth, Maine.
Forward by Telephone.

THE STANDARD GRANITE COMPANY.

HALL QUARRY, Maine, Sept. 12, 1902.

At a meeting of the Directors of the Standard Granite Company held on the fourth day of September 1902. It was voted that this corporation admit it in writing to its creditors its inability to pay its debts, and its willingness to be adjudged bankrupt on that ground under the law of the United States.

C. G. FERGUSON,
Treasurer of The Standard Granite Co.

L. B. Deasy and A. H. Lynam, for plaintiff.

Counsel argued in part:

What are all the possible intentions that the Standard Granite Company could have entertained in making the deposit? What are all the possible intentions that the bank could have attributed to the depositor?

1:—It might have intended the deposit to use in carrying on its business. But, it had no business to carry on. Its property was under attachment. An officer was in possession. It was hopelessly insolvent, and through the action of the creditors, including this defendant, an assignment for the benefit of creditors, or the prosecution of bankruptcy proceedings, was certain and imminent. The defendant bank knew of these things when it received the deposit. It certainly had no reasonable cause to believe that the deposit was intended by the Standard Granite Co. to be used in carrying on its business.

2:—An individual similarly circumstanced might have intended the deposit as a basis for post bankruptcy prosperity. Not so a corporation. A corporation is dissolved by bankruptcy proceedings against it. It can have no success, no career and no existence after bankruptcy.

3:—The corporate officers, in whose minds the corporate intent had its origin and existence, might have intended to abstract the deposit, to steal it, and use it for their own purposes. But, this money having been deposited in the name of the corporation, such an intent certainly cannot be presumed.

4:—The bank may have reasonable cause to believe the truth, to wit, that the deposit was intended to be held for the trustee in bankruptcy, in which case the plaintiff is entitled to recover under the count for money had and received.

5:—The defendant may have had reasonable cause to believe that the deposit was intended for the special benefit of the Belfast National Bank, in which case the plaintiff is entitled to recover by reason of positive provisions of the Bankruptcy Law. *Toof* v. *Martin*, 13 Wallace, 49; *Lampkin* v. *Peoples Nat. Bank*, (Mo.) 71 S. W. R. 715; *Pierik* v. *Havens & Geddes Co.*, 110 Fed. Rep. 133; *Harmon* v. *Walker*, (Mich.) 91 N. W. R. 1025; *Sherman* v. *Luckhardt*, (Kan.) 70 Pacific R. 702; *In re Myers*, 99 Fed. Rep. 691; *In re Eggert*, 98 Fed. Rep. 843.

R. F. Dunton, for defendant.

Deposit not a preference under sect. 60 of the bankrupt act. It is not a "transfer" under that section. It is admitted that the company did not intend it as a payment, and it was not a "pledge, mortgage, gift or security." Defendant's provable debt is the balance due on the notes held by it after allowing the deposit in offset. Brandenburg, 2nd ed. p. 675.

"The general rule of set-off applies between a banker and his customers, so that in case of mutual debts and credits, whether matured or not, they may be set off by the banker as against the liabilities of a bank depositor." Brandenburg, 2nd ed. p. 679.

"The relation between a banker and a depositor is that of debtor and creditor. Hence, a banker may offset the debt due to him on loans, overdrafts, or otherwise, against deposits which are made with him." Collier, 3rd ed. p. 450, and cases there cited.

"A banker who has for collection drafts of the bankrupt, the pro-

ceeds of which come into his hands after bankruptcy, may offset them against debts due to him." Black, p. 244; Collier, p. 450.

The relation between a bank and its general depositor is that of debtor and creditor. When he deposits moneys with his bank it becomes his debtor to the amount of them. When, therefore, he becomes indebted to the bank, it is a case of mutual debt and mutual credit, which may be well set off against each other. *Libby* v. *Hopkins*, 104 U. S. 308; *In Re Petrie*, 7 N. B. R. 332; *Clark* v. *Northampton Natl. Bank*, 160 Mass. 26.

The fact that the account of the Granite Company with the defendant bank had not been an active account since April previous to the deposit of the $800 can make no difference in this case, for it is admitted that it was not intended as a payment and the bank had no notice of any intention except as appears by the letter accompanying the deposit. Clearly this deposit was not intended as a preference by the depositor nor received as such by the bank. It was the ordinary transaction between depositor and bank.

It was a credit properly made by the bank to the company, and so remained at the time of the adjudication of bankruptcy. It was also a debt due to the company from the bank. The secret intention of the company as to the ultimate disposition of this deposit, is neither material nor admissible. It cannot affect the legal rights of the bank. But even if admissible, the deposit was none the less a debt due the company, and none the less a credit to the company, because the company intended to let it remain such until a trustee in bankruptcy should be appointed. No petition in bankruptcy had been filed against the Granite Company when this deposit was sent to the bank. It might be that no petition would be filed, no adjudication of bankruptcy made, and no trustee appointed.

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

STROUT, J. The plaintiff is the trustee in bankruptcy of the Standard Granite Company. The Granite Company had made with the defendant bank deposits in the ordinary manner, and on Septem-

ber 5, 1902, there was a balance of such deposits standing to the credit of the Granite Company of one dollar and four cents. That balance had been standing since the preceding April. No deposit was made or check drawn after April, till September 5, 1902, when the Granite Company sent to the bank a deposit of eight hundred dollars, accompanied by a letter which stated, "Enclosed find deposit credit S. G. Co. $800." The amount was received by the bank September 6, and as an ordinary deposit, and added to the balance of one dollar and four cents then standing to its credit. At that time the Granite Company was indebted to the bank in a sum exceeding three thousand dollars.

The Granite Company at that date was insolvent, and this fact was known to the bank. September 6, 1902, a petition in bankruptcy was filed against the Granite Company, upon which it was decreed bankrupt on September 20, 1902, and this plaintiff was appointed its trustee on November 5, 1902.

In this suit he claims to recover from the bank the eight hundred dollars deposited on September 6. The bank claims to set off the past-due indebtedness of the Granite Company to it.

It is admitted that the Granite Company in making the deposit, did not intend it as a payment on its obligation to the bank, "but did intend that it should be held for its trustee in bankruptcy when appointed. No notice of any intention, however, was given to the bank." The bank did not apply it in part payment of the indebtedness due.

No fraud was intended or practiced,—and none is claimed. The transaction did not constitute a preference under the bankruptcy laws. This is expressly admitted by counsel for plaintiff. It was not a payment or transfer of property within the meaning of section 60 of the bankruptcy act.

As between the bank and the Granite Company, notwithstanding the intention of the Granite Company that the fund should be held in trust, if that intention was not communicated to the bank, and if the circumstances immediately preceding and attendant upon the transaction were not such as fairly to apprise the bank of the depos-

itor's intention, and thus to charge it as trustee, the bank could set off its claim against that of the Granite Company, and in the absence of fraud, the trustee in bankruptcy has no greater rights against the bank than the Granite Company had. The trustee takes only the title of the bankrupt to his property, and "property transferred by him in fraud of his creditors." By section 70 of the bankrupt act, and under subdivision e, he "may avoid any transfer by the bankrupt of his property which any creditors of such bankrupt might have avoided, and may recover the property so transferred."

Except where otherwise provided in the act, the trustee's rights, in the absence of fraud, are limited to the rights of the bankrupt as they existed before bankruptcy. This principle is thoroughly established by decisions of the Supreme Court of the United States. *Yeatman* v. *New Orleans Savings Institution*, 95 U. S. 764; *Stewart* v. *Platt*, 101 U. S. 731; *Hauselt* v. *Harrison*, 105 U. S. 407; *Adams* v. *Collier*, 122 U. S. 390; *Goss* v. *Coffin*, 66 Maine, 432, 22 Am. Rep. 585. These decisions were under the bankrupt act of 1867, but in this respect the existing act does not differ from the earlier one.

But it is strenuously insisted that the fund was held in bank, in trust for the trustee in bankruptcy. That it was so intended by the Granite Company when the deposit was made, is admitted. Are the circumstances such as to charge the bank with knowledge of this intention? The case shows that on June 10, 1902, the Granite Company, then insolvent, sent to the bank a circular, in which it was stated that the company could not meet its obligations, that it was preparing a statement of its financial condition, and would confer with the creditors as to the best course to be taken,—and that an attachment on its property was then existing, and a keeper in possession. On June 20, a meeting of the creditors was called for June 25, at which time it was held. A copy of the call for this meeting was received by the bank prior to June 25. At that meeting the bank was represented by one of its directors. The Granite Company then presented a statement showing its insolvency, and stated its hope to pay twenty per cent of its indebtedness. At this meeting a committee was chosen and instructed, if possible, to procure a discharge

of the attachments, and to arrange for a common law assignment, and, failing in this, to commence bankruptcy proceedings.

Since June 10, the Granite Company had ceased to be a going concern, and all its efforts and that of its creditors had been to obtain a distribution of its assets equitably, and to that end the first attempt was to discharge the attachments. Honest dealing on the part of the Granite Company, which is to be presumed, required that all its assets should be husbanded for the benefit of all of its creditors. Pending the effort to obtain an assignment or adjudication of bankruptcy, it had eight hundred dollars in money which it intended to retain, and ought to retain, as part of its general assets. As some time would elapse before it could be thus administered, it was deposited in the bank really for safe keeping. All these facts were well known to the bank when it received the deposit. It knew it was not intended as a payment, and did not treat it as such. The bank could not fail to understand that it was intended that this money should be added to the other assets for the general benefit, as it equitably ought to be. It certainly understood that the Granite Company, under the then existing circumstances, would not voluntarily subject this portion of its assets to a set-off by the bank, to the injury of other creditors.

Upon consideration of all the circumstances, and the situation of the parties, we think it a fair inference that the bank understood that the deposit was intended only for safe keeping to be ultimately appropriated for the benefit of all the creditors of the Granite Company, and that in fact it was a deposit in trust for that purpose. And it being charged with such trust, the plaintiff, as trustee in bankruptcy, is entitled to recover.

Judgment for plaintiff for eight hundred dollars, and interest from December 22, 1902, the date of demand.

STATE OF MAINE *vs.* JOHN F. DOWDELL, Appellant.

Knox. Opinion March 11, 1904.

Intox. Liquors. Search and Seizure. Futile Amendment of R. S. 1883, c. 27, § 38. *Stat. 1903, c. 170, § 1. R. S. 1903, c. 29, § 47. Constitution of Maine, Art. XXVI.*

A search and seizure process could be maintained under R. S., c. 27, §§ 33 and 40, in August, 1903, although sect. 38 of the statute had been repealed in part at that time.

Section 38 of c. 27, R. S. 1883, prohibiting the unlawful keeping of intoxicating liquors, was repealed or nullified by the futile attempt to amend it as appearing in sect. 1 of chap. 170 of the laws of 1903; and although this error was corrected in the general revision of the statutes, § 47, c. 29, R. S. 1903, a search and seizure process commenced in August, 1903, was not affected by the provision of a statute subsequently enacted. But, inasmuch as the original prohibition in section 33 still existed, that "no person shall at any time sell any intoxicating liquor," *it is held;* that section 40 upon which the search and seizure process was founded affords in itself a complete basis for the prosecution. It describes the offense and specifies the penalty.

Also; that if any more direct and explicit prohibition of the unlawful keeping of intoxicating liquors can possibly be required than is contained in section 40, it is found in Art. XXVI of the Constitution of the State which declares that the "sale and keeping of intoxicating liquors are and shall be forever prohibited."

Exceptions by defendant. Overruled.

Search and seizure process against intoxicating liquors under R. S. (1883), c. 27, alleged to be in the defendant's possession with intent to sell them unlawfully.

The defendant demurred to the complaint and warrant on the ground that no such offense existed by the statute, by reason of the repeal of section 38. His demurrer was overruled and the case brought to the law court on his exceptions.

Philip Howard, County Attorney, for State.

M. A. Johnson, for defendant.

If then, there is no other section of statute that prohibits the keeping of liquor, which sect. 38 originally covered, if sect. 38 does not now cover, there can be no illegal keeping, and no crime for keeping regardless of the purpose for which the liquor is kept, and sect. 40 can hardly supply the defect.

If the legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to a court to extend them; nor to extend the grammatical and natural meaning of the terms as used by the legislature, even on a plea of a resulting failure of justice. Lord Tenterden in *Proctor* v. *Manwaring*, 3 B. & A. 145.

The rule of strict construction in penal statutes, requires that where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty. *Com.* v. *St. Oil Co.*, 101 Pa. St. 119–150; *Freight Discrimination Cases*, (*Hines* v. *R. R. Co.*), 95 N. C. 434, 59 Am. Rep. 250.

Where a statute admits of two constructions, that which operates in favor of life or liberty is to be preferred. *Com.* v. *Martin*, 17 Mass. 359; *Com.* v. *Keniston*, 5 Pick. 420.

The intent of the legislature must be ascertained. When sect. 40 was enacted, sects. 38 and 39 were also enacted. Now if sect. 38 is covered by sect. 40, then sect. 38 never was needed. Sect. 38 was intended by the legislature to fix the crime, and sect. 40 the method of procedure to enforce it.

If during the hurry of the legislature, or for any reason, the crime was eliminated from sect. 38, the court should give a different interpretation to sect. 40 than it formerly received, in order to cover the defects of legislation against the respondent.

The legislature, in its September session, restored sect. 38 to its former reading, which would seem to show that it was their judgment that sect. 38 alone fixed the crime, and that they had taken away the crime in their winter session.

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

WHITEHOUSE, J. This is a search and seizure process instituted August 21, 1903. It is based on section 40 of chapter 27, R. S. 1883. The case comes to this court on exceptions to the overruling of the defendant's demurrer to the complaint and warrant. It is claimed in behalf of the defense that the last legislature nullified section 38 of that chapter by a futile attempt to amend it, and that section 40, unaided by section 38, is not sufficient in itself to lay the foundation for this prosecution.

Section 38 declared that "no person shall deposit or have in his possession intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale."

As amended by the legislature of 1903 (c. 170, § 1) that section was made to read as follows: "Whoever shall deposit or have in his possession intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be sold by any person, or to aid or assist any person in such sale. Whoever violates this section shall be fined one hundred dollars and costs or be imprisoned 60 days." Thus the obvious purpose to make the fact of possession with intent to sell in violation of law a substantive offense and to fix the penalty therefor, was defeated by errors and omissions in revising or engrossing. These errors were corrected in the general revision of the statutes adopted at the September session, 1903 (§ 47, c. 29, R. S. 1903); but the offense imputed to the defendant in the case at bar was committed and the prosecution commenced in August, 1903, and it is obvious that this proceeding cannot be affected by the provisions of the statute subsequently enacted.

It is accordingly contended that after the accidental repeal of section 38, the statutes nowhere contained any express prohibition of the unlawful keeping of intoxicating liquors, and that section 40 cannot be deemed sufficient in itself to create any offense.

But the original prohibition in section 33 still existed, that "no person shall at any time . . . sell any intoxicating liquors."

Section 40 upon which the process in question is based contains

the following provisions: "If any person . . . makes sworn complaint before any judge . . . that he believes that intoxicating liquors are unlawfully kept or deposited in any place in the state by any person, and that the same are intended for sale within the state in violation of law, such magistrate shall issue his warrant commanding the officer to seize the same. . . .

"If upon trial the court is of opinion that the liquor was so as aforesaid kept and intended for unlawful sale by the person named in said complaint . . . he shall be found guilty thereof and sentenced to pay a fine of $100 and costs and in addition thereto be imprisoned sixty days."

By section 33 the sale of intoxicating liquor is absolutely prohibited. Section 40 sufficiently declares that such liquors are "unlawfully kept" when they are intended for sale in the state in violation of law; and if a person is found guilty of keeping such liquors for unlawful sale, he shall suffer the penalty there provided. It describes the offense and specifies the penalty. It seems to afford in itself a complete basis for the prosecution in this case. It is not questioned that the complaint contains the requisite allegations.

But if any more direct and explicit prohibition of the unlawful keeping of intoxicating liquors can possibly be required than is contained in this section of the statute in question, it is found in Article XXVI of the Constitution of the State, which declares that the "sale and keeping for sale of intoxicating liquors are and shall be forever prohibited."

Exceptions overruled. Judgment for the State.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, John R. Bishop, Claimant.

Oxford. Opinion March 11, 1904.

Sales, Delivery to Carrier passes title to purchaser. *Intox. Liquors* not intended for unlawful sale.

1. Under the settled law of this State, upon an order for the shipment of goods by express C. O. D. the carrier designated in the order acts as agent of the purchaser, and in the absence of any evidence to the contrary, a delivery to the carrier is deemed a delivery to the purchaser and title to the goods will pass to the purchaser upon delivery to the carrier.
2. Intoxicating liquors delivered to an express company in Kentucky and transported to Maine in pursuance of such an order become the property of the purchaser upon delivery to the carrier in Kentucky, and if not intended for unlawful sale by the claimant in this State are not liable to seizure while in the possession of the express company, and if so seized the claimant is entitled to an order for their restoration.

On report. Judgment for claimant to property seized.

Appeal from Rumford Municipal Court, Oxford County, upon the condemnation of four bottles of whiskey bought by the defendant in Kentucky and shipped by express C. O. D. by his order to this State.

The parties in this court below submitted the case to the decision of the law court upon an agreed statement of facts, which will be found in the opinion.

Ellery C. Park, County Attorney, for State.

The order is explicit in its terms and so far as anything before the court shows, was accepted and complied with in strict accord with those terms. If the court find that the prepaying of the express charges under this order, taken in connection with the other circumstances of the case, is sufficient evidence to warrant the conclusion that the vendor undertook to deliver the liquor to the vendee at

Rumford Falls, and that the carrier to which the liquor was delivered by the vendor was the agent of the vendor, then, it would seem that the sale was not made in Kentucky, but was to be made at Rumford Falls, in which case no title to the liquor ever passed to the vendee, because there was never any delivery either actual or constructive to him.—*Suit* v. *Woodhall,* 113 Mass. 394. Under such facts the liquor was liable to seizure while in the possession of the express company which would be constructively the possession of the vendor, because it was intended for sale in this State in violation of law.

G. D. Bisbee and Ralph T. Parker, for claimant.

The title passes when the goods are delivered to the carrier and this is so even where no carrier is selected by the consignee.

Creek v. *Cowan,* 64 N. C. 743; *Pilgreen* v. *State,* 71 Ala. 368; *State* v. *Carll,* 43 Ark. 353; *Brechwald* v. *People,* 21 Ill. App. 213; *Ramsey & Gore Manf. Co.* v. *Kelsea,* 22 L. R. A. 415, and note, (55 N. J. L. 320); *State* v. *Cairns,* (Kan.) 58 L. R. A. 55; *U. S.* v. *The Orene Parker Co.,* recently decided by the U. S. District Court for Eastern District of Kentucky; *U. S.* v. *Express Co.,* 119 Fed. Rep. 240.

Our own court has followed this view of the law.

If the order is carefully analyzed we find that the word "ship" means "put on board." "The words 'shipment' and 'shipped' are now used indifferently to express the idea of goods delivered to carriers for the purpose of being transported from one place to another, over land as well as water, and imply, with respect to carriage by land, a completed act, irrespective of the time or mode of transportation." *Ledon* v. *Havemeyer,* (N. Y.) 8 L. R. A. 245.

"The word 'shipped,' in common maritime and mercantile usage, means 'placed on board of a vessel for the purchaser or consignee to be transported at his risk;' and such a delivery is a constructive delivery to the purchaser." *Fisher* v. *Minot,* 10 Gray, 260. Considered in the light of the well known meaning of the language employed the conclusion is irresistible that the order was for a delivery to the carrier in Kentucky.

The initials C. O. D. have a fixed and definite meaning, well understood. *State* v. *Intox. Liq.* 73 Maine, 279.

Federal question. Counsel cited: *Rhodes* v. *Iowa*, 70 U. S. 412, in which the Supreme Court says:—

"We think that, interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee." See also *Vance* v. *Vandercook*, 170 U. S. 438.

We are aware that our court in *State* v. *Intox. Liq.* 95 Maine, 140, has declared this language to be dicta and not necessary to the decision of the question involved, but in that case the carrier was a railroad company transporting freight and we do not think the same principle would apply to an express company whose business is to deliver at the door of the consignee.

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

WHITEHOUSE, J. This case comes to the law court on the following agreed statement of facts:

"September 10th, one box containing four quart bottles of whiskey consigned to John R. Bishop, Rumford Falls, Maine, was seized by Constable E. P. Poor from the office of the American Express Company at Rumford Falls, and the liquors were afterwards duly libeled. The box was sent C. O. D., express charges prepaid, by Crigler & Crigler, liquor dealers, from Covington, Kentucky, in response to the following order, which was mailed to them:—

"Rumford Falls, Me., September 3rd, 1903.

"Crigler & Crigler,

"Covington, Kentucky,

"Gents:

"Please ship me C. O. D., by American Express, express prepaid, one gallon of rye whiskey.

"JOHN R. BISHOP,

"Rumford Falls, Maine.

"On the next day after the seizure, September 11th, Bishop called at the express office and asked for the box and was informed that it had been seized. He tendered the charges due on the same, which amounted to $3.85, to the agent of the American Express Company, and demanded the box, but was refused because of the seizure. The same day a like tender was made by Bishop to the seizing officer and the box demanded, which was refused.

"Bishop filed a claim for the liquors at the return day of the libel, and upon the foregoing evidence the judge of the Rumford Falls Municipal Court ruled pro forma that the liquors were liable to seizure and the same were condemned. From which judgment the claimant appealed to the Supreme Judicial Court.

"If upon the foregoing statement the law court decides that said liquors were liable to seizure and condemnation, the judgment of the lower court shall be affirmed, otherwise judgment is to be rendered for the claimant and said liquor ordered returned."

It is not contended that the liquor seized by the officer was intended for unlawful sale in this State by the claimant who ordered it. There is no evidence that it was so intended for unlawful sale, and the claimant declared on oath that it was not intended for sale.

In the order which the claimant sent to the Kentucky firm, he designated the carrier to whom the liquor was to be delivered, and specified that it was to be shipped C. O. D., express paid. Under such circumstances the carrier in receiving and transporting the liquor, acts as agent of the purchaser. "The contract stands upon the simple rule of the common law. The seller was entitled to his price, and the buyer to his property, as concurrent acts. The title passed to the vendee when the bargain was struck. Any loss of property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon a tender of the price, could sue for the property." *State* v. *Intoxicating Liquors*, Moffitt, claimant, 73 Maine, 278. This rule was affirmed in *State* v. *Peters*, 91 Maine, 31, and reaffirmed in *Greenleaf* v. *Gallagher*, 93 Maine, 549, 74 Am. St. Rep. 371.

The law is well established that in the absence of any evidence to

the contrary, such a delivery to a common carrier at the express request of the purchaser, will be deemed a delivery to the purchaser himself. *Frank* v. *Hoey*, 128 Mass. 263, and *Wigton* v. *Bowley*, 130 Mass. 252. The fact that the express charges were prepaid by the seller in accordance with the terms of the order has no tendency to show that he intended to preserve the jus disponendi and to prevent the property from passing to the vendee. *Sawyer Medicine Co.* v. *Johnson*, 178 Mass. 374.

In the case at bar the liquor was sold and delivered, and the title passed to the claimant in Kentucky and not in Maine.

Judgment for the claimant. Order for return of liquors to issue.

STEPHEN E. THAYER *vs.* PHOEBE G. USHER.

York. Opinion March 11, 1904.

Fraud. *Fraudulent Conveyance*, No proof that debtor owned the property. *Evidence*, When failure to contradict is not an admission. *R. S. 1903, c. 114, § 77.*

In an action against the defendant for knowingly aiding her son, Alvah C. Usher, in making a fraudulent transfer of his property to her for the purpose of securing it from creditors, it appears that the lumber which formed a part of the property alleged to have been fraudulently transferred was cut on the defendant's land, that Alvah C. Usher conducted the lumbering operation and sold a portion of the lumber; but whether in so doing he was acting as the agent of his mother, or whether he had contracted with her to cut the lumber upon shares, and sold his portion of it, the evidence failed to show. On report of the evidence to this court,

Held; that these facts have no necessary tendency to prove that Alvah C. Usher was the owner of the property in question.

It further appears that in a suit brought by the plaintiff against this defendant in the Municipal Court of Biddeford, in which he sought to hold her directly responsible for the amount of his claim, Alvah C. Usher appeared

as a witness and testified that he was the owner of the lumber in question, and that his mother, this defendant, was present in court at the time and made no denial of these statements made by her son. But the evidence entirely fails to show what the issue was at the trial in the Municipal Court. Whether the plaintiff sought to hold the defendant liable for his claim in an original or collateral undertaking, or upon any ground involving an inquiry into the ownership of the property in question, does not appear. With respect to the plaintiff's contention that the defendant's failure to contradict this testimony in the Municipal Court, must be deemed an admission on her part by silence and acquiescence, of the truth of her son's statements.

Held; that before the silence of a party can be taken as an admission of what is said in his presence, it must appear that the fact admitted, or the inference to be drawn from his silence, would be material to the issue;

That; the declarations of Alvah C. Usher in the Municipal Court, not shown to have been material to the issue before that court, cannot be deemed to have been admitted by the silence of the defendant and are not competent evidence to prove that Alvah C. Usher was the owner of the property alleged to have been fraudulently transferred.

On report. Judgment for defendant.

Action brought by plaintiff under R. S. 1903, c. 114, § 77, against the defendant for having aided a debtor in a fraudulent conveyance or concealment of property. The evidence for plaintiff was taken out before the jury, and at its close the case was reported to the law court to determine whether judgment should be for the defendant, or the cause to stand for trial.

The case appears in the opinion.

B. F. Cleaves, H. T. Waterhouse, and G. L. Emery, for plaintiff.

G. F. and Leroy Haley; C. W. Ross, for defendant.

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

WHITEHOUSE, J. This is an action against Phoebe G. Usher for "knowingly aiding" her son, Alvah C. Usher, in making a fraudulent transfer of his property to her, for the purpose of securing it from creditors. It is based upon the provisions of § 77, c. 114, R. S. 1903.

It is alleged in the declaration that on the 26th day of January, 1899, Alvah C. Usher was indebted to the plaintiff in the sum of

$193; that he then owned and possessed a large quantity of lumber and cord wood and certain live stock, all being situated on the premises owned by his mother, this defendant, and of the value of $530; that on that day he made a fraudulent transfer of this personal property to the defendant for the purpose of securing it from his creditors and of preventing its attachment and seizure on execution, and that the defendant accepted the transfer and thereby knowingly aided him in the accomplishment of that purpose.

The plaintiff thereupon introduces in evidence a bill of sale of certain lumber and live stock from the defendant to George B. Hayes, dated January 26, 1899; but there is no evidence in the case that any attempt was ever made by Alvah C. Usher to transfer any such property to this defendant by any written instrument, and no direct evidence of any sale or transfer of it of any kind from Alvah to his mother.

But assuming that the circumstances would justify an inference of some transaction of that character between Alvah and his mother, another obstacle is encountered which seems to be insuperable. There is no competent evidence in the case to show that Alvah C. Usher ever owned any of the property transferred to Hayes. It is not in controversy that the lumber in question was cut on the land of the defendant, that Alvah C. Usher conducted the lumbering operation, and sold a portion of the lumber; but whether in so doing he was acting as the agent of his mother, or whether he had contracted with her to cut the lumber upon shares, and sold his portion of it, the evidence fails to show.

The plaintiff contends, however, that Alvah made certain declarations in the Municipal Court of Biddeford, in February, 1899, in the presence of this defendant, which ought to be accepted as competent evidence and sufficient proof that he was the owner of this property.

It appears that although in January, 1899, the plaintiff recovered judgment against Alvah C. Usher for the amount of his debt, he immediately afterwards brought suit against this defendant for the same cause of action in the Municipal Court of Biddeford, seeking to hold her directly responsible for the amount of his claim. The plaintiff now says that in the trial of that case in February, 1899,

Alvah C. Usher testified "that he owned that wood and bought it of his mother and paid for it by the cord, and that it was his, and that his mother was not holden for a thing that went in there;" and that his mother, this defendant, was present in court at the time and made no denial of these statements made by her son. The plaintiff claims that this was an admission on the part of the defendant arising from her silence and acquiescence.

In relation to this principle of evidence, Chief Justice Shaw said, in *Com.* v. *Kenney*, 12 Met. 235, "If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the *reply*, because it is the act of the party, who will not be presumed to admit anything affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the *declaration*, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it." These observations were made in a case that arose before the passage of the statutes allowing parties to be witnesses, but to the extent above quoted they are equally applicable at the present time. In "The Encyclopædia of Evidence," Vol. 1, pages 376 and 377 (Camp. 1902), it is said: "Before the silence of a party can be taken as an admission of what is said, it must appear . . . that the fact admitted or the inference to be drawn from his silence, would be material to the issue."

In *Blanchard* v. *Hodgkins*, 62 Maine, 119, it appeared that in a hearing before a referee involving the same subject matter, witnesses for the plaintiff had given testimony to establish a bargain different from that set up by the defendant before the jury, and that the

defendant himself was also a witness at the hearing before the referee and did not contradict the testimony then given by the witness for the plaintiff. Evidence of these facts was deemed competent to go to the jury as tending to show an implied admission on the part of the defendant that the bargain was as stated by the witnesses before the referee. It will be observed, however, that the defendant was himself a witness before the referee and had an opportunity to deny the testimony of the witnesses against him. Furthermore the testimony was unquestionably material to the issue before the referee, and the inference from the defendant's silence respecting it was material to the issue before the jury.

In the case at bar the evidence entirely fails to show what the issue was at the trial in the Biddeford Municipal Court. Whether the plaintiff sought to hold the defendant responsible for his debt on an original or collateral undertaking, or upon any ground involving an inquiry into the ownership of the personal property in question, does not appear. There is no evidence to show that the alleged declaration of Alvah C. Usher that he was the owner of the property had any relevancy to the issue on trial before the court. It does not appear that the defendant heard these declarations or that she appeared on the stand as a witness. In any event she was not called upon to go upon the stand to contradict testimony which was not material to the issue on trial in the case against her. The defendant's failure to do so under the circumstances disclosed by the evidence, cannot be deemed an admission by silence and acquiescence of the truth of the declarations. They were not competent evidence in this action to prove that Alvah C. Usher was the owner of the property alleged to have been fraudulently transferred. There being no other proof of it, the entry must be,

Judgment for the defendant.

ROBERT COSGROVE *vs.* KENNEBEC LIGHT AND HEAT COMPANY.

Kennebec. Opinion March 11, 1904.

Negligence, defect in machinery not proven. *Contributory negligence,* of plaintiff.

1. Negligence on the part of the plaintiff that is the proximate cause of the injury will preclude an action to recover damages for the injury.

2. In an action by the plaintiff, a night engineer in the service of the Oakland Mfg. Co., to recover damages against the Kennebec Light & Heat Co. for injuries sustained by him as the result of bringing his right hand in contact with an electric light wire in the fire-room of the Oakland Mfg. Co., it appeared that the dangerous condition of the electric cord was caused by the breaking down of the insulation that separates the primary and secondary wires in the transformer at the defendant's electric station, whereby the entire high voltage of the primary current was transmitted through the secondary wires which supplied the incandescent lights in the fire-room of the Oakland Co., where the plaintiff was employed. It further appeared, however, that this transformer was purchased from a reputable house, that it was of a standard pattern and approved design, and that it had not previously shown any indications of breaking down.

Held; that under these circumstances the mere fact of the burning out of the defendant's transformer was wholly insufficient to establish the charge of negligence, or breach of duty, on the part of the defendant company.

3. It further appeared that two hours before the injury, Higgins, the day engineer, informed the plaintiff that there was trouble with the wires and that he had received a shock from the button controlling the light, and warned him not *to touch* it; but the plaintiff contended that he was induced by the assurances of the defendant's station agent, Berry, and by the nature of foreman Soule's telephone communication, to believe that the danger existing when Higgins received a shock from the button had been obviated, and that at the time of the accident he was following the instructions of Berry to "draw the light in where it belonged under the apron of the boilers."

Held; On a motion to set aside a verdict for the plaintiff, that his testimony in regard to the time and substance of the conversation by telephone with foreman Soule is so strongly discredited by the circumstances and its own inherent improbability, as well as by the great weight of positive evidence against it, that it cannot be deemed sufficient to support a finding that the plaintiff was misled or induced to relax any prudence or vigilance respecting the electric wires in the fire-room by reason of his conversation over the telephone with foreman Soule.

4. It further appeared that if the plaintiff was directed by station agent Berry to "tie the lamp under the apron where he wanted it" he performed the undertaking with due regard to the warnings he had received; he attached a string to the electric cord, drew the lamp into the desired position, tied the other end of the string around the pipe and fully completed the task without accident or injury of any kind. The conclusion was, therefore, deemed irresistible that after the plaintiff had finished his task of tying the lamp under the apron and as he was about to descend from the ladder, he unnecessarily and thoughtlessly grasped the electric cord and thereby received the shock and injury of which he complains. It was accordingly

Held; that a want of due care on the part of the plaintiff himself was the proximate cause of his injury, and that the verdict was clearly erroneous.

Motion for new trial by defendant. Motion sustained. New trial granted.

This was an action on the case to recover damages for injuries received by the plaintiff on the 18th day of February, 1901, by reason of his right hand being burned on an electric wire in the Oakland Manufacturing Company's shop but supplied with electricity from the defendant company's station, and sustaining a compound fracture of the collar bone as he fell after being burned. It was claimed that these injuries were caused through the negligence of the defendant company.

The verdict was for the plaintiff in the sum of $1,555.

The case appears in the opinion.

Geo. W. Heselton, for plaintiff.

Orville D. Baker, for defendant.

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

WHITEHOUSE, J. The plaintiff, a night engineer in the service of the Oakland Manufacturing Company of Gardiner, recovered a verdict of $1,555 against the Kennebec Light and Heat Company for injuries sustained by him as the result of bringing his right hand in contact with an electric light wire in the fire-room of the Oakland Company. The case comes to this court on motion to set aside the verdict as against the evidence.

It is not in controversy that the electric lights for the engine house

of the Oakland Company were furnished by the defendant company, and the wires hung in the pump-room and the fire-room substantially as required by the agents of the Oakland Company. The electric cord or wire in the fire-room, in connection with which the accident occurred, was suspended from the ceiling, and when the cord was plumb the light was about five and a half feet from the steam gauges in front of the boilers, and eight or nine feet from the floor. The apron or smoke flue projected about four feet and a half over the front of the boilers. For the purpose of bringing the light nearer the steam gauges, the electric cord was drawn in from its vertical line and "triced" under this apron by the use of twine; and it had been allowed to remain in that situation until it became detached a short time before the accident. The wires for these lights came in over the boilers from the defendant's electric light station, a few rods distant. The transformer, which reduced the high voltage current and transmitted the low voltage through these secondary lighting wires to the incandescent lamps, was also located in the electric station.

In the afternoon of February 18, 1901, the plaintiff came at the usual hour of five o'clock to commence his work as night engineer, relieving Mr. Higgins, the day engineer, of his duties. He testifies that Higgins then said to him: "'Robert, I wouldn't turn that button there that gives us the light in the boiler-room, for I got a shock off of it there to-day. It went right up my arm and most knocked me down on the floor.' Says he, 'I wouldn't touch that button to turn the light on or off.'" He further states that Higgins told him to inform Berry, the defendant's agent in charge of the electric station, that his transformer was burning out; and that thereupon he and Higgins went over to the station and he saw the transformer smoking. A few minutes later, about quarter past five, the plaintiff says he telephoned Mr. Soule, the defendant's foreman in Gardiner, that Higgins asked him to tell Soule that his transformer was burning out, and that Soule replied, "All right." About 5.30 or 5.40 P. M. he says he went over to the electric station again and told Berry that his transformer was burning out, that it was smoking on the wall then, and that the lights were "acting bad;" that Berry replied that he would come in and see to them after he got his

machines going; that about an hour later Berry came into the boiler-room with rubber gloves on his hands and rubber shoes on, and went up on top of the boilers, examined the wires, cut off a wire used by the brick-layers but not then in use, and said to him: "Your lights will go all right now. . . . I will go out and turn the current on, the lights on, and you draw that light in there where it belongs," and the plaintiff said all right, he would. The plaintiff then explains the accident as follows: "I immediately got the ladder, put it up to the boiler front. While I was in the act of going up the ladder, the lights came on. The boy was at the foot of the ladder with the lantern. I was in the act of tying the string around the wire of the lamp, when my right hand came in contact with the wire and I got a shock. It made me jump and this hand came against the boiler front which formed a complete circuit through my body." The hand was so burned that it was necessary to amputate one of the fingers, and by falling from the ladder the plaintiff sustained a fracture of the collar bone.

Mr. Higgins, called as a witness for the plaintiff, states that when he told the plaintiff that he received a shock from the button that afternoon, he added, "if you don't believe it, you try it;" and the language of the plaintiff's reply was: "To hell with it! I won't touch it; I don't like the stuff." In answer to the special inquiry, "What did you say to him in the way of advice as to handling or not handling the wires, Higgins testifies: "I told him I wouldn't touch it if I was him; gave him advice, that's all."

The plaintiff's son, Ralph C. Cosgrove, sixteen years of age, who stood at the foot of the ladder at the time of the accident, gives a version of it materially different from that of the plaintiff himself. He states that his father waited on the ladder until the electric light was turned on by Mr. Berry; that he tied one end of the string around the electric cord, drew the light in under the apron and tied the other end of the string around a pipe in front of the boiler to hold the light where he wanted it; that in doing this he did not take hold of the electric cord with his hands at all; that the next thing he saw, his father was hung on the wire with one hand against the face of the boiler and the other on the wire about a foot above the lamp.

The reasonable inference from this testimony that the plaintiff thoughtlessly and carelessly took hold of the electric cord with his hand after he had completed the act of tying it under the apron, appears to be confirmed to some extent by the testimony of Dr. Giddings, also a witness for the plaintiff, who states that the tissues were burned and scarred on the inside of the thumb and across the palm of the hand.

It satisfactorily appears from all the evidence, including the subsequent investigations, that the dangerous condition of the electric cord in the fire-room was caused by the breaking down of the insulation that separates the primary and secondary wires in the transformer at the defendant's electric station, whereby the entire voltage of the primary current was enabled to pass into the secondary wire which supplied the lights in the fire-room. It is not in controversy, however, that this transformer was purchased from a reputable concern, that it was of a standard pattern and approved design, and that it had not previously shown any indications of breaking down. It is not seriously contended, therefore, on the part of the plaintiff that any negligence or breach of duty on the part of the defendant company is established by the mere fact of the burning out of this transformer. But the plaintiff insists that notwithstanding the warning and advice given him by Higgins at five o'clock that afternoon, he was induced by the assurance of Berry after the investigation made with the rubber gloves and by the nature of Soule's telephone message, to believe that the danger existing at the time Higgins received a shock from the button, had been obviated; that at the time of the accident he was following the instructions of Berry to "draw the light in where it belonged," under the apron of the boilers, and that he was in the exercise of reasonable care in so doing when the accident happened.

But without deciding whether the testimony introduced by the plaintiff himself, in connection with the testimony of his son, Ralph C. Cosgrove, authorized the jury to find that the injury was sustained by the plaintiff while following the alleged instructions of Berry to "tie the cord under where it belonged," it is proper to consider whether upon all the evidence in the case the jury were

warranted in finding that the plaintiff's account of his injury was a credible and reliable one, for the defendant earnestly contends that the plaintiff's version is distorted and erroneous in regard to the most material facts and circumstances connected with the accident.

With regard to the telephone message sent by the plaintiff to Mr. Soule, the defendant's foreman, it is conceded that the plaintiff telephoned to him but once that evening, and Soule testifies that he distinctly remembers that it was not at quarter past five o'clock as claimed by the plaintiff, but after supper between seven and seven-ten P. M. In this he is corroborated by Mrs. Morrison, his wife's mother, who was visiting at his house at the time. She states that supper was finished before the telephone call came. Soule states that the plaintiff telephoned him that there was "some trouble with the wires in the fire-room;" he didn't know the nature of it, but he was "getting a shock off of the button." Soule says he replied, "be careful, Robert, and I will come right down." Mrs. Morrison says she "heard them talking about there being trouble and heard Mr. Soule say at the close, 'be careful, Bob.'" She distinctly recalled that part of the conversation because she learned from Mr. Soule the same evening that Mr. Cosgrove had been hurt. Thereupon Mr. Soule says he put on his coat and started for the station, going by the way of the post-office, but before arriving at the station he learned of the plaintiff's injury.

The plaintiff's story in its most essential particulars is also emphatically contradicted by Mr. Berry, the defendant's station agent. His testimony corroborates Mr. Soule and Mrs. Morrison as to the time when the plaintiff telephoned to Soule, and shows that he and not Higgins directed the message to be sent. He states that he didn't see any smoke issuing from the transformer, and was unable to discover by his examination in the fire-room that the wire was grounded at any point; that after turning on the current again the light seemed to be shining fairly well, but not quite as brightly as usual; that he went up on the ladder himself and tied the string around the electric cord, and that the plaintiff only took hold of the string and drew the cord under the apron, tying that end of the string around the pipe; that when the plaintiff drew the wire against

the apron a spark was emitted, and he told the plaintiff not to touch it, to keep away from it and telephone Mr. Soule, and that when he came back again the plaintiff told him Soule was coming down; that the plaintiff in the mean time had tied the lamp over nearer the gauge and was then holding the lamp with one hand and wiping it with the other, and that he then told the plaintiff a second time not to touch the wire, and that "if he took hold of it he would never let go." A few minutes later he learned from Ralph that the plaintiff had received 'an awful shock," and then reminded the boy that he heard him warn his father to let the wire alone.

With reference to the testimony of Berry, Higgins makes the important statement that seven or eight months before this suit was brought, and before there was any claim for damages on the part of the plaintiff, or any discussion in regard to the question of liability, Berry stated to him all the facts and circumstances connected with the accident in precise accordance with the version given by him in his testimony before the court. Higgins makes the further significant statement that when the plaintiff gave him an account of the accident soon after it occurred, he did not then claim that he received the injury in consequence of following Berry's directions to tie the lamp in under the apron, or that Berry was in any other way responsible for the accident.

The plaintiff admits that Higgins told him to give notice to Berry and not Soule, of the trouble with the electric lights. Berry made an effort to discover and remedy the difficulty, but when he saw the electric spark flash from the contact of the wire with the apron of the boiler, he evidently did not consider the result of his effort entirely satisfactory. He accordingly decided to have notice sent to the foreman, Mr. Soule, and requested the plaintiff to give the notice by telephone. This seems reasonable and probable, and is in entire harmony with the order of events stated by Berry and Soule.

Again, when Soule was informed by the plaintiff through the telephone that his "transformer was burning out," it does not seem reasonable or credible that Soule's only reply was "All right." He knew what the burning out of a transformer indicated, and it is highly reasonable and probable that he would give some direction or

some assurance of his personal attention to the matter. He says he did, and it is not disputed that he did in fact immediately start for the station. But assuming that the reply was "All right" and nothing more, it is still inconceivable that the plaintiff, with the general knowledge which he undoubtedly had, that the "burning out" of a transformer, with a shock from an electric button, must indicate a dangerous condition of the wires, could possibly have understood the words "All right" to signify anything more than that the message was understood and the matter would receive attention.

The testimony of the plaintiff in regard to the time and substance of the conversation by telephone with Mr. Soule is thus so strongly discredited by the circumstances and its own inherent improbability, as well as by the great weight of positive evidence against it, that it cannot be deemed sufficient to support a finding that the plaintiff was misled or induced to relax any prudence or vigilance respecting the electric wires in the fire-room by reason of his conversation with Mr. Soule. Even if he did not understand that he was expressly cautioned by Soule to be "careful," the plaintiff had already been sufficiently admonished by Higgins and by his own observation of the transformer, to impress upon him the necessity of exercising care and caution in handling the lamp and the electric cord. He admits that he was promptly informed when he came on duty that afternoon that there was trouble with the wires and that Higgins had received a shock from the button controlling the light so severe that it "nearly knocked him down;" and his profanely emphatic reply to the effect that he didn't like the stuff and wouldn't touch it, shows that he appreciated the warning and realized the danger. He was a competent engineer of good general intelligence and had had several years of practical observation and experience in the use of electricity in that room. He must have understood that the warning of Higgins was intended to include the wire as well as the button, for if the button was dangerous the wire was obviously more so. He saw that Berry wore rubber gloves when he made his examination of the wires, and according to the testimony of Berry was repeatedly and impressively warned by him not to take hold of the wires.

Assuming then that the plaintiff, as he claims, was told by Berry

to tie the lamp under the apron where he wanted it, it would seem that he performed the undertaking with due regard to the warnings he had received, for it clearly and distinctly appears from the testimony of the son that the plaintiff tied the string around the electric cord, drew it into the desired position, tied the other end of the string around the pipe, and fully completed the task without injury or accident of any kind. It was not until all this had been done that he looked up and saw that his father had hold of the wire with one hand and the other hand against the boiler. The conclusion is therefore irresistible that for some unexplained reason, after the plaintiff had finished his task, and as he was about to descend from the ladder, he unnecessarily and thoughtlessly or recklessly grasped the electric cord and thereby received the shock and the injury of which he complains.

It is accordingly the opinion of the court that a want of due care on the part of the plaintiff himself was the proximate cause of the accident and that the verdict is clearly erroneous.

Motion sustained. Verdict set aside. New trial granted.

NELLIE C. MORIARTY *vs.* CITY OF LEWISTON.

Androscoggin. Opinion March 12, 1904.

Way, to be safe and convenient for travelers. Duty of towns defined. *R. S. 1903, c. 23, §§ 56, 76.*

The only standard of duty fixed by the statute relating to the maintenance of highways, and the only test of liability created by it, will be found in the requirement that the ways shall be "safe and convenient for travelers."

A condition of absolute safety beyond the possibility of an accident is obviously unattainable; a condition of reasonable safety only is required in view of the circumstances of each particular case.

The question is not whether in a given case the town used ordinary care and diligence in the construction and repair of the way, but whether as a result the way as constructed and maintained was in fact reasonably safe and convenient for travelers.

The way must be safe and convenient in view of such casualties as might reasonably be expected to happen to travelers; and a defect such as the statute contemplates must be something which unlawfully impairs the reasonable safety and convenience of the way.

Held; that a plank set edgewise across a brick sidewalk for the purpose of securing the brick in position, and rising vertically three inches above the level of the brick pavement of the walk, on a prominent residential street in the City of Lewiston, unlawfully impaired the reasonable safety and convenience of the walk, and rendered the city liable in damages to a traveler who stumbled over it while walking in the exercise of ordinary care.

Agreed statement. Case remanded for assessment of damages by the jury.

This was an action to recover damages for an injury to the plaintiff, on the evening of March 3, 1902, while traveling along Elm Street toward Oak Street in the City of Lewiston, caused by her feet striking against a plank laid crosswise of the Elm Street sidewalk at its junction with a private driveway,—the plank being placed there edgewise or perpendicularly for the purpose of retaining in place the bricks composing a stretch of sidewalk whose continuation was of gravel. The plank itself projected above the surface of the bricks

from three inches at the traveled part of the walk, gradually declining to a height of one and one-half inches at the curb-stone. The condition of the plank was the alleged defect in this case.

The defense admitted notice; the injury; and the condition of the sidewalk at the time of the injury; but contended that the condition complained of, the alleged defective plank, did not constitute a defect within the meaning of the statute.

A. L. Kavanagh and W. H. Newell, for plaintiff.

Geo. S. McCarthy, for defendant.

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

WHITEHOUSE, J. This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff by reason of the defective condition of a sidewalk, which the defendant city was obliged by law to maintain and keep in repair so that it should be safe and convenient for travelers. The case comes to this court upon a statement of facts submitted by agreement of the parties, with a stipulation that "if the law court shall find that the plaintiff is entitled to recover, the case is to be remanded and damages assessed at nisi prius by the jury."

The condition of the sidewalk alleged to be defective and unsafe is described in the plaintiff's declaration, and in the agreed statement of the parties, as follows: "A plank was placed and suffered to remain edgewise across the sidewalk on the southerly side of Elm Street in said Lewiston, so as to present a perpendicular face toward College Street, which runs at right angles with said Elm Street, from one and one-half to three inches above the level of the brick paving of said walk; and said plank at the traveled part of said walk, viz: at a knot two and one-half feet from the curbing, presented a perpendicular face above the surface of said sidewalk of three inches, and gradually sloping to one and one-half inches at curbing, the said plank being placed at the westerly end of a stretch of brick sidewalk for the purpose of retaining the brick in front of a two and one-half story house numbered 83 on said Elm Street,

owned by one Ralph Wilkinson, and at the line where the land of Asa and Fred Donnell borders that of said Wilkinson, and was not at the junction of any cross-walk or street, but at the junction of the sidewalk and driveway adjoining, as shown by plan hereto annexed."

About a quarter before nine o'clock on the evening of March 3, 1902, the plaintiff was walking along on the brick sidewalk in question, struck her foot against the vertical face of the plank, and fell violently to the ground, receiving the injuries described in her writ. It further appears from the agreed statement that "on the evening of the accident there was no moon, that the sky was clear, but that the atmosphere was heavy with a haze; and that there was no artificial light at the place of the accident." It is also admitted that the plaintiff "had no notice of the condition of the sidewalk previous to the time of the injury," and that she was in the exercise of ordinary care at that time. Whether or not the plank in question, set edgewise across the sidewalk and presenting a vertical face three inches above the level of the brick paving, was such an obstruction to public travel upon it that the walk could not be deemed reasonably safe and convenient within the meaning of the statute, is the only question presented by the agreed statement for the determination of this court.

Section 56 of chapter 23, R. S. (1903), declares that "highways . . . legally established, shall be opened and kept in repair so as to be safe and convenient for travelers," etc. Section 76 of the same chapter provides that "whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair . . . in any highway . . . may recover for the same in a special action on the case."

The only standard of duty fixed by this requirement of the statute, and the only test of liability created by it, is that the way shall be "safe and convenient for travelers." But in the practical application of the statute to the highways of the state it has uniformly been held by this court that the words safe and convenient are not to be construed to mean entirely and absolutely safe and convenient but reasonably safe and convenient in view of the circumstances of each par-

ticular case. A condition of perfect safety, beyond the possibility of an accident, is of course unattainable; but a condition of reasonable safety is required. The question is not whether in a given case the town used ordinary care and diligence in the construction and repair of the way; but whether as a result the way as constructed and maintained was in fact reasonably safe and convenient for travelers. If through structural defects or want of repair the way is not reasonably safe and convenient and an injury is received through the defect alone, the sufferer is entitled to recover upon the conditions specified in the statute. It is immaterial whether the defect arose from negligence on the part of town officers or from causes which could not be controlled by the exercise of ordinary care and diligence on their part.

It was obviously impracticable and impossible for the legislature to prescribe and define all of the structural conditions and the precise state of repair required to make a highway safe and convenient. The methods of constructing and repairing public ways are necessarily determined in the first instance by the officers of the town to whom that duty is committed; but whether the result fulfills the requirements of the statute is a question which must ultimately be passed upon by the court and jury, whenever it arises. "What obstructions or other inconveniences will render a highway defective so as to make the town liable, if an injury is thereby occasioned, is to a considerable extent a matter of opinion or judgment, and it is one in relation to which persons of ordinarily good judgment are liable to differ." *Weeks* v. *Parsonsfield*, 65 Maine, 286. The location of the street, the amount of travel to be accommodated, and such other circumstances as may bear upon the question of reasonable safety in that place, must all be considered in reaching a conclusion. The way must be safe and convenient "in view of such casualties as might reasonably be expected to happen to travelers." *Perkins* v. *Fayette*, 68 Maine, 152, 154, 28 Am. Rep. 84; *Morse* v. *Belfast*, 77 Maine, 44. "A defect such as the statute contemplates, must be something which unlawfully impairs the reasonable safety and convenience of the way." *Bartlett* v. *Kittery*, 68 Maine 360.

In *Jones* v. *Deering*, 94 Maine, 165, speaking of the grade stake alleged to be a defect in that case, the court, acting with jury

powers, say in the opinion: "That it was dangerous is apparent from the injury it inflicted upon the plaintiff." The fact that a traveler sustains an injury upon a public way is competent to be considered in determining the question of the reasonable safety of the way, but it is obviously insufficient to establish the proposition that the way was not reasonably safe. The injury may have been caused by the traveler's own carelessness, or may have been the result of a "simple and unfortunate accident," as in *Haggerty* v. *Lewiston*, 95 Maine, 374, and not of any defect or want of repair in the way.

In the case at bar it is the opinion of the court that the plank complained of, rising vertically three inches above the level of the brick sidewalk upon which travelers were expected to travel in the night time as well as in the day time, did "unlawfully impair the reasonable safety and convenience of the walk." The fact that the plaintiff is conceded to have struck her foot against the plank and stumbled over it while walking in the exercise of ordinary care, is not only material but highly significant upon the question of the reasonable safety of the walk. It might reasonably have been anticipated that pedestrians having no previous knowledge of the condition of this plank would assume, as they would have a right to assume, that an apparently well constructed brick sidewalk on a prominent residential street would have a continuously smooth and level surface free from any obstruction of that height and character.

The facts in *Morgan* v. *Lewiston*, 91 Maine, 566, differed materially from those at bar. In that case the defect complained of was that the sidewalks at the junction of Main and Park Streets were not on the same level. The sidewalk on Main Street was of brick with a plank set upon edge at the outside of the walk, at the junction, to hold the brick in position, the top of the plank being flush with the surface of the brick walk. The Park Street walk was of gravel, and at the junction was lower than the surface of the brick walk, the difference in level varying from one to five inches at different points in the width of the walk. The plaintiff in that case was walking on the gravel sidewalk on Park Street and stumbled against the plank the upper edge of which was level with the surface of the brick walk on Main Street. If, like the plaintiff in the case at bar, she had been

walking on the brick sidewalk, she would have encountered no obstruction. The court held that it would be "unreasonable and impracticable" to require cities and towns to construct all of their sidewalks upon exactly the same level at the junction of rectangular streets.

In *Haggerty* v. *Lewiston*, 95 Maine, supra, the alleged defect was a shallow gutter which was constructed across the sidewalk to carry off the water from the conductor on the front of the building. The course of brick constituting the walk on one side of the gutter was about half an inch higher than the bricks in the gutter, and "about three-fourths of an inch or an inch" higher than the corresponding course of brick on the opposite side of the gutter. Thus the only vertical obstruction was about half an inch in height, and this condition was structural and not the result of a neglect to repair. It was held that such a slight inequality in the surface of the walk could not consistently be declared a defect.

For illustrations of obstructions and imperfections in sidewalks similar to the one at bar, which have been held sufficient to render the walk "unsafe" within the meaning of the law, see *George* v. *Haverhill*, 110 Mass. 506; *Dowd* v. *Chicopee*, 116 Mass. 93; *Marvin* v. *New Bedford*, 158 Mass. 464; *Sawyer* v. *Newburyport*, 157 Mass. 430; *Redford* v. *Woburn*, 176 Mass. 520; *Lamb* v. *Worcester*, 177 Mass. 82, and *Jones* v. *Deering*, 94 Maine, 165.

It is the opinion of the court that the defective condition of the sidewalk was the proximate cause of the plaintiff's injury and that she is accordingly entitled to recover.

Case remanded; damages to be assessed by the jury.

OAKLAND MANUFACTURING COMPANY

vs.

DAVID LEMIEUX AND LAND AND BUILDINGS.

Androscoggin. Opinion March 14, 1904.

Attachment. Time, when Sunday excluded. *Lien Claim. R. S. (1883), c. 32, § 9; c 91, § 34. Stat. 1897, c. 232, § 1.*

In an action to enforce a lien upon land and buildings for materials furnished in the construction of the buildings, the attachment must be made within ninety days after the materials are furnished.

Sundays are included in the computation of time allowed in which to make the attachment.

When the last of the ninety days falls upon Sunday, an attachment upon the following Monday is not seasonably made.

Exceptions by plaintiff. Overruled.

The case is stated in the opinion.

C. A. Knight, for plaintiff.

J. G. Chabot, for defendant; *D. J. McGillicuddy and F. A. Morey,* for land and buildings.

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

POWERS, J. This is an action of assumpsit to enforce a lien upon land and buildings for materials furnished in the construction of the buildings, heard by the presiding justice who found that the plaintiff had no lien. The last item in the plaintiff's account was furnished on Jan. 12, and the attachment was made ninety-one days thereafter on Monday, April 13, 1903. The attachment must be made within ninety days after the last materials are furnished, c. 232, § 1, P. L. 1897; but it is contended that as the last day of the ninety days fell on Sunday, that day is to be excluded in the computation of time.

The decisions upon this subject are not entirely harmonious. Some courts of high authority sustain the plaintiff's contention. Before the separation of Maine from Massachusetts however, it was decided in *Alderman* v. *Phelps*, 15 Mass. 225, that where the thirty days, during which property attached on mesne process is held subject to execution, expires on Sunday, the lien created by the attachment does not continue through the next day. The court there said: "The statute has limited the lien formed by the attachment on mesne process to thirty days from the rendering of the judgment. It is not for this court to extend the term; nor do we see any reason why the last day of the thirty should be excluded because it happens to be Sunday, rather than any or all of the Sundays during the time limited." That case is closely analogous to the one at bar where the lien is given by the statute to be enforced by attachment "which attachment shall be made within ninety days after the labor is performed or labors or materials furnished." *Alderman* v. *Phelps* has the same force as a decision of this court, and in Massachusetts it has been followed and cited with approval in numerous cases. *Cunningham* v. *Mahan*, 112 Mass. 58; *Cooley* v. *Cook*, 125 Mass. 406; *Haley* v. *Young*, 134 Mass. 364. In *Cooley* v. *Cook*, Gray, C. J., said: "Whenever the time limited by the statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the legislature to exclude them appears manifest." In *Haley* v. *Young*, supra, it was held that, if the last day of the three years limited by the statute for the redemption of land from a mortgage falls on Sunday, a tender of the amount due on the mortgage upon the following day is too late. Field, J., in delivering the opinion of the court said: "It is said that, at common law, when the time for the performance of a contract according to its terms expires on Sunday, a performance on the following Monday is good. *Hammond* v. *Am. Ins. Co.*, 10 Gray, 306. But this rule, whatever may be the extent of it, has not been applied to acts which by statute are required to be done within the time therein limited."

We are satisfied with the rule laid down in these cases. When a statute requires an act to be done within a certain number of days which must include one or more Sundays, if the last day happens to fall on Sunday, no good reason is perceived why that Sunday should be excluded and the others included. It is fair to presume that if the legislature had intended such a result it would have expressed that intention in unmistakable terms, as it expressed its intention in regard to days of grace when they were allowed in this State. R. S. 1883, c. 32, § 9. Nor is it easy to discover why, if the last day of the ninety falls upon Sunday, the creditor should have seventy-eight days in which to commence action and make his attachment, when if it falls upon any other day of the week, he has only seventy-seven. For other cases to the same effect, see *Anonymous*, 2 Hill, 375; *Ex parte Dodge*, 7 Cowen, 147; *People* v. *Luther*, 1 Wend. 42; *Drake* v. *Andrews*, 2 Mich. 203; *Williams* v. *Lane*, 87 Wis. 152.

The plaintiff relies upon a statement in *Cressey* v. *Parks*, 75 Maine, 387, 46 Am. Rep. 406, in support of his position. It is there said that "if one or more Sundays occur within the time, they are counted unless the last day falls on Sunday in which case the act may be done on the next day." That statement must be regarded as having reference to the subject under consideration, namely, the day on which the sale is to be made on a distress for taxes. It was held in that case that whenever the legislature intends Sunday shall be excluded from the days within which an act shall be done, it is done in express terms and never left to implication; that where the distress is made upon Saturday, Sunday is included and the sale must be made on Wednesday, but that where the last day falls upon Sunday, the sale should be made upon the following Monday, because the legislature has specially provided that the property distrained shall be kept four days. As no sale can be made on Sunday and a sale made on Saturday would be to keep the property but three days, it is necessary to exclude Sunday and to make the sale on Monday in order to keep the property the four days required by the statute. The legislative intention to exclude Sunday in such cases is shown by the statute, which does not permit a sale to be made before or after the four days, but only upon the fourth day. Such a case

differs widely from one in which the act may be done upon any day of a long period of time which necessarily includes one or more Sundays. No reference was made to *Alderman* v. *Phelps*, in *Cressey* v. *Parks*, and as the two cases are not in conflict, the somewhat broad statement made in the latter case, which was entirely accurate as applied to the subject under discussion, cannot be considered as impeaching the authority of the earlier case.

In the case before us the attachment was not made within the ninety days as required by statute and the lien was thereby lost.

Exceptions overruled.

INHABITANTS OF VERONA *vs.* STEPHEN D. BRIDGES.

Hancock. Opinion March 16, 1904.

Taxes. Action of Debt, When irregularities no defense. *Practice,* as to exceptions not taken at nisi prius. *R. S. (1883), c. 6, § 175.*

In an action of debt to recover a tax, it is no defense that the collector had not given an official bond.

Questions not duly raised at the trial, and not appearing in the bill of exceptions, will not be considered by the law court.

This was an action of debt for a balance of tax assessed against the defendant for the year 1900.

At the conclusion of the testimony the justice presiding directed the jury to return a verdict for the plaintiff for the sum of one dollar, being the amount claimed; to which ruling the defendant seasonably excepted on the ground that neither the assessors nor collector were shown to have been elected by ballot as required by statute, that it does not appear that the collector gave bond, and for the further reason that the warrant to the collector is insufficient.

The record for the town meeting for the year of 1900 was annexed to the bill of exceptions.

There was no record or other evidence of the election of assessors or collector by ballot, nor of the giving of bond by the collector.

A copy of the warrant to the collector was also annexed.

The action was duly directed in writing by the selectmen and the taxes duly assessed except in the above particulars.

The defendant took exceptions to the rulings and directions of the court.

O. F. Fellows, for plaintiff.

L. B. Deasy, for defendant.

The board that assessed the tax does not appear to have been elected at all by any method. This vitiates the tax. *Jordan* v. *Hopkins*, 85 Maine, 160; *Machiasport* v. *Small*, 77 Maine, 109.

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

PEABODY, J. This is an action of debt to recover the balance of a tax assessed against the defendant for the year 1900.

A verdict for the plaintiff was directed by the presiding justice, and the defendant excepted on the grounds that neither the assessors nor the collector are shown to have been elected by ballot, that it does not appear that the collector gave a bond, and that the warrant to the collector is insufficient.

The first and third grounds of exception are expressly waived by the defendant's counsel.

The second exception does not apply to this action which is brought directly by the town under R. S. (1883), c. 6, § 175. *Rockland* v. *Ulmer*, 87 Maine, 357.

The counsel raises a new point in his brief, namely, that the board of assessors which assessed the tax does not appear to have been elected at all. He relies upon the report of the town meeting introduced in evidence to show the election of a board identical in only two names out of the three with that which assessed the tax; that Whitmore, Bassett and Heath were elected assessors, and Whitmore, Bassett and Delano assessed the tax. *Jordan* v. *Hopkins*, 85 Maine, 159; *Machiasport* v. *Small*, 77 Maine, 109. This seeming defect in the assessment of the tax is not available to the defendant under his bill of exceptions. *Harwood* v. *Siphers*, 70 Maine, 464.

Exceptions overruled.

INHABITANTS OF KNOX *vs.* INHABITANTS OF MONTVILLE.

Waldo. Opinion March 16, 1904.

Pauper. Evidence, Declarations when not res gestae. *R. S.* (*1883*), *c. 24.*

The home which a person must have in a town for five successive years to acquire a pauper settlement therein is equivalent to domicil which depends upon residence and intention.

A person's intention can only be shown by his acts and words, but a mere expression of intent disconnected with any relevant circumstances would be too remote to be admissible as evidence.

A pauper's intention is a question of fact. He may testify himself to it, but his declarations to others can only be received in evidence when accompanied by acts which they explain, so that they will be regarded as a part of acts from which his intention may be inferred.

Exceptions by defendant. Overruled.

Assumpsit for pauper supplies.

The case appears in the opinion.

C. F. Johnson, for plaintiff.

W. P. Thompson and R. F. Dunton, for defendant.

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

PEABODY, J. This is an action brought to recover for pauper supplies, amounting to $327.50, furnished by the plaintiff town of Knox to one James A. Bailey, who, it is claimed, had acquired a pauper settlement in the defendant town of Montville as provided by statute.

The verdict was for the plaintiff.

The case comes to the law court on exceptions filed by the defendant to the ruling of the presiding justice, excluding two questions asked by the defendant's counsel on cross-examination of Mrs. Mamie A. Thompson, a witness called by the plaintiff, namely: "While Mr. Bailey and his wife were stopping at your brother, Burton F.

Foster's, did you hear him say whether or not he intended to return to Bangor?" "While James A. Bailey and his wife were boarding at your house, did you hear James A. Bailey say anything about returning to live in Bangor?"; also to the following ruling of the justice: "I shall limit the testimony to the declarations accompanying the act in coming or going under the decision cited. Now, if she knows what the purpose was, or the declaration of the parties when they came there as a part of the act, I think she may state."

The controversy, as shown by the bill of exceptions, is whether the pauper had abandoned his home in Bangor and intentionally begun to reside in Montville in October, 1879. It appears that at this date he came from Bangor where he stored his goods, to Montville, and boarded with his wife's brother, Burton F. Foster, for about six months, and then boarded with her sister, Mamie A. Thompson, until the spring of 1881 when they moved their household goods from Bangor and commenced keeping house, and continued to reside in Montville until the fall of 1885. If, as claimed by the defendant, the home of the pauper commenced in the spring of 1881, and ended in the fall of 1885, the period would be less than five years.

The answers to the questions excluded, if admissible in evidence, would, it is assumed, tend to prove the time when the pauper's domicil commenced in Montville. The declarations to which the questions related were made while he was boarding in that town.

The case of *Baring* v. *Calais*, 11 Maine, 463, is claimed to be authority in support of the admissibility of declarations, made by the pauper during the condition of residence, disconnected with any distinct acts which would themselves be evidence; but it seems evident that that case simply decided in general that the declarations of the pauper are competent evidence of his intention, and that it was not essential that the declarant should be dead, or that his declarations should be against his interest, but only that they be made under such circumstances as to be parts of the res gestae. The illustrations used and the citations made by the court indicate only that the contemporaneous declarations by a person who does some act, are evidence to explain it. It does not appear under what circumstances the excluded declarations were made, but we must assume that the doc-

trine of that case is in harmony with previous and subsequent decisions in this State. *Gorham* v. *Canton*, 5 Maine, 266, 17 Am. Dec. 231; *Wayne* v. *Greene*, 21 Maine, 357; *Corinth* v. *Lincoln*, 34 Maine, 310; *Richmond* v. *Thomaston*, 38 Maine, 232; *Cornville* v. *Brighton*, 39 Maine, 333; *State* v. *Walker*, 77 Maine, 488; *Etna* v. *Brewer*, 78 Maine, 377.

It was held in *Barnes* v. *Rumford*, 96 Maine, 315: "The true principle upon which such evidence is admissible seems to be that the statement testified to is a verbal act, illustrating, explaining, or interpreting other parts of the transaction; that the declaration is contemporaneous with the principal fact, and so far explains or characterizes it as to be in a just sense a part of it and essential to a complete understanding of it." The same principle is stated in 1 Green. on Ev., § 108.

The home which a person must have in a town for five successive years to acquire a pauper settlement therein is equivalent to domicil which depends upon residence and intention. A person's intention can only be shown by his acts and words, but a mere expression of intent disconnected with any relevant circumstances would be too remote to be admissible as evidence. *Deer Isle* v. *Winterport*, 87 Maine, 37.

The pauper's intention is a question of fact. He could himself testify to it; and his declarations could be received in evidence of it, but only if accompanying acts which they explain, so that they are regarded as a part of acts from which his intention may be inferred.

The rule of limitation to the admission of the pauper's declarations adopted by the presiding justice is properly deduced from the distinction between original and hearsay evidence.

Exceptions overruled.

AUGUSTA STEAM LAUNDRY COMPANY, In Equity,

vs.

HARRY DEBOW.

Kennebec. Opinion March 17, 1904.

Contracts. Restraint of Trade. *Damages,* liquidated. *Equity,* when injury is irreparable. Injunction granted.

Where a party binds himself in a sum certain not to carry on or allow to be carried on any particular kind of business within a certain territory, or within a certain time named, generally the sum mentioned will be regarded as liquidated damages.

To entitle a party to an injunction for the violation of such an agreement, he must show that from some cause the anticipated injury is irreparable.

Such injury is shown to be irreparable when it is admitted that a judgment at law against the defendant would be worthless.

In such case, notwithstanding the damages are liquidated, in the absence of anything in the agreement showing a contrary intention, the obligee has the option to proceed in law or in equity. If he elect the latter course an injunction will be granted.

Bill in equity praying for an injunction. Submitted on agreed statement. Injunction granted.

The case appears in the opinion.

Jos. Williamson and L. A. Burleigh, for plaintiff.

B. F. Maher, for defendant.

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

POWERS, J. This case is reported on the following agreed statement of facts.

"Bill in equity praying that the defendant be perpetually enjoined and commanded by this court absolutely to desist and refrain from going into or carrying on the laundry business in said Augusta, either in his own name or in the name of any other person, or as clerk or agent of any other person, or from going into or carrying on the laun-

dry business in said Augusta in any manner, directly or indirectly, and from all attempts, directly or indirectly, to accomplish said object until the 11th day of June, 1907.

On July 11, 1902, in consideration of the purchase of their laundry business, the defendant and one Guy H. Johnson made a written agreement under seal with the plaintiff as follows:

'And we hereby agree not to engage in the laundry business, together or separately, for five years in Augusta without permission of said company, and further agree that if either of us so engage in said business, the one so engaging shall pay said company one dollar per day for the time so engaged.'

On May 1, 1903, the defendant without the consent of said plaintiff entered into the laundry business on Bridge Street in said Augusta as agent for one H. F. Twombly of Gardiner and has ever since engaged in said business."

It is also admitted that at the time of the commencement of the bill and of the hearing, the plaintiff was engaged in the laundry business at Augusta, and that a judgment for damages against the defendant would be worthless.

The one dollar per day which the defendant agreed to pay, for the time which he was engaged in business in violation of his agreement, must be regarded as liquidated damages. It is not disproportionate to the actual injury which it may well be believed the plaintiff would suffer through the defendant's competition. Another consideration leading to the same conclusion is the difficulty of accurately ascertaining in a case of this kind the amount of the damages sustained. *Maxwell* v. *Allen*, 78 Maine, 32, 57 Am. Rep. 783. And, in general, where a party binds himself in a sum certain not to carry on or allow to be carried on any particular kind of business, within a certain territory, or within a certain time named, the sum mentioned will be regarded as liquidated damages. *Holbrook* v. *Tobey*, 66 Maine, 410, 22 Am. Rep. 581. This being so, it is claimed that the plaintiff has a plain, adequate and complete remedy at law.

The remedy by injunction is an extraordinary one, and should only be applied when the remedy at law is inadequate and inefficient to do justice in the particular case. The plaintiff must show that

from some cause the anticipated injury is irreparable, "that is, not reparable by the recovery of damages in an action at law." *Haskell* v. *Thurston*, 80 Maine, 129. In the present case it is admitted that a judgment at law against the defendant would be worthless. It needs no argument to show that a worthless judgment is not an adequate remedy for a substantial injury; that an action at law, which only leaves the plaintiff poorer by the expense which he incurs in its prosecution, is no reparation for the actual and substantial injury which he has suffered by the defendant's breach of his contract. Such a remedy is no remedy. True, the damages are liquidated and the plaintiff has a right to recover a judgment for them in an action at law, but when it is admitted that the judgment would be worthless, in every just and equitable sense it is a misnomer to call this right a remedy. It is but a stone; the plaintiff asks for bread. The principle that the insolvency of the defendant may make the right of action at law an inadequate and inefficient remedy is recognized in *Haskell* v. *Thurston*, supra, and in the text and cases cited in 10 Ency. Pleading & Practice, 956.

It is claimed that the option is with the defendant to determine whether he would perform the agreement or pay the damages. We do not think so. The object of the agreement was to give to the plaintiff the right to pursue the laundry business in Augusta for the term of five years without competition from the defendant. The defendant agreed to do two things, not to engage in the business, and if he did so engage, to pay the sum named. He has done neither, and his financial condition is such that he cannot be compelled to do the latter. The plaintiff had a right to rely upon each and all of the agreements made with him by the defendant. In the absence of any words showing an intention on the part of the parties to give to the defendant the option of substituting the latter for the former agreement contained in the contract, the plaintiff must be held to have the option to elect upon which agreement he will proceed. *Ropes* v. *Upton*, 125 Mass. 258, is very similar to the case at bar. The defendant there had agreed under a forfeiture of one thousand dollars to sell his business and its good-will to the plaintiff, and not thereafter to engage in the business in the town of Danvers. He did

engage in business and an injunction was granted notwithstanding the sum named was held to be liquidated damages, the court saying that there was abundant authority to show that the distinction contended for was not regarded by courts of equity. The fact that the defendant is acting as agent of another is immaterial. *Emery* v. *Bradley*, 88 Maine, 357.

The result is that the bill must be sustained and an injunction granted as therein prayed for.

Decree accordingly and for costs against the defendant.

FRED W. SPENCER, In Equity,

vs.

ISADORE G. KIMBALL, and others.

Kennebec. Opinion March 18, 1904.

Will. Devise of Life Estate and Remainder. Merger. Power of Sale by Life Tenant inoperative. *Mortgage.*

The devise of a life estate coupled with a devise of the residue and remainder to the same beneficiary, there being no intervening estate, merges the two estates and vests an absolute fee in the devisee.

A power of sale given to the devisee of the life estate becomes inoperative as a power from the testatrix by such merger, and a mortgage given by the devisee in his individual right will be upheld.

The will further provided that in case of a sale, one-third of the proceeds of such sale should be added to a trust fund created for another beneficiary. *Held;* that such beneficiary's interest is contingent upon a sale, and that the mortgage before foreclosure cannot be regarded as a sale under the power.

The money loaned upon the mortgage is not the proceeds of a sale to which the terms of the will apply.

Held; that the trust, if any, attached only to the proceeds of the sale, and not to the real estate.

On report. Bill for construction of will and foreclosure of mortgage. Bill sustained.

Bill in equity against Isadore G. Kimball, individually and as executrix and trustee of the will of Harriet H. Greenlief, late of Augusta; Harry W. Kimball and M. Kimball, minors, Charles H. Greenlief, Minnie M. Greenlief and Lendall Titcomb, trustee of said Charles, praying for a construction of the will of said Harriet H. Greenlief and also a decree of foreclosure of a mortgage given by Isadore G. Kimball to the plaintiff.

The principal provisions of the will, omitting certain specific legacies, are as follows:—

"Be it remembered, that I, Harriet H. Greenlief of Augusta in the County of Kennebec in the State of Maine, being of sound and disposing mind and memory, but mindful of the uncertainty of this life, do make, publish and declare this my last will and testament, hereby revoking all former wills by me made. After the payment of my just debts, funeral charges and expenses of administration, I dispose of my estate as follows: . . . I direct that all my debts, funeral expenses and charges of administration be paid out of my funds now deposited in the savings bank. I give and bequeath to my daughter Isadore G. Kimball one-half of all money I have in the savings bank remaining after payment of my debts, funeral charges and expenses of administration in trust during the life of my son Charles H. Greenlief to keep the same in the savings bank and to pay therefrom as occasion may require not exceeding two dollars a week toward the board or other necessary living expenses of my said son Charles H. Greenlief.

"I give to my said daughter Isadore G. Kimball the use of my house and lot of land on which it stands in said Augusta where I live during her life or until such time as she shall deem it best to sell the same, and I authorize her to sell and convey said real estate at any time at her discretion.

"In case she shall sell said real estate one-third of the proceeds of such sale is to be added to the trust fund aforesaid to be deposited in the savings bank as required of said trust fund, to become a part of said trust fund as above provided in favor of my said son Charles H. Greenlief.

"All the rest, residue and remainder of all my property and estate

both real and personal, I give, bequeath and devise unto my said daughter Isadore G. Kimball if she shall survive me, otherwise unto the said Carrie M. Kimball and Henry W. Kimball if both living in equal shares, if not both living at my decease, then all to the survivor of them. . . ." Dated Feby. 26, 1900.

The bill alleges that said Harriet H. Greenlief died on the first day of March, 1900, leaving a will which was duly proved and allowed by the Probate Court for Kennebec County; that on the 26th day of March, 1900, said Isadore G. Kimball was duly appointed and qualified as executrix of said will; that on the 23d day of December, 1901, said Lendall Titcomb was duly appointed trustee of Charles H. Greenlief under said will; that on the 25th day of May, 1901, said Isadore G. Kimball conveyed the house and lot described in the will to said Fred W. Spencer in mortgage to secure the loan of $700, payable in one year from that date with interest at the rate of twelve per cent per annum, payable annually until paid; that nothing has been paid upon the debt secured by mortgage, and that the same is long over due.

The prayer of the bill is as follows:

First. That it may be ordered and decreed unless the amount now due upon the note and debt secured by said mortgage shall be paid to the plaintiff by said Isadore G. Kimball within such reasonable time as the court may appoint, the defendants shall be forever foreclosed from all right of redeeming said premises.

Second. That the court will construe and interpret the provisions of said will and particularly determine what interest in said real estate said Isadore G. Kimball received thereby.

Third. That unless the amount now due on said note and debt shall be paid by the defendants to the plaintiff within such reasonable time as the court may appoint, that such premises may be ordered sold at public auction and the proceeds thereof applied as the court may determine.

The defense to the bill as set up by the answers is:—

"Whatever obligations were created or assumed by the mortgage set forth in complainant's bill, if true as alleged, are binding against Isadore G. Kimball alone, and the complainant has his plain and

adequate remedy at law, either by suit and attachment, or by foreclosure, and to such suit or foreclosure this respondent would not be a proper party. That such alleged mortgage was not a sale in contemplation of the authority given in said will, but a security given by the Isadore G. Kimball for the payment of her personal debt not contemplated by the will. But if the court is of the opinion that the alleged mortgage is a species of sale, inchoate or contingent, authorized by the will, and endangering the whole property, then this respondent asks that the court order a sale of said property and that one-third of the proceeds including the said sum of seven hundred dollars be given to Charles H. Greenlief."

The cause came on to be heard on bill, answer and replication, and it appearing to the justice presiding that questions of law were involved of sufficient importance and doubt to justify the same, by consent of the parties, the cause was reported to the law court for hearing and decision at the December term, 1903.

Jos. Williamson and L. A. Burleigh, for plaintiff.

S. and L. Titcomb, for defendants.

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

STROUT, J. This bill asks a construction of the will of Harriet H. Greenlief, so far as to determine what interest in real estate was thereby given to Isadore G. Kimball, and also a decree of foreclosure of a mortgage given by Mrs. Kimball to the complainant.

By one clause in the will the testatrix gave to her daughter, Isadore G. Kimball, "the use of my house and lot of land on which it stands in said Augusta where I live, during her life, or until such time as she shall deem it best to sell the same, and I authorize her to sell and convey said real estate at any time at her discretion." The next clause is, "in case she shall sell said real estate, one-third of the proceeds of such sale is to be added to the trust fund," before provided for her son, Charles H. Greenlief.

The succeeding clause is, "all the rest, residue and remainder of all my property and estate, both real and personal, I give, bequeath

and devise unto my said daughter Isadore G. Kimball, if she shall survive me," otherwise to her grandchildren.

The daughter Isadore did survive her mother. There being no intervening estate, the devise to her of a life estate, coupled with a devise of the reversion, merged the two estates and vested in her an absolute fee, and rendered the authority to sell given in the devise of the life estate inoperative as a power from the testatrix. *Davis* v. *Callahan*, 78 Maine, 313.

The provision for the son, in case of sale of the real estate, was contingent upon a sale. The daughter was not directed to sell. It was optional with her. If she did sell, one-third of the proceeds was to go to the trust fund for the son, but if she did not sell, nothing went to him. Her mortgage before foreclosure cannot be regarded as a sale under the power. It was but a security for her debt, and upon payment of the debt, voluntarily or upon compulsion, the mortgage would be functus. The mortgagee was not obliged to rely upon the land, but might collect his note by ordinary suit. The money loaned upon the mortgage security was not proceeds of a sale to which the terms of the will applied.

The union of the life estate with the reversion in Isadore would not operate as a merger, if there was any intermediate estate. In this case the provision for the son, in the event of sale, created no charge upon the land, nor interest in it, hence no intervening estate.

Whether in the event that the mortgage debt shall be paid and the mortgage discharged, and the real estate subsequently sold by Mrs. Kimball, or whether if the mortgage is foreclosed and thereby the title passes to the mortgagee, it will be regarded as a sale, and one-third of the amount received in either event be charged with a trust for the son, it is not necessary now to decide, as in either case the title to the real estate is not affected. The trust, if any, attaches only to the proceeds of a sale, and not to the real estate.

In her personal capacity Isadore mortgaged the real estate to the complainant, to secure a loan to her. It is now outstanding and wholly unpaid. The complainant is entitled to a decree that if Isadore G. Kimball, or anyone claiming under her, shall pay to the plaintiff the amount due upon the mortgage within one year from

the entry of the decree in this case, the mortgage to be discharged, otherwise the equity of redemption to be forever foreclosed.

Bill sustained against Isadore G. Kimball, in her individual capacity, and dismissed as to all other defendants.

Decree in accordance with this opinion.

CLARENCE P. HANDY *vs.* JAMES RICE, and another.

Penobscot. Opinion March 24, 1904.

Specific Performance, Agreement to convey land. *Payment,* Terms of. *Bond for a Deed. Words,* "Before or at the time the same shall become due." *Trust. Contempt. Dower,* Release of. *Title by descent.*
R. S. 1903, c. 77, § 17; c. 79, § 6.
Stat. 1895, c. 157.

The clause in a bond for a deed giving the dates of maturity of the notes to be paid by the obligee to entitle him to a conveyance, is not necessarily repugnant to a later clause in the bond requiring the obligor to convey the property upon payment of the sum agreed upon "before or at the time the same shall become due."

Even if the payee could not be compelled to surrender the notes, until he had received the full amount of principal and interest to maturity, the obligation to convey the property "before or at the time the same shall become due," is a distinct one, and can be enforced by specific performance in equity.

To entitle the obligee in such a bond to receive a conveyance of the property, he need only pay or tender to the obligee the amount of the principal and the accrued interest to that date, and not to maturity of the notes.

Quaere: Whether the obligor may still have a valid personal claim for interest on the unmatured notes from the date of tender to maturity.

One who takes a conveyance of land which the owner has previously agreed to sell to another, with full knowledge of the existence and terms of the bond and the conditions which prevail as to payments thereon, holds the legal title as trustee of the obligee in the bond.

Where the obligor in a bond for a deed has agreed that the deed shall include a release of dower, it is no injustice or hardship for the decree for specific performance to require the obligor to make every reasonable exertion to comply with his contract.

If the obligor has a wife who refuses to release her dower or right by descent, proof of such refusal would be a sufficient cause for staying contempt proceedings against the obligor, until he could have an opportunity to apply to the court to have the wife's appropriate share of the approved price deposited with the clerk under the provisions of R. S. 1903, c. 77, § 17.

Proof of full compliance with the provisions of the statute whereby the wife's "interest or right by descent" has been barred will be accepted to purge all contempt of court by the obligor for not delivering a deed containing a release of dower or title by descent by his wife in accordance with the decree.

Appeal in equity by defendants. Appeal dismissed.

Bill for specified performance of the obligor's contract to convey real estate, as contained in a bond for a deed.

The case is stated in the opinion.

E. C. Ryder, for plaintiff.

Hugo Clark and J. D. Rice, for defendants.

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

WHITEHOUSE, J. This is a bill in equity to enforce the specific performance of an agreement to convey real estate.

By the terms of the bond the plaintiff, a resident of Aroostook County, agrees to pay to the defendant, James Rice, a resident of Bangor, "seventy dollars Dec. 1, 1899, fifty dollars July 1, 1900, fifty dollars January 1, 1901, fifty dollars July 1, 1901, and fifty dollars Jan. 1, 1902, with interest on the whole at 12% until paid, agreeably to his five notes of even date herewith." And in consideration thereof the defendant, James Rice, agrees that "after the payment of said sum before or at the time the same shall become due as aforesaid," he will upon request convey to the plaintiff certain real estate in Molunkus, in the County of Aroostook, "by good and sufficient deed thereof including release of dower."

The case comes to this court by appeal from the decree of a single justice, with a report of all the evidence. The case also presents a

statement of the findings of fact and of the special rulings of the court below, as follows:

"July 7th, 1899, the defendant, James Rice, living in Bangor gave to plaintiff a bond for a deed for the land in Molunkus described in the bill, and the plaintiff gave the defendant, James Rice, the notes described in the bond. The plaintiff thereupon moved on the land and has since occupied it as a homestead. At the time of executing these papers, Rice told the plaintiff that he might pay the money on the notes to Joseph Davis who lived in Chester and who had some care of some of Rice's interest in that vicinity.

"When the first note was due the plaintiff went to Davis and asked for the note and paid the amount with interest, and took it up. When the second note fell due it was not paid at maturity but a few days afterwards, July 12, the plaintiff paid $25.00 on the note to Davis and had the indorsement made by Davis and agreed to pay the balance in a month or so. He did not pay the balance however till December 27th, when he paid it to Davis and took up the note. In the meantime he had been dunned by Rice for the balance and had been notified that unless paid at once, a forfeiture would be insisted on, but no steps were taken to eject him from the premises nor was he then explicitly notified that no more payments would be received. Mr. Davis sent the amount to Mr. Rice.

"On January 1, 1901, the plaintiff went again to Davis and desired to pay the note then due and also to pay all the unmatured notes, claiming that by the terms of the bond he could do so and acquire a right to a deed. Mr. Davis said he did not have the notes but would send for them. The plaintiff insisted, however, that he take the money which he finally did, the full amount of all the remaining notes with interest up to that day, giving a receipt. The plaintiff had never been informed that Davis' authority was revoked. This money, Davis sent to Rice with letters of explanation. Rice returned this money and also the balance of the second note which had been paid Dec. 27 to Mr. Davis with the instructions to return the whole to the plaintiff. He retained, however, the remaining notes of the plaintiff, and has never offered to return them until the hearing when he asked leave to amend his answer and offered to

return the notes. Davis offered to repay the money to the plaintiff but the plaintiff refused to receive it. Subseqently, at some date not stated, Davis deposited the amount in the Savings Department of the Eastern Trust & Banking Co. to his own personal credit.

"During these events Mr. Rice conveyed the land to his son the other defendant by a deed not yet recorded, but his son had full knowledge of all the events.

"Upon these facts I rule, (1) that no forfeiture was incurred by the plaintiff,—(2) that his payments to Davis were under the circumstances payments or tenders to James Rice,—(3) that though James Rice may still have a personal claim for interest on the unmatured notes up to their maturity the tender of the amount accrued at that date, Jan. 1, 1901, entitled the plaintiff to a deed under the terms of the bond and is entitled to a conveyance from both defendants according to the term of the bond,—(4) that the plaintiff is entitled to costs."

The final decree provides "That said James Rice and Frank X. Rice shall make, execute and deliver to said Clarence P. Handy a deed of quit-claim with special covenants of warranty against incumbrances created by them of the premises described in the bill of complaint, including the release of dower or title by descent by the wives of said James Rice and Frank X. Rice, within fifteen days from the date of filing this decree in accordance with the terms of the bond."

It is a settled rule in the equity practice of this State that the decision of a single justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that such decree is erroneous; and the burden to show the error falls upon the appellant. *Young* v. *Witham*, 75 Maine, 536; *Berry* v. *Berry*, 84 Maine, 542; *Hartley* v. *Richardson*, 91 Maine, 424.

A careful scrutiny of all the evidence reported in the case at bar fails to show that the findings of fact above stated were "clearly erroneous;" on the other hand it satisfactorily appears that they were correct.

The conclusions of law deduced by the justice below would seem to follow naturally and necessarily from his findings of fact.

It is a well established principle in equity that the obligee in a bond for the conveyance of real estate containing the usual provision that the bond shall be void upon the execution of a deed of the property, cannot be compelled to accept the amount of the penalty named in the bond in full discharge of the obligation, but upon compliance with the conditions on his part is ordinarily entitled to a specific performance of the bond as a distinct agreement for the conveyance of land. 1 Pom. Eq. Jur. 446; *Dooley* v. *Watson*, 1 Gray, 414; *Bragg* v. *Paulk*, 42 Maine, 502.

In the case at bar it is claimed in behalf of the defense that the plaintiff is not entitled to specific performance in the first place because it is said he failed to pay the amount of the notes and interest at maturity as required by the terms of the bond.

It is true that the balance of $25.00 and interest due on the second note payable July 1, 1900, was not paid until the following December when the amount due was accepted by Mr. Davis, the authorized agent of the defendant, James Rice, and the note duly surrendered to the plaintiff. The right to insist upon payment of the note at maturity was undoubtedly waived. The defendants were not prejudiced by the delay in the payment of a note drawing twelve per cent interest, and it was obviously not deemed a sufficient reason for insisting upon a forfeiture. No measures were taken by the defendants to obtain possession of the premises, and the plaintiff was not then expressly informed that no further payments would be received. When the third note became due January 1, 1901, the plaintiff paid to Mr. Davis, as agent for James Rice, not only the amount of that note, but also of the two unmatured notes due respectively July 1, 1901, and January 1, 1902, with interest to the time of payment; but the defendants now contend that by reason of the omission to include in this payment the interest on those two notes to the time of maturity, amounting to the further sum of nine dollars, the plaintiff failed to perform the conditions of the bond, and is not entitled to a conveyance of the property. Although by the terms of the bond the obligor agreed to convey the property to the plaintiff upon payment of the amount of the notes "before or at the time the same shall become due," it is insisted in behalf of the defendants that the payee

of the notes could not be compelled to accept payment and surrender the notes until they became due, and that the terms of the notes must control the other stipulation in the bond. It is manifest, however, that the clause in the bond descriptive of the notes to be paid by the plaintiff is not necessarily repugnant to the later clause requiring the obligor to convey the property to the plaintiff upon payment of the sum agreed upon "before or at the time the same shall become due." If it be conceded that by the terms of the notes the payee could not be compelled to surrender them until he had received the full amount of the principal and interest to the date of the maturity of each note, that fact does not relieve the obligor of the bond from his distinct obligation to convey the property to the plaintiff upon payment of the amount due on the notes either at maturity or at any time before maturity. By the explicit and unambiguous terms of the bond, the plaintiff became entitled to a deed of the property from the obligor, when January 1, 1901, he paid or tendered the amount of the principal and accrued interest to that date. Whether defendant James Rice still had a valid personal claim for the interest on the unmatured notes from that date to their maturity, it is unnecessary to determine in this case. The payment of the consideration draws to it the equitable right of property in the land, and a trust is thereby created in favor of one who pays it. "While the contractor or vendor holds the legal title, he holds it as trustee for the vendee; and this naked trust, impressed upon the land follows it into whosoever hands it may go by subsequent conveyances until it reaches some holder who is a bona-fide purchaser thereof for a valuable consideration without notice of the original vendee's equitable title." *Cross* v. *Bean*, 83 Maine, 61; Pomeroy on Cont. § 371.

The defendant, Frank X. Rice, having taken his conveyance with "full knowledge of all the events" stated in the findings of facts, is chargeable with the terms of the trust in favor of the plaintiff and may properly be compelled to comply with them. *White* v. *Mooers*, 86 Maine, 62; *Ricker* v. *Moore*, 77 Maine, 292.

Finally, the learned counsel for the defendants insists that the provision in the decree that their deed shall include "the release of dower or title by descent by the wives of James Rice and Frank X. Rice,"

is wholly unauthorized and in itself a sufficient cause for reversing the decree.

Prior to the enactment of chapter 157 of the Laws of 1895, prescribing the mode of procedure in case of a wife's refusal to release dower, this objection on the part of the defendants might have presented questions of some difficulty and doubt, but the force of the objection seems to be wholly obviated by the provisions of the act above mentioned. Section 10 of that act (R. S. 1903, ch. 77, § 17) provides that if the owner of real estate contracts to sell it and his wife refuses to release her right by descent, the owner may apply to a justice of this court, who may approve the sale and price and order the owner to pay to the clerk for the benefit of the wife such sum as would amount to one-third of the price, if the owner has issue, and one-half if he has no issue, at the expiration of the owner's expectancy of life, computed at three per cent compound interest; and that when the amount has been duly paid and the fact certified and recorded as prescribed in the act, the wife's interest or right by descent in such real estate shall be barred.

By the terms of the bond in the case at bar, the obligor is required to convey to the plaintiff "said real estate and a good and perfect title thereto by good and sufficient deed thereof including release of dower." It is no injustice or hardship to require the defendants to make every reasonable exertion to comply with these stipulations in the bond. If, as suggested by counsel, it should appear that neither of the defendants has a wife, obviously no release of dower would be necessary to give a "perfect title," and the clause objected to would be superfluous and harmless. If, on the other hand, either of the defendants has a wife who should refuse to release her dower or right by descent, proof of such refusal would properly be deemed sufficient cause for staying any proceedings for contempt against such defendant until he could have an opportunity to apply to the court to have the wife's appropriate share of the approved price deposited with the clerk under the provisions of the statute above given, and thus become enabled to give a "good and sufficient deed" without the joinder of the wife. Proof of full compliance with the provisions of this act, whereby the wife's "interest or right by descent" had become barred,

would be accepted as sufficient cause for the final discharge of any rule for contempt that might have been issued.

It is accordingly the opinion of the court that the decree below should stand unreversed and unmodified.

Among the equity powers expressly conferred upon this court by the statute, is the power to compel the specific performance of written contracts; R. S. (1903), ch. 79, § 6; and the circumstances of this case unquestionably present an appropriate occasion for the exercise of it.

Appeal dismissed. Decree below affirmed with additional costs.

SARAH W. COTTON

vs.

WISCASSET, WATERVILLE & FARMINGTON RAILROAD COMPANY.

Kennebec. Opinion March 25, 1904.

Fences. Railroads,—sufficient fence defined. *R. S. (1883), c. 22, § 1; c. 51, §§ 36, 37.*

Revised Statutes (1883), c. 51, §§ 36 and 37, require a railroad company to erect and maintain, along the line of its road, a fence sufficient to restrain and exclude any of the ordinary domestic animals from straying upon that part of its track which passes through or is contiguous to the inclosure where such animals are pastured or kept.

A fence abutting a railroad four feet in height and otherwise complying with the statute and that will restrain horses, cows and oxen but will not restrain sheep, is not a legal and sufficient fence under the railroad statute relating to fences.

Agreed statement. Judgment for plaintiff.

Action to recover the statute penalty for failing to erect and maintain a sufficient fence.

The case is stated in the opinion.

F. J. C. Little, for plaintiff.

L. R. Folsom, for defendant.

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

SPEAR, J. This is an action brought under R. S. (1883), c. 51, §§ 36 and 37, to recover of the Wiscasset, Waterville and Farmington Railroad Company a forfeiture of one hundred dollars for the failure, on the part of said company, after due notice, to repair their fence along the line of said railroad, adjoining the plaintiff's premises. The case comes up on the following agreed statement of facts: "It is admitted that Sarah W. Cotton was the owner in fee simple of real estate described in the writ, on the sixth day of May, 1902, and for a long time prior thereto, and still is the owner of such real estate," and "that on the sixth day of May, 1902, she gave to said defendant *legal notice* that the line fence between her close and that occupied by the defendant, was defective and in need of repair;" that "said fence although four feet in height, and otherwise complying with the statute, and sufficient to restrain horses, cows and oxen, was not sufficient to *restrain sheep* from passing from her land on to that of said defendant;" "that said defendant did not repair said fence within thirty days after said notice had been given;" and "that if the action can be maintained upon this statement of facts under the declaration in the plaintiff's writ, the defendant is to be defaulted, otherwise the plaintiff is to become non-suit."

The statute under which the plaintiff claims is as follows: "The owner of any inclosed or improved land or wood-lot belonging to a farm abutting upon any railroad which is finished and in operation, may at any time between the twentieth day of April and the end of October, give written notice to the president, treasurer, or either of the directors of the corporation owning, controlling or operating such railroad, that the line fence against his land has not been built, or if built, that the same is defective and needs repair. And if said corporation neglects to build or repair such fence, for thirty days after

receiving such notice, it forfeits to such owner one hundred dollars, to be recovered in an action on the case." The defendant contends that, under the agreed statement and this statute, the plaintiff shows no cause of action; that although she alleges that the defendant company has neglected and refused to erect and maintain a sufficient and lawful fence, she at the same time negatives the allegation by the admission that there was a fence erected and maintained which was "four feet in height and otherwise complying with the statute." But the agreed statement goes further and admits that, while the fence may comply with the statute, and will "restrain horses, cows and oxen" it "*will not restrain sheep.*" This qualification that "*it will not restrain sheep*" contains the very essence of the agreed statement. The other qualifications, that the fence otherwise complies with the statute, and will restrain horses, cows and oxen, are simply terms of exclusion, eliminating these questions from consideration, thereby leaving for determination the single question whether a fence that "*will not restrain sheep*" is "legal and sufficient" under the railroad statute relating to fences.

The defendant's objection cannot prevail. The cause of action is properly set out. This brings us directly to the issue in question, does section thirty-six contemplate the erection and maintenance of a fence by the railroad company that will restrain and exclude, not only horses, oxen and cows, but the other smaller domestic animals, such as sheep? We think it does.

Revised Statutes (1883), c. 22, § one, provides: "All fences four feet high and in good repair, consisting of rails, timber, boards, stone walls, iron or wire; and brooks, rivers, ponds, creeks, ditches and hedges, or other things which, in the judgment of the fence viewers having jurisdiction thereof are equivalent thereto, are legal and sufficient fences." This statute is as old as the State. An analysis shows that it is very indefinite in describing what constitutes a "legal and sufficient" fence. First, it must be four feet high. Second, it may be of rails, timber, boards, iron or wire. But how shall it be put together? How many rails, how many timbers, how many wires? Upon these details the statute is silent. It would not be contended that one rail, one timber or one strand of wire,

erected at a height of four feet, would constitute such a fence, nor that twenty of either kind would be required. How many then are required? Where is the mean between these two extremes? The statute does not say and therefore does not fully define what constitutes a "legal and sufficient" fence. In the very nature of the case it could not, for what might be "legal and sufficient" for one purpose might not be for another. A fence that would be sufficient against oxen might not be effective against sheep, but it might be unreasonable to require a fence against oxen to be sheep tight. All these matters were, therefore, wisely left to the discretion of the fence viewers so that the sufficiency of each particular line of fence could be determined with reference to the purpose which it was intended to serve. If the parties disagree as to whether a piece of fence is "legal and sufficient" to effect the result expected of it, then the fence viewers are the tribunal designated to settle that question. They can undoubtedly determine whether the material prescribed by statute as suitable, is so put together as to constitute, in the particular case upon which they are called to pass, a "legal and sufficient" fence. That is, the legality and sufficiency of a fence is determined, not upon the number of rails or wires it contains, but with reference to the particular office it is intended to serve.

The court will take judicial notice of the historical fact that when this statute was enacted, sheep were among the most indispensable domestic animals kept upon the farm, and, as late as 1842 when the railroad statutes were enacted, the raising of sheep was a most important feature of nearly every farming industry. Even at this latter date the spinning wheel and the loom had by no means been laid aside, and the homespun was worn by many a country lad. These flocks, then as now, grazed from the earliest spring to the latest fall, upon the pastures of the farm, and had to be fenced against as much and even more than horses and oxen. In view, then, of the purpose which the division fence, for all these years, has been required to serve, it cannot be doubted that the legislature intended that it should be sufficient, when properly built and kept in repair, to restrain and exclude sheep as well as the larger domestic animals.

Revised Statutes (1883), c. 51, § 36, specifying the kind of fence required along the line of a railroad, is as follows: "Where a railroad passes through inclosed or improved land, or wood-lots belonging to a farm, *legal* and *sufficient* fences shall be made on each side of the land taken therefor, before the construction of the road is commenced, and such fences shall be maintained and kept in good repair by the corporation." It will be readily observed that this section specifies and requires fences that shall have exactly the same characteristics as those defined in section one, c. 22, namely, that they shall be "legal and sufficient;" therefore we think it should be construed with reference to section one, c. 22, in pari materia, to which it is proper to refer to ascertain what kind of a fence under section 36, is "legal and sufficient." The phrase in each statute is the same and has the same meaning. The interpretation given to section 36 by the court in *Gould* v. *Bangor & Piscataquis R. R.*, 82 Maine, 126, sustains this view. The court, in construing the phrase "legal and sufficient" in section 36, alluded to c. 22 as follows: "It must, perhaps, be further conceded that a fence made of barbed wire "protected by an upper rail or board of wood," may, under the proviso attached to § one, c. 22, R. S., be deemed a "legal and sufficient" fence, and when properly built and kept in repair, a full discharge of the obligation resting upon the corporation by virtue of the statute." It finds that the phrase "legal and sufficient" has the same meaning in section 36 that it has in c. 22. But we have above held that a "legal and sufficient" fence under c. 22, when properly built and kept in repair, should restrain and exclude sheep; it therefore follows that a "legal and sufficient" fence under c. 36, should accomplish the same result. There is no reason why it should not. Our court have held that it should. In the last cited case pages 126-127 they say: "Hence it is clear that considering the object to be attained and the well established principles of law applicable, while the fence must be so built and maintained as to be a reasonable restraint against all domestic animals of ordinary docility, it is not to be made unnecessarily dangerous to that class of animals, or permitted to become so by neglect." While the question in the case at bar was not directly in issue in the case quoted, yet the point is there squarely

decided, that the railroad corporation must fence against "all domestic animals of ordinary docility." Sheep are most certainly domestic animals of ordinary docility and must necessarily come within the above classification.

It therefore seems clear to us that, with reference to the object it was intended to accomplish, the statute requires a railroad company to erect and maintain, along the line of its road, a fence sufficient to restrain and exclude any of the domestic farm animals of ordinary docility from straying upon that part of its track which passes through or is contiguous to the inclosure where such animals are pastured or kept. If it passes the inclosure of horses and oxen, it must fence against horses and oxen; if it passes the pasture of sheep, it must fence against sheep; that is, it must build a fence against each man's farm or inclosure that will accomplish the particular purpose for which the fence is required. The corporation is not obliged, in order to comply with the statute, to build a sheep tight fence along its whole line, whether it passes the inclosure of sheep or not, but only along so much of its line as passes a sheep inclosure.

In accordance with the stipulation in the agreed statement, the entry must be,

Defendant defaulted for one hundred dollars.

IRENE C. SEAVEY *vs.* MATTHEW LAUGHLIN, Admr.

Penobscot. Opinion March 25, 1904.

Verdict. Jury. New Trial, facts not proven.

An inference of fact may be found by a jury only from other facts proved, and is a deduction or conclusion from facts or propositions known to be true.

Held; that the jury instead of basing their verdict upon a fact proved, based it upon a probability; but a probability is not a proven fact, and hence the inference drawn from it by the jury cannot be properly based upon it.

Motion for new trial. Granted.

Action to recover an alleged loan evidenced by a check. The jury gave a verdict for the plaintiff, and the defendant filed a motion for new trial.

The case appears in the opinion.

Tuber D. Bailey, for plaintiff.

M. Laughlin, for defendant.

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

SPEAR, J. This is an action brought by Irene C. Seavey against Matthew Laughlin as administrator of the estate of Maude S. Ober, late of Brewer, in the County of Penobscot. The claim is alleged to be for money loaned September 18, 1895, by said Seavey to said Ober. The evidence of the alleged loan is a cashier's check. The verdict was for the plaintiff and the case comes up on motion by the defendant.

On the 18th day of September, 1895, Rebecca J. E. Stanley had a deposit in a bank in Brooklyn, New York, in trust, for her daughter, Irene C. Seavey, the plaintiff, and drew upon the deposit a check to her own order, of one hundred and fifty dollars, indorsed it in blank and delivered it to Irene, who took the check, put it in a sheet of writing paper, folded it, and enclosed the check and paper in an

envelope and sealed the envelope. There is no direct evidence whatever that the envelope was addressed or sent to any particular person. The next known of the check was its appearance at the trial of this case indorsed in blank by Rebecca J. E. Stanley, and by J. Howard Ober, the husband of the defendant's intestate, who indorsed it for collection. The only evidence in any way touching the financial relations of the plaintiff and defendant's intestate, Maude S. Ober, is found in a letter from Maude to her sister Irene dated at Brewer, Maine, April 4, 1896, an extract of which is as follows: "If nothing happens, I will pay you your money this summer. I worry so much about it. Irene do you suppose that I will get anything more from the estate? I would like to know, for I could write to Mr. Hunter and have him make it over to you, so if anything happened to me you should have what is your own." This letter may or may not allude to the check in suit, but unfortunately there is no way of determining. There is no evidence whatever that the letter alludes to the check.

Inference of fact can be found by a jury only from other facts proved. "Inference is a deduction or conclusion from facts or propositions known to be true. When the facts themselves are directly attested, the jury may deduce or infer or presume from them the truth or falsity of the main proposition." *Gates* v. *Hughes*, 44 Wis. 336. Can it be said, from the admission in the extract of the letter quoted, that it is *a fact proved*, that it referred to the check in question? The defendant in his brief says, "Two inferences can be drawn from the facts in this case. One is that the money was sent directly to J. Howard Ober and that it was a loan to him. The second is that the check was sent to Maude S. Ober who turned it over to her husband, J. Howard Ober to collect for her, as the check was payable to bearer after the indorsement in blank. But the jury drew the latter inference." These alternative findings, which the jury were authorized to make, were not based upon facts proven but upon probabilities, what might or might not be so. As before observed, the only evidence before them upon which to base the inference was the letter of Maude S. Ober to her sister Irene, but this letter does not in any way refer to the check as the indebtedness

therein mentioned and may just as well have referred to some other indebtedness as that created by the check; consequently no fact was proven in the whole case which by necessary implication referred to the check. The jury therefore instead of basing their verdict upon a fact proven, based it upon the probability that Maude referred to the check as the subject of the indebtedness named in her letter; but a probability is not a proven fact, and the inference which the jury drew could not properly be based upon it.

Verdict set aside. New trial granted.

MERTON L. KIMBALL, Trustee, *vs.* CHARLES A. DRESSER.

Oxford. Opinion March 25, 1904.

Bankruptcy. Preference, defined. *Action,* not sustained. *Bankruptcy Act, 1898, §§ 1, 60.*

In order to entitle a trustee, under the Bankruptcy Act of 1898, to recover a preference, he must prove (1) the insolvency of the debtor, (2) the payment by the bankrupt to the creditor, and (3) a consequent inequality between creditors of the same class.

Held; that a want of proof to sustain all these elements of a preference will preclude a recovery.

On report. Judgment for defendant.

This was an action brought by the plaintiff as trustee in bankruptcy of the estate of Edgar F. Hodsdon of Roxbury, to recover of the defendant the sum of one hundred and fifty dollars, alleged by the plaintiff to have been paid by said Hodsdon to the defendant on an existing debt, within four months of the filing of petition in bankruptcy by said Hodsdon, and while said Hodsdon was insolvent. The action is brought under section 60 b of the United States Bankruptcy Act of 1898, and the declaration alleged that at the time of said payment the defendant had reasonable cause to believe that it was intended thereby to give a preference, and that at the time of said payment said Hodsdon was insolvent. It was admitted at the trial

below that the payment on account was made but fifteen days before the filing of the petition, $100 by check from the Dunton Lumber Co., and $50, as a credit for camps which had been owned by the bankrupt and were transferred to the defendant by him on the same day that the $100 was paid.

The case appears in the opinion.

A. S. and M. L. Kimball, for plaintiff.

Jurisdiction: *Bardes* v. *First Natl. Bank,* 4 A. B. R. 163; *In re Blair,* 4 A. B. R. 220. Preference: *In re Fixen & Co.* 4 A. B. R. 10. Reasonable cause to believe: *In re Philip Jacobs,* 1 A. B. R. 518; *Crittenden* v. *Barton,* 5 A. B. R. 775. Interest: *Traders Natl. Bank* v. *Campbell,* 14 Wall. 87.

J. P. Swasey, for defendant.

Counsel cited: *Warren* v. *Moody,* 122 U. S. 132; *Grant* v. *First National Bank,* 97 U. S. 81; *Dixson* v. *Wyman,* 7 A. B. R. 186; *McKey* v. *Lee,* 5 A. B. R. 267.

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

SPEAR, J. This case comes up on report.

It is an action brought by the plaintiff as trustee in bankruptcy of Edgar R. Hodsdon of Roxbury, in the County of Oxford, to recover of the defendant the sum of $150, which the plaintiff alleges was paid by said Hodsdon to said defendant in violation of the U. S. Bankruptcy Act of 1898. The plaintiff in his writ alleges that Hodsdon filed a voluntary petition in bankruptcy on the 16th of May, 1901, and that on the 29th day of April, 1901, "said Hodsdon being then and there indebted to said defendant, in a sum to said plaintiff unknown, then and there paid to said defendant the sum of $150; that on the day of said payment said Hodsdon was insolvent and unable to pay his debts in the ordinary course of business; that said defendant received said sum of $150 from said Hodsdon on the 29th day of April, 1901, and that said defendant, at the time of receiving said sum, had reasonable cause to believe that said Hodsdon was then and there insolvent and unable to pay his debts in the

ordinary course of business, and that it was intended thereby, to wit: by the said payment of $150 to give said defendant preference within the meaning of said bankruptcy act."

The allegations in the declaration as to the time of payment and the filing of the petition are undisputed. But it is further incumbent upon the plaintiff, in order to sustain his action, to prove that the payment to the defendant was a preference under the bankrupt act. Paragraph 60 defines a preference as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

A preference under this law, says Collier on Bankruptcy, p. 6, has but three elements: "(a) insolvency, (b) the procuring or suffering of the judgment or the making of the transfer by the bankrupt, (c) a constant inequality between creditors of the same class." The making of a transfer under (b) is admitted. We therefore are required to consider only the two other items, (a) and (c). Under (c), in order to entitle the plaintiff to set aside the payment to the defendant, it is incumbent upon him to prove, by a fair preponderance of the evidence, that at the time the payment was made, May 1st, 1901, Edgar F. Hodsdon was insolvent within the meaning of par. 15, section one of the act of 1898, to wit: "A person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with an attempt to default, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." Upon this point the plaintiff offered no testimony and did not present any statement of the assets and liabilities of the bankrupt. The only evidence from which an inference of the insolvency of the bankrupt, at the time he made the payment,

could be drawn, was the admission that seventeen days later he was adjudged a bankrupt on his own petition. While it may be highly probable that the bankrupt was insolvent on the 29th day of April, it by no means follows as a legal inference that he was so, from the fact that he went into bankruptcy on the 16th of May. Many contingencies, such as unwise investments, losing contracts, misfortune or accident, might happen in seventeen days to reduce this bankrupt or any other person from a condition of solvency to one of insolvency. We think the evidence entirely fails to sustain the allegation that the bankrupt on the 29th day of April, 1901, was insolvent.

Upon the third element, which the plaintiff must prove in order to sustain the allegation of a preference, he offers no evidence; but upon this point it is also incumbent upon him to show affirmatively that the payment made to the defendant gave him an opportunity to obtain a greater percentage of his debt than any other creditors of the same class. But here, again, we have no statement of the assets or liabilities of the bankrupt and no explanation of the nature or character of the indebtedness of the bankrupt to the defendant, whether it was preferred or otherwise, except the admission that the balance due the defendant was $262.57. From anything that appears in the case, the bankrupt, on the first day of May, 1901, may not have owed any other person. There is nothing upon which the court is able to determine what the estate would be able to pay. Every other creditor may be a preferred creditor with funds in the estate sufficient to pay him in full. We find nothing in the case that tends to show that the payment to the defendant enabled him to obtain a greater percentage of his debt than other such creditors of the same class. The want of proof upon these elements precludes the plaintiff from maintaining this action. It is unnecessary to consider the other points raise by the defendant.

Judgment for the defendant.

DAVID S. KIRSTEAD *vs.* FRANK BRYANT, and another.

Somerset. Opinion March 25, 1904.

Negligence. Defective machinery. *Evidence. Burden of Proof.* No connection between cause proved and effect claimed.

In an action to recover damages caused by defective machinery the burden of proof rests upon the plaintiff to show that the injury received was occasioned by the defect as claimed.

This he may do either by direct proof or reasonable inference from the facts and circumstances in the case.

The plaintiff was injured by the sudden breaking of the eccentric rod of an engine and while he was at work with it. He claimed that the defective condition of the engine was the direct cause of the breaking of the eccentric rod and consequently the proximate cause of his injuries; and he thereupon contended that there was something wrong which was indicated by the pounding of the engine.

Held; that the plaintiff has failed to produce evidence of the fact that the pounding and the breaking of the eccentric rod were produced by one and the same cause.

The testimony shows conclusively that the pounding was in the cross-head; therefore, the cause of the pounding could not be the cause of the accident. Hence there is no connection between the cause proved and the effect claimed.

Motion for new trial. Motion sustained.

Case for alleged negligence arising from defective machinery. After verdict for the plaintiff the defendants filed a general motion for a new trial.

The case is stated in the opinion.

Forrest Goodwin, for plaintiff.

Geo. H. Morse and J. W. Manson, for defendant.

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

SPEAR, J. This is an action in which the plaintiff seeks to recover damages for personal injuries received by the sudden break-

ing of the eccentric rod in the engine upon which it was the duty of the plaintiff to do certain work. He alleges, in substance, in his writ, that the engine upon which he was at work was defective and out of repair and that before the accident the defendants had due notice of the defective condition of the engine, and that although they had ample time in which to repair it, they neglected so to do; and that said defective condition of the engine was the direct cause of the breaking of the eccentric rod and consequently the proximate cause of the injuries received by him.

The verdict was for the plaintiff in the sum of $500. The defendant on motion seeks to set this verdict aside as against the evidence. The only evidence which the plaintiff produced tending to show a defective condition of the engine was an unusual noise made by the engine, defined by the witnesses in the case as "the pounding of the engine." The evidence is undisputed that the engine was but two years old, of proper construction and without any known defects or want of repair, except the pounding, which developed and first appeared the day before the accident. The plaintiff describes the discovery of the pounding as follows: "On the morning of the 16th of January, 1899, I was firing and working there as usual and I noticed the sound then of the engine. I had been at work in front of the furnace and had started back and Mr. Bryant came in and I told him there was something wrong with the engine." Mr. Bryant was one of the defendants and owners of the engine. The plaintiff testifies that the next morning, the 17th day of January, "I got up as usual and got up my steam and started up the engine as usual." Then he was asked "Whether or not she was pounding in the morning," and he answered, "Yes, just the same." There is no intimation nor claim on the part of the plaintiff, in his testimony, or on the part of any witness, in the whole case, that there was any other evidence or indication of a defect or want of repair in the engine except that disclosed by the pounding. Nor does the plaintiff's counsel so claim. In his argument he says, "the plaintiff is not able to say just what caused the pounding or just what caused the accident. His contention is that there was something wrong with the engine which *was indicated by the pounding*

of the engine." Therefore, the only question to be determined in this case is whether the cause which produced the pounding is the cause which produced the breaking of the eccentric rod.

The burden rests upon the plaintiff to assume the affirmative of this proposition. It is his duty to show, either by direct proof, or reasonable inference from the facts and circumstances in the case, that the pounding and the breaking of the eccentric rod were produced by the one and the same cause. We think he has failed to produce any evidence of this fact.

We will now consider the testimony of the plaintiff's witnesses with respect to its tendency to prove that the cause of the pounding was the cause of the accident. Mr. Goodrich succeeded the plaintiff in running the engine after it had been repaired by the substitution of a new eccentric rod and eccentric strap. The engine continued pounding and a Mr. Hersey was called in to fix it, and Mr. Goodrich, the plaintiff's witness, testifies as to what was done to remove the cause of the pounding, as follows: "Q. After you begun to run the engine, did Mr. Hersey come to fix it so far as the pounding? A. I believe so, about two days, it might have been a little longer. Q. Within two days after the accident? A. Yes, sir. Q. Do you know what part of it he adjusted? A. Something about the cross-head, the piston. Q. This is the cross-head? A. Supposed to be, yes, sir. Q. The pounding was something there that he put the wrench on and stopped? A. I don't know where the pounding was, but that is where he worked. Q. That is where he worked and the pounding stopped? A. Yes, sir." He also said: "It was pounding about as near as I could remember, when Mr. Hersey came to fix it, as it was the afternoon before the accident. It was pounding very near the same." This testimony shows in two ways that the cause of the pounding was not the cause of the accident. First, because the repair made by Mr. Hersey, which stopped the pounding, was not and was not claimed to be the defect which caused the accident. Second, because the cause of the pounding continued just the same after the accident, until it was removed, as before; although, in the meantime, complete repairs had been made upon the eccentric rod and strap, which would immediately, after

being made, have removed the cause of the pounding, if it had been due to any of the connections with them; but such repairs did not stop the pounding, hence the conclusion it was not there. But the pounding did stop immediately upon the repair of the cross-head, hence the conclusion that the cause was in the cross-head.

Mr. Hersey, who made the repair that stopped the pounding, testified as to what he found and did, as follows: "Q. Did you find what caused the noise? A. I did. Q. State what caused the noise? Mr. Goodwin: What do you mean before the accident? Q. After the accident? A. The noise was just the same before and after the accident. Q. You say, after the accident, after the machine was repaired, you noticed the same noise you noticed before the accident? A. Yes, sir. I located it accidently. I was there after the repairs and saw that the engine was running all right. I stopped the engine to feel my repairs over, and when I started the engine, or whoever did, when the engine was started, I went round on the other side of the engine, and in going round there, I done what I most always do, I felt of the crank to see if the crank was adjusted right. I passed down to the cross-head, and felt the cross-head over. In feeling of that cross-head my finger touched that nut. I thought I felt a little movement in the nut. I felt of that nut, and the nut was loose enough so that I could move it with my hand. . . . I went over and got a wrench and put the wrench on it. I did not turn down the wrench any, I simply put the wrench on the nut to see if the nut was loose, and I found the nut a little loose, and I tightened the nut up. Q. Did you hear any noise after that? A. No. I didn't hear any noise after that. The noise was stopped. That particular noise was stopped." This testimony as to the continuation of the pounding and what stopped it, is in exact accord with that of Mr. Goodrich, the plaintiff's witness, who succeeded the plaintiff in running the engine, and, it seems to us, establishes beyond question the conclusions drawn from his testimony, that the cause of the pounding, both before and after the accident, was in the cross-head.

In order to apply the testimony of the following witness to the cause of the accident, it may be well, at this point, to observe how

this engine was constructed with respect to the location of the cross-head and piston-rod with reference to that of the eccentric rod and strap, inasmuch as the eccentric rod and strap were the only things about the engine which broke. The engine stands firm upon its foundation. The piston-rod and cross-head are by themselves upon one side of the engine, and the eccentric rod and strap upon the other side. Mr. Houghton, the witness called by the plaintiff, as an expert machinist of twenty-five years' experience, testified on cross-examination as follows: "Q. Suppose the pounding was in the end of the cross-head, would you consider that dangerous? A. It is liable to break something there because the whole force of the engine is applied to the cross-head. Q. What would that be apt to break? A. That is something that could not be determined by calculation what part of the cross-head might break. The connecting rod might break, the piston-rod might break, it would break in the weakest part, and that is hard to determine. No two engines ever break alike. Q. Would it have any tendency to break that wheel? A. No. Q. What would it break? A. If it was on that side, the first place would be the cross-head, one or the other of those connections." He means by "that side" the cross-head side of the engine. But nowhere does he intimate that a pounding in the cross-head side would break the eccentric strap or rod or anything else on the eccentric side. But the testimony shows conclusively that the pounding was in the cross-head; therefore, the cause of the pounding could not be the cause of the accident. There is no connection between the cause proved and the effect claimed. The above conclusions are drawn from the testimony of the plaintiff's own witnesses, corroborated by the testimony of Mr. Hersey, who made the repairs. The testimony of the defendants' witnesses all tends to support the above conclusion, and to present a theory of how the accident occurred, but as the plaintiff's own testimony fails to show that the proximate cause of the accident was the "pounding of the engine," it is unnecessary to consider the defendants' evidence.

Motion sustained. Verdict set aside. New trial granted.

SOMERSET RAILWAY, In Equity,

vs.

LEWIS PIERCE, and others, Trustees and others.

Cumberland. Opinion April 4, 1904.

Trusts, expense of adversary proceedings not allowed. *Equity.*

It is a general equitable principle that when one of several parties, having a common interest in a trust fund, at his own expense takes proper proceedings for the protection and preservation of the fund, he is entitled to reimbursement out of the trust fund itself, or by contribution from those who accept the benefit of his efforts.

The trust fund should bear the expense of its administration, but it is chargeable only with those expenses which are incurred for the benefit of all the cestuis que trustent.

When one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, he is not entitled to reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.

See *Somerset Railway* v. *Pierce*, 88 Maine, 86; *Pierce* v. *Ayer*, 88 Maine, 100; *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Pierce* v. *Ayer*, 171 U. S. 650.

On report. Motion in equity. Denied.

The case is stated in the opinion.

D. D. Stewart, for trustee.

W. T. Haines and J. H. & J. H. Drummond, Jr. for Railway.

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

POWERS, J. This case is reported to the law court upon a motion, filed in the name of the trustees, for the appointment of a master to determine and report what sums are due them for services and disbursements in the several suits in which they have been parties as trustees since October, 1902.

July 1, 1871, the Somerset Railroad Company made a mortgage of its franchise and railroad property to trustees to secure the payment of certain bonds. The conditions of the mortgage having been broken, the mortgage bondholders in 1883 organized a new corporation, under the statute, by the name of the Somerset Railway. That corporation, in accordance with the statute, took possession of all the mortgaged property on Sept. 1, 1883, and has ever since retained possession and operated the road. On July 8, 1884, it purchased the equity of redemption from the mortgage, from which sale no redemption has been had. The suits referred to in the motion were first, two writs of entry, brought by the trustees under the mortgage against the servants and officers of the Somerset Railway, to recover possession of all the property embraced in the mortgage; *Pierce* v. *Ayer*, 88 Maine, 100; second, the present suit in equity brought by the Somerset Railway to have the prosecution of the writs of entry enjoined, its title to the mortgaged property declared valid, and the trustees ordered to release and convey to the new corporation all the title they held as trustees under said mortgage, *Somerset Railway* v. *Pierce*, 88 Maine, 86; third, writs of error in the same cases to the U. S. Supreme Court. *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Pierce* v. *Ayer*, 171 U. S. 650.

In all these cases the trustees were unsuccessful. The expenses referred to in the motion are the taxable costs recovered or decreed against the trustees in these suits because they were unsuccessful, the taxable costs which they would have recovered or which might have been decreed them if they had been successful, and the services and disbursements of the counsel in the defense of the present suit and the prosecution of the other suits.

An examination of the evidence shows that the trustees have never paid or agreed to pay a dollar of the items claimed, and that the services were not rendered or the disbursements made under such circumstances that any promise on their part to pay for the same can be implied. On the contrary it sufficiently appears from the evidence that a minority of the bondholders, who had declined to exchange their bonds for the stock in the new corporation, commenced and prosecuted the writs of entry and defended this bill in equity in the

name of the trustees but for their own benefit. The trustees only authorized such use of their names upon an agreement to save them harmless from all cost and expense. In accordance with that agreement a bond dated June 12, 1893, was executed and delivered by certain of the minority bondholders to the trustees to indemnify them against all costs and expenses in the writs of entry and this equity suit. The counsel for whose services an allowance is now sought were employed and acted for the minority bondholders throughout the course of this entire litigation. The trustees have been fully paid and given receipts for all their personal services and disbursements. Strictly speaking, therefore, there remain unpaid no services and disbursements on the part of the trustees within the language of the motion filed, and none for which they are in any way liable.

It is claimed, however, that in equity the trust fund is properly chargeable with the payment of the expenses incurred by the minority bondholders in these suits. It is a general equitable principle that where one of several parties, having a common interest in a trust fund, at his own expense takes proper proceedings for the protection and preservation of the fund, he is entitled to reimbursement out of the trust fund itself, or by contribution from those who accept the benefit of his efforts. *Trustees of the Internal Improvement Fund* v. *Greenough*, 105 U. S. 527. The trust fund should bear the expense of its administration. Such proceedings by whomsoever taken are for the benefit of all, to rescue the trust estate from destruction and restore it to the purposes of the trust.

The expenses for which reimbursement is sought here do not fall within this class. The history of this litigation shows that it was an effort on the part of the minority bondholders to wrest the trust estate from the possession of the new corporation to which it belonged, and which was holding and using it for the benefit of all who were interested in it. The object, if successful, was to apply the trust estate to the payment of the bonds held by the minority to the exclusion of the majority who had exchanged their bonds for the stock of the new corporation. It is not the fact that this litigation was unsuccessful,—not its result so much as its purpose,—which stamps the present claim as inequitable, and places it without the pale of those

which equity allows as a charge upon the trust estate. The bondholders were divided into two hostile camps. In such cases the defeated party must bear the expense which it has incurred in its own interest alone. The trust estate is chargeable only with that which is incurred in the interest of all the cestuis que trustent. This principle is well stated by Mr. Justice Woods in *Hobbs* v. *McLean,* 117 U. S. 567. "Where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate."

Motion denied with costs against trustees.

INHABITANTS OF FREEMAN *vs.* BENJAMIN DODGE.

Franklin. Opinion April 7, 1904.

Contracts, consideration. Moral obligations. *Pauper,* Son's contingent liability for mother's support. *Pleading,* variance. *Exceptions,* to harmless ruling. *R. S. 1903, c. 27, § 18.*

1. The contingent statutory liability which a son is under to reimburse the town of his mother's pauper settlement for pauper supplies furnished to her, is not a sufficient consideration for his promise to the town to pay the same.
2. Nor is his moral obligation a sufficient consideration.
3. Where in such case the town relied upon the promise and omitted to prosecute its statutory claims for reimbursement within the time limited by statute, the promisor is not estopped to deny liability.
4. The defendant's mother, having her pauper settlement in the town of Freeman fell into distress in the town of Strong, where she was supplied by one Walker, who sued Strong for reimbursement. The town of Freeman assumed the defense of that suit and after judgment against Strong paid the judgment. In the declaration in the present suit it was alleged that the defendant promised "to reimburse the plaintiff town for such judgment debt and damage and costs as the plaintiff town might incur by

assuming the defense" of the action of Walker against Strong, and in support of this allegation, the plaintiff relied in part upon a letter written by the defendant to one of the selectmen of the plaintiff town before the Walker suit was brought, in which he said,—"I just received word that my mother had been thrown on the town. If you will keep the expenses as low as possible, I will pay the bill." *Held;* that the promise proved by the letter was entirely collateral to the promise alleged in the writ, that the letter does not support the allegation; and that it is immaterial in this action whether the promise contained in the letter was founded upon a sufficient consideration, or not.

5. Exceptions to a harmless ruling upon an immaterial proposition, even if it was erroneous, cannot be sustained. In this case, however, the ruling was correct.

Exceptions by plaintiff. Overruled.

This was an action of assumpsit upon an alleged promise by the defendant to reimburse the plaintiff town for such judgment debt and damage and costs, as the plaintiff town might incur in assuming the defense of an action by one Walker against the town of Strong for supplies furnished one Dorcas Dodge, the mother of the defendant, who had fallen into distress in the town of Strong. There was evidence tending to show the following facts:

The said pauper, Dorcas Dodge, had a pauper settlement in the town of Freeman, where she generally lived with her son, the defendant, when not visiting her other children. In the spring of 1901, while visiting her daughter in Strong, she fell into distress and was supplied by one Walker, who called upon the town of Strong for reimbursement. At this time the defendant was absent in Massachusetts, but, hearing from his family that his mother had been thrown upon the town of Strong, wrote to one of the selectmen of the town of Freeman, Mr. Burbank, the following letter, dated May 6, 1901: "I just received word that my mother had been thrown on the town. If you will keep the expenses as low as possible I will pay the bill. As soon as I get home I will see you." On arrival home he made an effort to have his mother removed from Strong to Freeman, but objections being made by the Walkers with whom she was staying, no removal was made. Walker brought an action against Strong, of which the overseers of the poor of Freeman assumed the defense, and the case was tried at the May term, 1902,

and resulted in a judgment against Strong for the sum of $74.20 debt or damage, and $36.11 costs of suit, which judgment the town of Freeman paid. The town of Freeman also paid for counsel fees and witnesses in the defense of the suit $89.03.

The town introduced evidence tending to show that in February, 1902, the defendant told one of the selectmen and overseers of the poor of the town of Freeman that if they would go ahead and defend the suit of Walker vs. Strong on account of his mother, he would pay all the bills and expenses. There was also evidence to the contrary.

The presiding justice instructed the jury that the promise contained in the letter, if any, was without consideration and that in this action nothing could be recovered from the defendant Dodge for any sum actually paid for supplies furnished his mother. The presiding justice also instructed the jury that if the defendant Dodge requested one of the overseers of the poor to assume the defense of the action of Walker vs. Strong, and promised to reimburse the town of Freeman for all costs and expenses incurred therein, and the overseers of the poor of Freeman did upon the strength of that request and promise defend the suit, then the town of Freeman could recover the amount of the costs in that suit, and also the expenses incurred by Freeman in defending the action, and he submitted to the jury the question, whether or not the defendant made the request and promise in February, 1902, as alleged. Upon this issue the jury found for the defendant, and returned a general verdict of did not promise.

To the ruling that the plaintiff could not recover in this action under the evidence for the supplies furnished Dorcas, or what it paid Strong for those supplies, the plaintiff excepted.

F. W. Butler, for plaintiff.

By R. S. (1903), c. 27, § 18, the defendant if of sufficient ability was liable to contribute for the support of his mother, but that support could be recovered of him only for a period of six months prior to the petition to the court. The selectmen had his written promise that he would pay. The suit of Walker against Strong was pending and before that was tried the six months had elapsed so that there was no liability on the part of the defendant under the statute. The

town are injured by reason of the promise. Without that they could and would have made application to the court for an assessment against the defendant. By reason of the promise that proceeding was not begun, and it is wrong to allow the defendant to thus injure the town and then escape liability as he is attempting to do.

A benefit to one party or injury to the other is a sufficient consideration. *Mascolo* v. *Montesanto*, 61 Conn. 50, 29 Am. St. Rep. 170, and cases cited.

Loomis v. *Newhall*, 15 Pick. 159, overrules *Mills* v. *Wyman*, 3 Pick. 207 and *Cook* v. *Bradley*, 17 Conn. 57, 18 Am. Dec. 79, 82, as explained in *Kendall* v. *Kendall*, 7 Maine, 171.

E. E. Richards, for defendant.

The waiver of any legal right at the request of another party is a sufficient consideration for a promise. But the promise must have been accepted and acted upon. There must be the understanding between the parties, that the consideration for the promise is some waiver of a right or forbearance to enforce a claim on the part of the promise. *Benson* v. *Hitchcock, Admr.* 37 Vermont, 567.

The selectmen of Freeman waived no rights in consequence of the defendant's promise, and did nothing except that which by law they were legally bound to do. A promise to do that which one is already bound to do is not a consideration. *Pool* v. *Boston*, 5 Cush. 219; *Jennings* v. *Chase*, 10 Allen, 526; *Smith* v. *Bartholomew*, 1 Met. 276, 35 Am. Dec. 365; 3 Am. and Eng. Enc. Law, 1st ed. 834.

Plaintiffs denied all liability for the Walker claim and contested the suit. There is nothing to point to any reliance upon defendant's promise until long after the occurrences which gave rise to the suit Walker vs. Strong.

Even if it should be contended that there was an implied acceptance of the defendant's proposition the latter was not in terms in return for the waiver of any rights, or for any service or detriment, which the town was not already bound to assume. The defendant requested the selectmen to do only that which the laws of the State imposed upon them as their duty.

He asked no exemption from his liabilty to support as one of the pauper's kindred, under the statute, and no reference was made to it.

It was open to the plaintiffs to pursue the remedy provided by statute for contribution by kindred, and their failure so to do should not be attributed to defendant's promise made for another consideration, expressly stated.

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

SAVAGE, J. Assumpsit upon an alleged promise by the defendant to reimburse the plaintiff town for such judgment debt and damage and costs as the plaintiff might incur in assuming the defense of an action brought by one Walker against the town of Strong for supplies furnished the mother of the defendant, who had fallen into distress in Strong, but whose pauper settlement was in the plaintiff town. Walker who furnished the supplies called upon the town of Strong for reimbursement. At this juncture the defendant, hearing that his mother had been thrown upon the town of Strong, wrote to one of the selectmen of Freeman the following letter:—"I just received word that my mother had been thrown on the town. If you will keep the expenses as low as possible I will pay the bill. As soon as I get home I will see you." Walker brought an action for the supplies furnished against Strong. Freeman assumed the defense. The case was tried, resulting in a judgment against Strong, which judgment Freeman paid. Freeman now claims to recover of the defendant the amount of that judgment.

The plaintiff claimed that the defendant told one of the selectmen and overseers of the poor of the plaintiff town that "if they would go ahead and defend the suit of Walker v. Strong on account of his mother, he would pay all the bills and expenses." This was denied by the defendant. Upon this issue the jury found for the defendant.

The plaintiff also relied upon the promise contained in the above mentioned letter. But the presiding justice instructed the jury that the promise contained in the letter, if any, was without consideration and that in this action nothing could be recovered from the defendant for any sum actually paid for the supplies furnished his mother,

and the correctness of this ruling is the only question presented by the exceptions.

It should be noticed that while the plaintiff in argument claims that a portion of the supplies were furnished after the letter from the defendant was written and received, the bill of exceptions does not disclose that fact, if it be a fact. We cannot travel out of the case, but must take the bill of exceptions as it reads. The bill states that "in the spring of 1901, while visiting her daughter in Strong, the defendant's mother fell into distress and was supplied by one Walker, who called upon the town of Strong for reimbursement." The bill then details the writing of the letter, which was dated May 6, 1901, but it nowhere states, even by implication, that any supplies were furnished afterwards by Walker, or Strong or Freeman. Assuming that it was a material fact, it was incumbent upon the excepting party to state the fact in its bill of exceptions. In the absence of any such statement we must treat the case as if the fact did not exist.

That the defendant was under a moral obligation to pay expenses already incurred in relieving his mother from distress may be taken as true. That he was under a contingent or conditional statutory liability to reimburse the plaintiff for expenses incurred for the relief of his pauperized mother is also true. R. S. 1903, ch. 27, § 18. A mere moral obligation, or as it is sometimes rather loosely stated, a moral obligation not founded upon an antecedent legal liability,—(see *Farnham* v. *O'Brien*, 22 Maine, 475) is not sufficient consideration for a promise. The following cases, somewhat analogous to the one at bar, support this doctrine, *Mills* v. *Wyman*, 3 Pick. 207; *Loomis* v. *Newhall*, 15 Pick. 159; *Dodge* v. *Adams*, 19 Pick. 429; *Cook* v. *Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Kendall* v. *Kendall*, 7 Maine, 171. See also 6 Am. & Eng. Ency. of Law 2nd ed. p. 679. The defendant's moral obligation therefore was not a sufficient consideration for his promise.

And if the existence of a fixed statutory liability be a sufficient consideration for a promise, as is assumed in some of the cases above cited, we think any liability which existed in this case was too remote and contingent to furnish a sufficient consideration. This case must

be distinguished from those based upon promises made in consideration of the compromise of claims of doubtful liability. Here the liability was created by statute, and by statute alone. It appears that the plaintiff town at the time of the promise had not paid the expense incurred. It had become only contingently liable to pay. Its liability depended upon proof that the pauper's settlement was in the plaintiff town, that the pauper had fallen into distress, that the supplies furnished were pauper supplies, and that legal notice should be given, none of which questions had then been adjudicated. Or, if the plaintiff town was liable and had admitted its liability by paying the expenses, the defendant's liability to the town would be contingent upon proof of his being of sufficient ability to pay. Here then is one contingency dependent upon another contingency, and the defendant's liability dependent upon both.

We think a reasonable rule is the one declared in *Mills* v. *Wyman*, supra. There it was sought to found a sufficient consideration for the promise of a father to pay expenses already incurred for the relief of his son on the ground of a statutory obligation compelling lineal kindred to support such of their poor relations as are likely to become chargeable to the town of their settlement. The court said:—"It is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto." . . . And after mentioning the various contingencies to which the liability was subject, the court added:—"The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged." While the Massachusetts statute referred to in *Mills* v. *Wyman* differs from our own statute which we have cited, in this, that it relates to future support rather than repayment of expenses already incurred, the contingent character of the liability is the same in both cases. And we can see no reason why the rule declared in *Mills* v. *Wyman* is not applicable in this case.

It is said that the town relying upon the promise omitted to prosecute its statutory claim against the defendant within the time limited, and that the defendant is now estopped to deny liability. But this

can make no difference. One who relies upon a naked promise does so at his peril. *Bragg* v. *Danielson*, 141 Mass. 195.

But there is another and fundamental difficulty with these exceptions. The letter concerning the effect of which the present controversy has arisen, does not appear to have been material to the issue of liability raised by the pleadings. It was entirely collateral to the promise declared on in the writ. The promise alleged in the writ, as appears by the bill of exceptions, was to reimburse the town for such judgment debt and damage and costs as the town might incur in assuming the defense of the action of Walker v. Strong for supplies furnished defendant's mother. The promise in the letter was "to pay the bill" of expenses incurred in the relief of the defendant's mother. Although the promise alleged and the promise proved may both relate to the same subject matter, they are essentially distinct. One is a promise to pay a judgment which may (or may not) be recovered. The other is a promise to pay a bill incurred, and already incurred so far as the case shows. The former assumes a pending action, and contemplated defense, with a possible judgment for debt and costs. It is the payment of this final judgment which it is alleged that the defendant promised to reimburse the plaintiff town. The letter does not support the allegation. It proves another and distinct promise. It is irrelevant to the promise alleged. Whether the promise contained in the letter was founded upon a sufficient consideration is entirely immaterial.

The ruling of the court was upon an immaterial proposition, and was harmless, even if it had been wrong. For this reason also the exceptions must be overruled. *Neal* v. *Paine*, 35 Maine, 158; *Hardy* v. *Colby*, 42 Maine, 381; *Witherell* v. *Maine Ins. Co.*, 49 Maine, 200.

Exceptions overruled.

HENRY L. FOSS, and others,

vs.

ETIENNE R. DESJARDINS, and others, and LAND and BUILDINGS.

Androscoggin. Opinion April 7, 1904.

Liens, on land and buildings. Lost by delay in filing notice or bringing action within time provided by statute. *R. S. 1883, c. 91, §§ 32-34.*

Proceedings to enforce lien claims upon land and buildings for materials furnished will become invalidated by delay in bringing the action for more than ninety days after notice of the claim has been filed, as provided in R. S. 1883, c. 91, § 34.

The same result follows from failure to file the notice of a lien claim within forty days after the lienor ceases to furnish materials. *Ib.* c. 91, § 32.

Exceptions by land owner. Sustained.

Action to enforce a lien of the plaintiffs against the land and buildings of Herbert W. Robinson.

The case appears in the opinion.

Tascus Atwood, for plaintiffs.

It was superfluous to give any dates in the certificate and certainly if the certificate would have been good without dates, the mere fact that the blinds were furnished one week later than the date in the certificate in no way prejudiced the owner's rights, for the amount claimed included the blinds and the date of the delivery of the blinds was within forty days of the filing of the certificate. The writ was dated within ninety days from November twentieth and the ruling of the justice for judgment against the property as well as against the principal defendant was right and in accordance with law.

It requires very little to make a valid notice. *Ricker* v. *Joy*, 72 Maine, 108; *Durling* v. *Gould*, 83 Maine, 134.

The law does not require that the items making up the materials shall be given, consequently if plaintiffs in particularizing omitted

blinds, but the amount covered them, no harm was done the owner, and again R. S. 1883, c. 91, § 33, would cure this inaccuracy (if inaccuracy it was). It might well be claimed the expression "outside finish" would include blinds, but the shorter step is the fact the legislature designed by sec. 33 that a lienor's rights should not be lost by an inaccuracy "if the same can be reasonably recognized."

W. H. White, Seth M. Carter, for defendants.

D. J. McGillicuddy and F. A. Morey, for land owner.

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

PEABODY, J. This is an action to enforce the lien of the plaintiffs upon land and buildings owned by Herbert W. Robinson, in the City of Lewiston, for materials furnished in the erection of the buildings under a contract with the defendants.

The account annexed to the writ between the plaintiffs and the defendant contractors was referred to an auditor, who reported that the amount due from the defendants to the plaintiffs was $297.59; that the last item for the buildings described in the writ, one lot of blinds and trimmings, was delivered November 20, 1902; that the item next preceding was a shelf delivered November 11, 1902, found to be a gift from the defendants without any knowledge on the part of the plaintiffs that it was to be a gift; and that the item next preceding this was delivered November 10, 1902.

The presiding justice rendered judgment for the plaintiffs for the sum of $296.07 and interest from the date of the writ, which was February 9, 1903, and a lien judgment against the premises for a like amount.

To the rulings of the court, the owner of the land and buildings filed exceptions.

The item of November 11, 1902, could not create a lien, as it was not a part of the materials furnished for the buildings, and it was properly disallowed by the court. All the other items found due by the auditor were allowed and entered into the lien judgment.

The statutory notice of the plaintiffs' claim was filed in the city clerk's office December 20, 1902.

The contract between the plaintiffs and the defendants was not an entire contract but embraced a series of items, as appears by the auditor's report. These items were correlated only as being furnished for the same buildings and in the aggregate forming an inchoate lien claim in favor of the sub-contractors, which could be preserved only by observing the requirements of the statute which create the lien.

It was indispensable that the notice of the claim should be filed in the city clerk's office within forty days after the claimants ceased to furnish materials, and that the suit should be commenced within ninety days after the last materials were furnished. Sections 32 and 34, chap. 91, R. S. 1883.

The auditor's report finds that the last item, except the one disallowed by the court delivered subsequently to November 10, 1902, was furnished November 20, 1902. This item, being beyond the dates which the plaintiffs' notice includes, "from July 1, 1902, to November 13, 1902," cannot be proved as part of the plaintiffs' lien claim. Consequently the suit in reference to the date of the last item provable was fatally late, and the lienors' rights were thereby lost.

Section 33, chap. 91, R. S. 1883, does not apply, and the reasoning of the court in *Durling* v. *Gould*, 83 Maine, 134, and *Wescott* v. *Bunker*, 83 Maine, 499, does not sustain the contention of the plaintiffs. The proceedings were invalidated not by technical inaccuracies in the notice, but by delay in commencing the suit which dissolved the lien.

Exceptions sustained.

GEORGINA M. CROSBY *vs.* ALBERT M. SPEAR.

SAME *vs.* SAME.

Kennebec. Opinion April 8, 1904.

Jurisdiction, State and Federal Courts, when exclusive and concurrent. *Bankruptcy.* Trustee's title and possession. *Replevin,*—when not maintainable against trustee.

When a court, State or Federal, has once taken into its jurisdiction a specific thing, no court, except one having a supervisory control or superior jurisdiction in the premises, has a right to interfere with and change that possession.

After an adjudication in bankruptcy and qualification of the trustee, the bankrupt's property is placed in the possession of the bankruptcy court.

An action of replevin in a state court cannot be commenced and maintained against the trustee to recover property in the possession of and claimed by the bankrupt at the time of the adjudication, and in the possession of the referee in bankruptcy at the time when the action is begun.

An adverse claimant may bring suit in the state court and try the title to the property; but after the jurisdiction of the bankruptcy court has once attached he cannot take the property in specie out of the possession of that court or of any of its agents.

On report. Plaintiff nonsuit.

Two actions of replevin, between the same parties, to recover possession of certain store fixtures, etc., from the defendant, the trustee in bankruptcy of F. Elbridge Drake, a bankrupt.

The property was in the bankrupt's possession at the time of his adjudication in bankruptcy and was taken by the plaintiff by writs of replevin from the trustee subsequently appointed.

At the close of the testimony the presiding justice, with the consent of the parties, reported the case to the law court to determine the question whether the actions could be maintained.

The facts will be found in the opinion.

Geo. W. Heselton and A. M. Goddard, for plaintiff.

Orville D. Baker, for defendant.

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

POWERS, J. The sole question raised by the report is whether these two actions of replevin can be maintained in the state court.

F. Elbridge Drake of Gardiner, remaining partner of F. E. Drake & Co., filed his voluntary petition in bankruptcy May 21, and was duly adjudged bankrupt by the United States District Court of Maine on May 26, 1900. The defendant was thereupon appointed and qualified as trustee of the individual and partnership estate of the bankrupt, and took possession of the store fixtures constituting the property replevied, claiming title to them as trustee. These fixtures were in the bankrupt's possession at the time of the adjudication and were included by him in his schedules as a part of the partnership estate, and he also there stated that he understood they would be claimed by the plaintiff. July 3, 1900, the plaintiff sued out these two writs of replevin, and under them the property in controversy was taken from the possession of the trustee in bankruptcy and delivered to the plaintiff.

It is familiar doctrine that when a court, State or Federal, has once taken into its jurisdiction a specific thing, no court, except one having a supervisory control or superior jurisdiction in the premises, has a right to interfere with and change that possession. This principle is fully illustrated and ably vindicated by Mr. Justice Matthews in *Covell* v. *Heyman,* 111 U. S. 176, cited and relied upon in *White* v. *Schloerb,* 178 U. S. 542, and is necessary to prevent unseemly and vexatious collision between the State and Federal courts. It applies as well to property held by the State as by the United States courts "excepting those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States."

We are unable to distinguish this case from *White* v. *Schloerb*, supra. It was there held, "after an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of the referee in bankruptcy at the time when the action of replevin is begun."

There the property was in the possession of the referee, here it was in the possession of the the trustee. The latter was as much the officer and agent of the District Court as the former. It matters not what particular officer of the court is holding the property or what may be his title. He holds it as the agent of the court whose representative he is. His possession is its possession. It brings it within the jurisdiction of that court, and from that jurisdiction it cannot be taken by any process issuing out of this court. An adverse claimant may bring suit in the state court and try the title to the property; but after the jurisdiction of the bankruptcy court has once attached he cannot take the property in specie out the possession of that court or of any of its agents. *Truda* v. *Osgood*, 71 N. H. 185; *Weeks* v. *Fowler*, 71 N. H. 221.

The filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction, and on adjudication and qualification of the trustee, the bankrupt's property is placed in the custody of the bankruptcy court. *International Bank* v. *Sherman*, 101 U. S. 403; *Mueller* v. *Nugent*, 184 U. S. 1.

The decision here reached is not based upon any express provision of the Bankrupt Act of 1898 conferring exclusive jurisdiction upon the United States Court in actions relating to the estate of the bankrupt. On the contrary, it is conceded that this court has concurrent jurisdiction of all questions of title to property derived through the bankruptcy proceedings. A party claiming the same may prosecute any remedy, to which he is entitled, that does not involve a withdrawal of the property from the custody of the officer and of the jurisdiction of the court, in any court, State or Federal, having jurisdiction of the parties and the subject matter. The objection

to these actions of replevin is that, after the bankruptcy court has taken the property into its possession, they change the judicial custody of the property and aim to transfer its actual possession to a new court and a new jurisdiction.

We are aware that the Supreme Court of New Jersey in a recent case, *Cook* v. *Scovel*, 68 N. J. L. 484, have held that the state courts have jurisdiction of an action of replevin brought against a trustee in bankruptcy who claims that the goods in controversy belonged to the bankrupt. No reference is made in the opinion to *White* v. *Schloerb* above mentioned, and the only case cited in support of the decision is *Claflin* v. *Houseman*, 93 U. S. 130, where an assignee in bankruptcy brought suit in a state court under the thirty-fifth section of the Bankrupt Act of 1867, to recover the amount collected by the defendant on a judgment against the bankrupts recovered within four months before the commencement of the proceedings in bankruptcy. It was there held that where neither by express enactment nor necessary implication exclusive jurisdiction is given to the Federal courts, the State courts having competent jurisdiction in other respects may be resorted to for the enforcement of rights acquired under the laws of the United States. The question of the transfer from one jurisdiction to another of property in custodia legis was neither involved nor discussed, and we cannot regard *Claflin* v. *Houseman* as opposed to the doctrine of *White* v. *Schloerb* or *Covell* v. *Heyman*, supra.

Our conclusion is, that the property replevied from the trustee was at the time in his possession as an officer and agent of the bankruptcy court, and therefore within its custody and exclusive jurisdiction; and that it could not be taken out of its jurisdiction by any process issuing from a State court.

In accordance with the stipulation of the parties the entry in both cases must be,

Plaintiff nonsuit. Judgment for return of the property.

STATE OF MAINE *vs.* BENJAMIN KAUFMAN.

Lincoln. Opinion April 8, 1904.

Fish and Game. Sardines,—Herring held as such. *Stat. 1901, c. 240.*

The policy of the law seeks to regulate the canning business, for the purpose of protecting the fishing industry, by preventing the decimation of herring on the coast of Maine.

It is contrary to the Stat. of 1901, c. 240, regulating the packing of sardines, to pack and can herring between the first day of December and the tenth day of May following, although the fish are more than eight inches in length and are sold as brook trout.

On report. Judgment for the State.

Indictment for unlawfully packing and canning 3277 cans of sardines at Boothbay Harbor, Lincoln County, on the 13th day of December, 1901, and between the first day of said December and the tenth day of May following.

By agreement of the parties the case was reported to the law court, the penalty to be fixed by the court below if the judgment should be for the State.

The evidence introduced disclosed that on the 13th day of December, 1901, the factory at Boothbay Harbor, of which the defendant was superintendent, had on hand 3277 cans of fish put up in decorated cans, which cans were marked "Mustard Sardines." The fish were all at least eight inches long. These fish, so put up, were in fact herring, and all to be marked, and some of them were marked "Brook Trout," and packed in souse and tomato. Sardines are always put up in mustard or oil, and never in souse and tomato in cans of these sizes. The fish were on hand the 1st of December, and well knowing that the packing time for sardines had expired on the 1st of December, they at once proceeded to pack them as "Brook Trout," and not as sardines. They used plain, square and oval

cans, until the supply was exhausted, and notwithstanding that they would lose the cost of the decorations, they continued to pack the fish, and thus saved them, in these cans, intending to remove and did remove the decorations subsequently. The decoration cannot be removed until after the can is sealed, otherwise it would spoil the can, since the chemical by which the decoration is removed, is very powerful. The decorations were all removed, and the cans were all marked "Brook Trout" and sold under that name.

The cost of packing herring as "Brook Trout," "Alaska Mackerel" and any of the various brands of fish known to the trade, is materially greater per case than to pack in the decorated cans as sardines.

The testimony on the part of the defendant showed that the packers received one-quarter more for packing the "Brook Trout;" that these were all retorted, that is, subjected to high steam pressure and not steamed or boiled as are sardines. They were sold at a higher price than sardines; and there was testimony on the part of the defendant that sardines are herring of small size packed in oil or mustard. There is a quarter-size can used occasionally with clear vinegar and whole spice put in with the fish, but with this exception alone sardines are always packed in oil or mustard.

The fish in question, were packed in souse and tomato and the defendant claimed, therefore, that they were not sardines.

J. W. Brackett, County Attorney, for State.

G. B. Kenniston, for defendant.

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

PEABODY, J. This case is before us on report by agreement of the parties.

An indictment was found by the grand jury in the County of Lincoln at the April term, A. D. 1902, against the respondent for the violation of chap. 240 of the Public Laws of 1901 by packing sardines during close time.

The defense of the respondent is that he was packing, not sardines, but brook trout, as these products are commercially distinguished.

The fish known as sardines are found in the Mediterranean Sea, and on the coast of Italy, Spain and France, but not in American waters. In Maine herring is the fish usually packed for sardines.

The provision of the statute alleged to have been violated has reference to herring when used for canning purposes, and the regulation intended prohibits packing or cannnig sardines of any description between the first day of December and the 10th day of the following May.

The fish were canned by the respondent between these dates, but as shown by the evidence they were not less than eight inches in length.

Another provision contained in the same clause of the statute fixes the penalty for catching, packing, preserving, or selling, or offering for sale within the same dates, any herring for canning purposes less than eight inches in length measured from one extreme to the other.

There would be a logical inconsistency in holding that a person is liable to a penalty for canning fish which he may lawfully catch for canning purposes, and there is a seeming ambiguity which requires a construction of this statute. The rule should be observed, that in construing a penal statute an interpretation should be given which is most favorable to the innocence of the citizen, and most agreeable to reason and justice. But another and paramount rule of construction requires that the policy and intent of the legislature should be ascertained. Endlich on Int. of Stats., §§ 245, 330, 337.

The evidence discloses the fact that there are several kinds of sardines known in the packing business, differing as to the size of the fish and the process and treatment in canning. At certain periods of the year the herring used must not be less than eight inches in length, and at other seasons they may be of any length. They can be packed as standard sardines, or more expensively packed as a higher grade of sardines, or as imitation trout, or imitation mackerel. The treatment and process are elected by the packer, and distinguish the grades of the sardine product. But the policy of the law seeks to

regulate the canning business, for the purpose of protecting the fishing industry, by preventing the decimation of herring on the coast of Maine.

The words in which the ambiguity of the statute originates are "for canning purposes," and "of any description," in the clause referred to, not from any obscurity in the terms themselves, but in their relations to each other.

Assuming the intent of the legislature to be to prevent the extinction of the fish used in packing sardines, the words "for canning purposes," simply modify the limitation of the taking of herring under eight inches in length, which are principally used for sardines, and evidently do not imply a license to take herring of larger size for canning purposes in close time. It appears from the evidence that in packing these fish, and discarding the smaller, there is a waste, and there must necessarily be a diminished reproduction of the fish. The words, "of any description," are of wide application, and clearly prohibit all sardine canning within the time limits fixed by the statute.

A statutory definition of sardines within the meaning of the act relating to the packing of sardines might simplify this question, but we think the obvious intention of the legislature may be inferred from the context and the subject matter. The fish, process and treatment, used by the respondent in canning the goods which he calls and labels brook trout, fulfill all the conditions of canning sardines. To hold otherwise would defeat the purposes of the law.

Judgment for the State.

ALONZO M. BUMPUS AND CHESTER H. THURSTON

vs.

ALFRED E. TURGEON.

Androscoggin. Opinion April 11, 1904.

Partnership. Actions, by partners—all to join ex contractu. *Pleading.*

It is a general rule of pleading that all persons, who are partners in a firm when a contract is made with it, should join in an action for the breach of such contract.

The defendant was indebted to a firm consisting of the plaintiff and T. for lumber purchased of the partnership. T. in fraud of the plaintiff settled the account by taking the defendant's check for part and the application of the balance in discharge of T.'s individual debt to the defendant.

Held; that the innocent partner cannot alone maintain a suit to recover the amount so applied.

Exceptions by plaintiff. Overruled.

Assumpsit by the plaintiffs as co-partners on account annexed to recover the price of lumber sold to the defendant.

The facts appear in the opinion.

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

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

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

POWERS, J. The defendant was indebted to A. M. Bumpus & Co., a co-partnership consisting of the plaintiff and one Chester H. Thurston, who is living, in the sum of $511.69 for lumber purchased of the partnership. Thurston in fraud of his partner settled this account for the defendant's check for $154.14 and by the application

of the balance in discharge of his individual debt to the defendant. This suit was afterward brought in the name of the partnership to recover the amount so applied. At the trial, after the evidence was all in, the plaintiff amended his writ by striking out the name of Thurston as plaintiff. Thereupon the presiding justice directed a verdict for the defendant and the plaintiff took exception.

The case presents the single question whether, under the facts above stated, the innocent partner may maintain an action in his name alone to recover the partnership debt. It is a general rule of pleading, too familiar to require either citation or argument, that all persons who are partners in a firm when a contract is made with the firm, should join in an action for the breach of it. To this there are exceptions, as in the case of the death of one of the partners, his bankruptcy, or of a dormant or nominal partner, and possibly in other instances.

The attempt has often been made, and failed, to sustain an action in the name of one member of a firm in defiance of the above rule. *Hewes* v. *Bayley*, 20 Pick. 96; *Halliday* v. *Doggett*, 6 Pick. 359; *Cushing* v. *Marston*, 12 Cush. 431; *Fish* v. *Gates*, 133 Mass. 441. While there is a conflict of authority as to whether an action may be maintained by all the partners under the circumstances presented by the case at bar, no case has been cited in support of the plaintiff's contention that it can be sustained by less than all.

In the present case the promise was to the plaintiff and Thurston jointly, the consideration for that promise moved from them jointly. A recovery must be for their joint benefit. To permit the plaintiff alone to maintain this action would be a violation of a rule of pleading which never heretofore has been questioned. It is urged that as this court has decided in *Blodgett* v. *Sleeper*, 67 Maine, 499, that an action cannot be maintained by the plaintiff and Thurston jointly, the plaintiff if he cannot sue alone is left wholly without remedy at law. It is however simply one among many of the legal limitations, incident to the partnership relation, which the plaintiff accepted when he voluntarily entered into the partnership.

In *Homer* v. *Wood*, 11 Cush. 62, an analogous case, in which suit

was brought in the name of the firm, the Massachusetts court after saying that the innocent or defrauded partner cannot recover in his own name alone, and holding that the firm also cannot maintain a suit, said:

"It may seem hard and inequitable that the innocent party, who is himself the victim of his co-partner's fraud, should be thus shut out from his legal remedy. But the legal connection of partners is so peculiar and intimate, that their rights and remedies in a court of law are necessarily limited by the relation which they hold to each other. They cannot maintain an action against one of their copartners who is indebted to them in his individual capacity, nor against another firm of which one of the co-partners is also a member. These and similar restrictions are the unavoidable results of the technical rules of law in their application to the mutual relations of co-partners, and serve to show, that, in a court of law, the rights of co-partners cannot always have corresponding and adequate remedies. These must often be sought in a court of equity only."

It is not now necessary to determine whether, as stated in *Craig* v. *Hulschizer*, 34 N. J. P. 363, "the equitable remedy is entirely adequate." The well settled rules of pleading forbid the maintainance of this action ex contractu by one of the partners alone.

Exceptions overruled.

ISAIAH M. PIERCE, Assignee,

vs.

HERBERT J. BANTON AND ADA M. FISKE, Admx.

Penobscot. Opinion April 11, 1904.

Sales. Warranty. License, to cut logs. *Lumber Permit. Damages,* when title of licensor fails.

The written agreements commonly used in this State between a licensor and licensee, called permits, whereby the licensee is authorized to enter on land and cut and remove logs and timber paying stumpage therefor, are executory contracts for the sale of the logs and timber after the cutting, as personal property, coupled with a license to enter and cut.

When it is provided in such written license or permit that "said grantee (licensee) agrees that the said grantor (licensor) shall reserve and retain full and complete ownership and control of all lumber which shall be cut and removed . . ." until all matters shall be settled and the agreed stumpage paid, *held;* that this provision amounts to an assertion of title by the licensor to the timber and logs on the permitted lands; that such an assertion of title is a warranty of title; and is as effectual to create a warranty as actual possession of the thing sold.

When such logs or timber are replevied from the licensee by the true owner of the land, the rule of damages is the value of the logs at the time when, and the place where, they were replevied from him, and all costs, if any, to which he may be subjected by the replevin suit, less the stumpage price he was to pay under the terms of his permit, to which balance interest should be paid from the date of the taking on the replevin writ.

On report. Judgment for plaintiff.

This was an action of assumpsit in which there were four counts, two to recover damages for an alleged breach of a written contract, the third on an implied warranty of title, and the fourth for money had and received. They were all founded on a written permit to cut timber on lot 22 in the town of Medford, Penobscot County, given by the defendant Herbert J. Banton and the defendant Ada M. Fiske's intestate, Fred J. Fiske, to Harry J. Bailey, the plaintiff's assignor.

The second count, treated by counsel as a count for breach of an implied warranty of title, is as follows:

"Also, for that whereas heretofore, to wit; on the 9th day of December, A. D. 1899, at Bangor aforesaid, by a certain agreement then and there made by and between the said Herbert J. Banton and Fred J. Fiske, in his lifetime, and Harry J. Bailey, it was agreed that the said Herbert J. Banton and Fred J. Fiske should deliver during the season then next following to the said Harry J. Bailey, certain large quantities of pine, spruce and fir lumber to be cut from lands described in said agreement by the said Harry J. Bailey under a license given to him, the said Harry J. Bailey, by the said Herbert J. Banton and Fred J. Fiske, said lumber to be cut and removed upon certain conditions and restrictions fully set forth in said agreement at a price per thousand feet for stumpage which was stipulated and agreed upon in said agreement, to wit: for spruce $2.25 per M. for pine $4.50 per M and for fir $2.25 per M, and the said agreement being so made as aforesaid, afterwards, to wit, on the first day of June, 1900 at Old Town in said County of Penobscot, in consideration thereof that the said Harry J. Bailey at the special request of the said Herbert J. Banton and said Fred J. Fiske had then and there undertaken and faithfully promised the said Herbert J. Banton and Fred J. Fiske to perform and fulfill the said agreement in all things on his part and behalf to be performed and fulfilled, they, the said Herbert J. Banton and Fred J. Fiske, undertook and then and there faithfully promised the said Harry J. Bailey to perform and fulfill the said agreement in all things on their part and behalf to be performed and fulfilled; and the plaintiff saith that the said logging season of 1900 hath long since passed and although the said Harry J. Bailey was always ready and has offered between the 6th day of December, 1899 aforesaid and the day of the purchase of this writ to accept and take all of the lumber that he cut under said license and agreement during the logging season of 1899 and 1900 aforesaid and to pay the said stumpage of $2.25 per M for spruce and fir and $4.50 per M for pine, yet the said Herbert J. Banton and Fred J, Fiske in his lifetime nor the said Ada M. Fiske since his decease, not regarding their said agreement nor their said promise and undertaking

so by them made as aforesaid, but contriving and fraudulently intending to deceive the said Harry J. Bailey in this behalf, did not deliver to the said Harry J. Bailey 884 pine logs and 906 spruce and fir logs making in all 1790 logs of the lumber so cut by the said Harry J. Bailey under said license and agreement, but wholly neglected and refused so to do.

"And the plaintiff avers that the said Harry J. Bailey hath been put to great expense of time, money and labor in cutting said lumber and hauling the same and driving the same to market, to wit; at Stillwater in the Penobscot river, and that by reason of the neglect and refusal of the said Herbert J. Banton and Fred J. Fiske in his lifetime or the said Ada M. Fiske since his decease, to deliver said lumber as aforesaid, the said Harry J. Bailey hath wholly lost the time, money and labor expended in cutting and hauling and driving said logs and hath lost the opportunity to sell said logs at an advanced market price, to wit, fifteen hundred dollars ($1500) for said logs and lumber.

"And the plaintiff further avers that on the 12th day of June, A. D. 1901, all of the right, title and interest in and to said logs and lumber and right to maintain an action for a breach of said contract was transferred and assigned to him, the said Isaiah M. Pierce by the said Harry J. Bailey, as will appear by the assignment to be filed in court with this writ, wherefore and by force of the statute in such case made and provided the defendants became liable and promised the plaintiff to pay him the sum of fifteen hundred dollars ($1500) on demand."

It appears from the reported testimony in the case that on the 9th day of December, 1899, Herbert J. Banton of Lagrange and Fred J. Fiske of Bangor gave to Harry J. Bailey of Howland a permit, called an agreement and conditional license to cut and remove spruce, fir and pine timber from lot 22 in the town of Medford. Under said license Harry J. Bailey entered upon the lot during the winter of 1899 and 1900 and cut and removed the logs which form the subject of controversy in this suit. The title to lot 22 was claimed by William M. Eldridge of Dexter and, during the winter of 1899 and 1900, he asserted his title to the premises in various ways, by

forbidding the cutting of the logs on the part of Bailey and finally by going on to the logs in the spring, marking them over, rolling them into the river and driving them. By the terms of the permit Harry J. Bailey was to pay stumpage for spruce and fir $2.25 per thousand, and for pine $4.50 per thousand, the stumpage to be paid on the 1st day of June, 1900. Prior to that day said Harry J. Bailey, having lost possession of said logs by the assertion of a superior title on the part of William M. Eldridge, did not pay or tender to the said Banton or Fiske the stumpage due on said logs, but claimed that he has ever held himself in readiness to do so.

On the 24th day of August, 1900, the said William M. Eldridge caused to be replevied the logs which were cut from lot 22 on a replevin writ dated June 21, 1900; said action was entered at the October term, 1900, the action being tried at the April term, 1901. A verdict was rendered for the plaintiff, William M. Eldridge, and the jury made a finding that the property described was the property of Eldridge, and not of the defendant. That replevin suit against Harry J. Bailey was defended by Banton and Fiske, the defendants in this action. A motion for a new trial was submitted to the full court and judgment was rendered on the verdict. Judgment rendered March 8, 1902.

On the 11th day of December, 1899, Harry J. Bailey assigned the permit mentioned in this case to I. M. Pierce, of Montague, as security for supplies and money advanced to carry on the lumbering operation, and by an assignment dated June 12, 1901, said Harry J. Bailey made absolute the conditional assignment.

On the 27th day of June, 1901, Isaiah M. Pierce, the assignee, brought this action against the defendant, Herbert J. Banton and Ada M. Fiske, administratrix of the estate of Fred J. Fiske, for breach of contract in the non-delivery of the logs.

W. H. Powell, for plaintiff.

The plaintiff was excused from making a tender or payment, and it is sufficient that he has always been ready to pay the agreed price of stumpage upon delivery of the logs. Law never requires useless formalities. *Ward* v. *Fuller*, 15 Pick. 190; *Southworth* v. *Smith*, 7 Cush. 393; and *Mowry's case*, 112 Mass. 400.

Payment of the purchase price, or the stumpage, and the delivery of the logs and the title to the same were to be simultaneous, and on June first the defendants could not have delivered the logs because they were in the possession of Eldridge; they could not have given title to them because they did not have title themselves, but it was in Eldridge as has been shown by the result of the case in court. It would be unreasonable to expect the plaintiff to make a tender of the stumpage. If tendered, it would have been accepted by the defendants, and if they were irresponsible then the plaintiff's loss would be just so much the greater. 2 Pars. Cont. 7th ed. p. 811.

Counsel also cited: *Lake Shore & M. S. R. Co.* v. *Richards*, 152 Ill. 59, 30 L. R. A. p. 45, and notes; *Skinner* v. *Tinker*, 34 Barb. 333; *Bond* v. *Carpenter*, 15 R. I. 400; *Salvo* v. *Duncan*, 49 Wisc. 215; *Corbett* v. *Anderson*, 85 Wisc. 218; *Grandy* v. *Small*, 5 Jones L. 51; *Shaw* v. *Grandy*, 5 Jones L. 57; *Abrams* v. *Suttles*, Busbee, L. 90; *Woods* v. *Cooke*, 61 Maine, 215; *Duffy* v. *Patten*, 74 Maine, 396; *Richards* v. *Allen*, 17 Maine, 296; *Bassett* v. *Bassett*, 55 Maine, 127; *McCarthy* v. *Mansfield*, 56 Maine, 538.

Banton and Fiske, were in actual possession of lot 22; they had all the possession that the nature of the property permits; and that is all that the law requires. The property was wild land; no one ever stays upon wild land except for temporary purposes.

The possession of Bailey was the possession of Banton and Fiske, and but for the permit the sale would have been completed when the logs were severed from the soil. The licensee of Banton and Fiske was in possession of the land at the time that the sale was made. In *Shattuck* v. *Green*, 104 Mass. on page 42, the court holds "If a tenant in common of personal property, which is in the possession of a third person as bailee of all the owners, sells his individual share, the possession of the bailee is his constructive possession so as to attach to the sale an implied warranty of title," and in *Grose* v. *Hennessey* 13 Allen, p. 389, the court holds, "If a chattel is sold to which the vendor had no title, the purchaser may maintain an action against him to recover damages therefor; and it is immaterial that the purchaser has not been deprived of possession of the chattel." The defendant, Hennessey, was in possession of real estate under a lease. He sold to

the plaintiff, Grose, a building located on the land as personal property. At the same time he transferred to Grose the lease of the land. He had no title to the building as personal property because it was a part of the realty, and the title to the realty was in another.

On page 390 in the opinion by Hoar, J., in the above case is the following: "By the sale of it as a chattel no title passed. In every sale of personal property there is an implied warranty of title; here there was no expressed warranty." So far as the case discloses it is exactly similar to the case at bar. The case does not disclose whether the defendant, Hennessey, held the land under a lease from the true owner or not; if he did not, the two cases are exactly parallel.

A sale of personal chattels implies affirmation by the vendor that the chattel is his and, therefore, he warrants the title unless it is shown by the facts and circumstances that the vendor did not intend to assert ownership but only to transfer such interest as he might have in the chattel sold. Benj. Sales, § 639.

If there was an assertion of ownership by the vendor in the property sold, then there would arise a warranty title even though he were not in possession. *Huntingdon* v. *Hall*, 36 Maine, 501.

Damages: *Bush* v. *Holmes*, 53 Maine, 417, and 5 Am. & Eng. Ency. of Law, p. 30, and notes.

Taber D. Bailey, for defendants.

First: The permit in this case is simply an executory contract for conditional sale of standing timber coupled with a license to go upon the land and remove the logs.

Second: After the trees were cut and removed from the land the license was executed, but the contract of conditional sale was not executed, because the stumpage never was paid and the title to the personal property did not pass until the payment of the stumpage money, and the performance of the other conditions precedent.

Third: There is no implied warranty of title, because a warranty is an incident of completed sales only, and second because the vendors were not in possession of the property sold.

Counsel cited: *Banton* v. *Shorey*, 77 Maine, 48; *Comstock* v. *Smith*, 23 Maine, 202; *Putnam* v. *White*, 76 Maine, 551; *Brown* v.

Haynes, 52 Maine, 578; *Crosby* v. *Redman*, 70 Maine, 56; *Osbourne* v. *Gantz*, 60 N. Y. 540; *Huntingdon* v. *Hall*, 36 Maine, 501; *Pratt* v. *Philbrook*, 33 Maine, 17. Damages: *Ripley* v. *Mosely*, 57 Maine, 76; *Washington Ice Co.* v. *Webster*, 62 Maine, 341; *Winslow* v. *Lane*, 63 Maine, 161.

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

STROUT, J. Defendant Banton and Fred J. Fiske, now deceased, made a written agreement with Harry J. Bailey, by which Banton and Fiske authorized Bailey to enter upon certain lots of land, among them lot 22 south of and adjoining the Piscataquis river, in Medford, and cut and remove spruce, fir and pine timber, and pay therefor the stumpage mentioned in the agreement. The settled construction of contracts of this character is, that they are executory contracts to sell the timber after cutting, as personal property, coupled with a license to enter and cut. *Emerson* v. *Shores*, 95 Maine, 237.

Under this contract Bailey cut a quantity of timber from "the lower half of lot No. 22." From this 1180 pine logs, 341 fir logs and 98 spruce logs were taken from Bailey on a replevin writ against him, in favor of William M. Eldridge et al. That suit was tried at the January term of this court for Penobscot County, 1902, and defended by the defendants in this case. The issue in that case was one of title to the logs, based upon the title to the lower half of lot No. 22. The verdict was that the logs were the property of the plaintiff in that action, and not the property of Bailey. There was also a special finding that the plaintiffs and their grantors had for twenty consecutive years occupied lot 22 "actually, openly, notoriously and continuously" before the cutting of the logs replevied. Judgment was finally entered upon the verdict. This judgment conclusively determined, as between these parties, that the land where the replevied logs were cut was the property of the plaintiffs in the replevin suit, and that the defendants in this suit had no title thereto, nor to the logs cut thereon.

The plaintiff is the assignee of Bailey of all his rights under his contract with the defendants, and all rights of action which Bailey had growing out of his operation under the agreement.

The plaintiff claims that the defendants impliedly warranted to Bailey their title to the logs. It is held in this State that no warranty of title is implied in a sale of personal property, where the seller is not in possession of the property, and makes no delivery of it, nor any representation as to the title. In such cases the rule caveat emptor applies. *Huntingdon* v. *Hall*, 36 Maine, 503.

But the facts in this case differ from that. Here, in the written license to Bailey it is provided that "said grantee hereby agrees that the said grantor shall reserve and retain full and complete ownership and control of all lumber which shall be cut and removed from the aforementioned premises," until all matters shall be settled, and the agreed stumpage paid. This language fairly amounts to an assertion of title by the licensors to the timber on the permitted lands. They could not "reserve and retain complete ownership" of that to which they had no title. The expression is equivalent to saying,—we now own this timber, and we retain such ownership till payment is made. Such assertion of the title is a warranty of title. This principle is distinctly recognized and affirmed in *Huntingdon* v. *Hall*, supra. Such assertion of title is as effectual to create a warranty as actual possession of the thing sold. It having been shown that Banton and Fiske had no title to the logs in controversy, which were cut by Bailey under their permit, there was a breach of their warranty, and for that breach they are liable to the plaintiff.

The rule of damages is the value of the logs at the time when and the place where they were replevied from Bailey, and all costs, if any, to which he was subjected by the replevin suit, less the stumpage price he was to pay under the terms of his permit, to which balance interest should be added from the date of the taking on the replevin writ.

In accordance with the agreement of the parties, case remanded for assessment of damages.

STATE OF MAINE *vs.* WILLIAM HENRY.

Kennebec. Opinion April 12, 1904.

Criminal Law. Practice, Motion in arrest, *Verdict,* surplusage. Assault with dangerous weapon.

The rule which prevails in this State as well as at common law in criminal procedure is, that a motion in arrest of judgment will be granted only on account of some intrinsic defect apparent on inspection of the record.

But judgment will not be arrested when a part of the verdict that is repugnant to the indictment may be rejected as surplusage.

The respondent was indicted for felonious assault with intent to kill being armed with a dangerous weapon. The jury rendered a verdict of guilty of assault and battery with a dangerous weapon. *Held;* that assault and battery armed with a dangerous weapon means no more than assault and battery. *Also;* that the words "and battery" may be rejected as surplusage.

Exceptions by defendant. Overruled.

The defendant was found guilty by a jury in the Superior Court for Kennebec County of "assault and battery with a dangerous weapon" and thereupon filed a motion in arrest of judgment on the ground that the verdict so rendered was for an offense not known to the laws of the State. The presiding justice having overruled the motion, the defendant took exceptions.

Thos. Leigh, County Attorney, for the State.

Geo. C. Sheldon and M. E. Sawtelle, for defendant.

The indictment will not sustain the verdict, assault and battery, although the minor offense, since the indictment does not contain an averment of assault and battery. It is true as an academic proposition of law, that the major offense assault armed with a dangerous weapon with intent to kill, includes the minor offense, assault and battery; but this general proposition as applied to specific indictments depends upon the averments in the indictment. The minor offense must be accurately stated, in every case, in the indictment, in order to sustain a conviction under indictment for the major offense. The minor offense must be an ingredient of the major as a generic

proposition, and fully averred, in the indictment, in order to sustain a conviction for it. Whart. Crim. Pl. & Prac. 9th ed. c. 3, § 250, and cases.

The offenses competent to sustain a verdict under this indictment are two, assault armed with a dangerous weapon, the major; and simple assault. *State* v. *Phinney*, 42 Maine, 384.

The indictment for assault, armed with a dangerous weapon, with intent to kill, will sustain a conviction for assault, but not for assault and battery, unless the indictment contains an averment of assault and battery. 2 Ency. Pl. & Pr. p. 859, and cases; *State* v. *McDevitt*, 69 Iowa, 549; *State* v. *McAvoy*, 73 Iowa, 557; *Young* v. *People*, 61 Ill. App. 434.

It was held that a conviction for simple assault, under indictments similar to the one at bar, no battery being averred in the indictment, was the only valid verdict, in the following cases: — *State* v. *Grimes*, 29 Mo. App. 470; *Whilden* v. *State*, 25 Ga. 396, 71 Am. Dec. 181; *White* v. *State*, 13 Ohio, 569; *Com.* v. *Hall*, 142 Mass. 454; *McBride* v. *State*, 7 Ark. 374; *Com.* v. *McGarth*, 115 Mass. 150.

The issue under the indictment at bar is two-fold:

(1) Assault, armed with a dangerous weapon, with intent to kill; (2) Simple assault. The issue assault and battery is not raised under this indictment, hence, the verdict is not responsive to the issue. The verdict therefore is fatally defective, by reason of its unresponsiveness and variance.

The ostensible verdict, under the indictment, to wit, simple assault, is a minor offense, as compared with the actual verdict rendered, to wit, assault and battery with a dangerous weapon, and is fatally defective for the reason that the major offense is never supported by the minor offense. *State* v. *Leavitt*, 87 Maine, 72.

The words "and battery with a dangerous weapon," are neither surplusage nor redundancy, since they are not merely descriptive of the word "assault"; but so far as the words, "and battery" are concerned, together with the word "assault," constitute an offense superior to and distinct from an assault, since assault and battery is a specific offense, defined by the statutes of Maine, with an implied difference as to the severity of the penalty therefor. The respondent

moreover under the verdict at bar is placed in jeopardy, as to the penalty.

There is no such offense, known to the statutes of Maine, or to the common law, as assault and battery with a dangerous weapon.

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

PEABODY, J. The respondent was indicted at the September term A. D. 1903 of the Superior Court of Kennebec County for a felonious assault with intent to kill being armed with a dangerous weapon.

The jury rendered a verdict of guilty of assault and battery with a dangerous weapon.

A motion in arrest of judgment was filed by the respondent for the reason, "The verdict rendered by the jury was defective, illegal and wrong, in that it was at variance with the indictment; further the verdict rendered finds your respondent guilty of an offense not known to the laws of this State, to wit;—assault and battery armed with a dangerous weapon."

The motion was overruled by the presiding justice and the respondent excepted.

It is urged by the attorney for the State that the objection being to a wrong verdict, the proper remedy is not a motion in arrest of judgment, but a motion to have the verdict set aside and a new trial granted, citing as authority *State* v. *Snow*, 74 Maine, 354. The language of the court under the particular circumstances of that case must be understood as deciding that where proof would be required to show that the verdict of the jury was wrong, a motion in arrest of judgment cannot be entertained. The rule which prevails in this State as well as at common law is, that such a motion can only be made on account of some intrinsic defect apparent on inspection of the record. *State* v. *Bangor*, 38 Maine, 592; *State* v. *Carver*, 49 Maine, 588, 77 Am. Dec. 275; *State* v. *Murphy*, 72 Maine, 433.

The record shows that the verdict does not in form follow the indictment, and consequently judgment must be arrested unless such

part of the verdict as is repugnant to the indictment may be rejected as surplusage. It is claimed in the motion and exceptions that assault and battery armed with a dangerous weapon is an offense unknown to the law. A verdict of assault and battery may be based upon evidence showing personal violence under circumstances in aggravation or mitigation of the offense, relevant to the penalty, which need not be averred. But their averment in the indictment would be harmless, and needless particulars in the verdict which is otherwise proper, would not be prejudicial error. It amounts to no more than assault and battery. *Wilson* v. *People*, 24 Mich. 410; *Wright* v. *People*, 33 Mich. 300.

The more important question for decision is, whether the verdict rendered under this indictment which contains no allegations of violence, can be sustained. There are authorities which appear to hold that an indictment for assault with intent to kill includes as a minor offense, assault and battery, as well as simple assault. *Reynolds* v. *State*, 11 Texas, 120; *Gardenhier* v. *State*, 6 Texas, 348; *State* v. *Bowling*, 10 Humph. (Tenn.) 52; *State* v. *Kennedy*, 7 Blackf. (Ind.) 233; *Gillespie* v. *State*, 9 Ind. 380; *Clark* v. *State*, 12 Ga. 350; *State* v. *Graham*, 51 Iowa, 72. But an examination of these cases shows, or by implication it appears, that actual violence was averred, and there is no conflict between them and authorities which hold restrictively that upon an indictment for assault with intent to kill there may be a verdict for assault, but not for assault and battery, unless the averments charge, and the proof establishes an actual battery. *Stewart* v. *State*, 5 Ohio, 241; *State* v. *Schreiber*, 41 Kan. 307; *State* v. *Stedman*, 7 Port. (Ala.) 495; *State* v. *Grimes*, 29 Mo. App. 470; *Whilden* v. *State*, 25 Ga. 396, 71 Am. Dec. 181; *White* v. *State*, 13 Ohio (State) 569; *Com.* v. *Hall*, 142 Mass. 454.

From authorities cited and those which follow, it will be found that a practically universal rule prevails, that the verdict may be for a lesser crime which is included in a greater charged in the indictment, the test being that the evidence required to establish the greater would prove the lesser offense as a necessary element. The exception was formerly recognized in England and in some American

states, that is cases where the graver crime was a felony, a verdict for a misdemeanor could not be sustained. The reason assigned was that the criminal procedure then existing was less favorable to a person indicted for felony than for a misdemeanor, but the reason has ceased, and consequently the exception. *State* v. *Waters*, 39 Maine, 54; *State* v. *Phinney*, 42 Maine, 384; *State* v. *Leavitt*, 87 Maine, 72; *Wall* v. *State*, 23 Ind. 150; *Smith* v. *State*, 2 Lea (Tenn.) 614; Wharton's Criminal Pl. and Pr. (9th ed.) § 250.

By statute in this State offenses against lives and persons are defined, which include assault as an element, and among them is the offense charged in this indictment. In accordance with the rule stated, the jury could have rendered a verdict of simple assault with or without the entry of nolle prosequi as to the intent of killing; and the intent not being proved, that was the only proper verdict, because violence, the element which distinguishes assault and battery from assault, is not alleged. But assault is included in the specific offense of assault and battery, and judgment may follow for the minor offense unless the verdict is vitiated by reason of adding improperly the words, "and battery." While these words added to those of a correct verdict define another crime not justified by the indictment, it is to be observed that the same penalty and the same judgment apply to the one as to the other, and we perceive no reason, and find no authority why these words may not be regarded as surplusage. 1 Bishop Criminal Law, § 819; *Dyer* v. *Com.* 23 Pick. 402; *Com.* v. *Fischblatt*, 4 Met. 354; *Com.* v. *Stebbins*, 8 Gray, 492; *State* v. *Stedman*, 7 Port. (Ala.) 495, supra; *Com.* v. *Hall*, 142 Mass. 454, supra. In *Bittick* v. *State*, 40 Texas, 117, in essential features like the case at bar, Gray, J., says, "It is true that the evidence does not prove the battery, and the formal and proper verdict on such an indictment would be only guilty of aggravated assault. But that the verdict does not find this is clear. Does its including also a battery vitiate the whole? We think not; and especially as the same penalty and judgment apply to the one as to the other. It is not a material error."

A man convicted of assault is protected thereby from prosecution for the battery in which it may have terminated, because said Totten,

J., "The one is a necessary part of the other; and if he be now punished for the battery, he will thereby be twice punished for the assault." *State* v. *Chaffin*, 2 Swan, (Tenn.) 493; Bishop's New Criminal Law, § 1058. And in this case the respondent cannot be heard to complain of judgment against him for the smallest in a series of statutory offenses where a jeopardy of the lower is a bar to each and all of the higher offenses. Bishop's New Criminal Law, §§ 1057 , 1070a.

Exceptions overruled. Judgment for the State for assault.

FRED INGRAM *vs.* MAINE WATER COMPANY.

Kennebec. Opinion April 18, 1904.

Constitutional Law. Mill and Mill Dams. Jury Trial, none to assess damages. *R. S. (1883), c. 92, § 12. Const. of Maine, Art. 1, § 20.*

1. The taking of private property under the Mill Act, R. S. (1883), c. 92, is sustained in this State on the ground that such taking is an exercise of the right of eminent domain.
2. There is no constitutional right to a jury trial to assess damages for property taken by eminent domain.
3. The second clause of sect. 12, chapter 92, R. S. 1883, is constitutional.

Exceptions by plaintiff. Overruled.

Complaint for flowage of plaintiff's land by defendant's mill dam under the mill acts.

The defendant was defaulted at the March term, 1903, and commissioners were appointed who seasonably made their report.

At the request of the plaintiff a jury was impanelled to try the cause and the report of the commissioners was under the direction of the court given in evidence to the jury.

Evidence tending to contradict the report of the commissioners was offered by the plaintiff.

The court ruled that such evidence could not be received unless misconduct, partiality or unfaithfulness on the part of some commissioner was shown. To this ruling the plaintiff excepted.

Jos. Williamson and L. A. Burleigh, for plaintiff.

1. A trial by jury in which the evidence that may be presented is restricted as in sect. 12 of c. 92, is not a trial by jury within the meaning of that term as used in sect. 20 of Art. 1 of the Constitution. A trial under the rules of evidence laid down in sect. 12 substitutes for the judgment of the jury that of three commissioners. It preserves the shadow of a jury trial, but divests it of its substance. *King* v. *Hopkins,* 57 N. H. 334,—An able and exhaustive exposition of the subject, deciding the issue squarely in our favor under a precisely similar constitutional provision, the court holding unconstitutional a statute making the report of referees under the mill act prima facie evidence only. *Plimpton* v. *Somerset,* 33 Vt. 283.

Howard v. *Moot,* 64 N. Y. 262, where the court says: "It may be considered for all the purposes of this appeal that a law that should make evidence conclusive which was not so in and of itself, and thus preclude the adverse party from showing the truth, would be void as indirectly working a confiscation of vested rights." *Howard* v. *Moot* is cited with approval in *Holmes* v. *Hunt,* 122 Mass. 519.

The statements in *Bryant* v. *Glidden,* 36 Maine, 36, on this point are dicta, the case being decided on other grounds. In the same case, 39 Maine, 458, the point was not raised.

While statutes may prescribe that matters which were not competent evidence at common law shall be admitted, the legislature cannot prescribe that evidence shall be conclusive which is not so in and of itself. We are able to find no case in which a compulsory reference has been held constitutional except where it related to an account and where also it was made only prima facie evidence. If the trial prescribed in sect. 12 is the kind contemplated by the Constitution, then the legislature may prescribe a similar rule in all causes, and all civil cases may be tried before commissioners whose decision shall be conclusive unless some unreasonable condition be complied with.

legislatures may enlarge the sources of testimony, but cannot unreasonably restrict them.

That a trial by a constitutional common law jury is not contemplated in sect. 12, is made still clearer by a comparison of its provisions with those of sects. 7, 8 and 9 of the same chapter, where the issues to be submitted to such a jury are distinctly specified and all others relegated for decision to the commissioners.

2. The "cause" to be tried named in sect. 12, is both a civil suit and a controversy concerning property, and the exception of "cases where it has heretofore been otherwise practiced" does not apply.

The word "heretofore," means at the adoption of the Constitution. This date was Dec. 6, 1819. *Copp* v. *Henniker*, 55 N. H. 191; *King* v. *Hopkins*, 57 N. H. 334, 3 Am. & Eng. Enc. Law, 1st ed. 720.

The issues to be tried, first before the commissioners under section 9, and second before the jury under sect. 12, are:

First: Is the land described in the complaint injured by the dam? This is the main or vital issue of the complaint. By the express terms of sect. 7 it cannot be tried under that section, and a long line of decisions holds it triable under sect. 12. If this issue is decided in favor of the complainant, the commissioners or jury then reach the following issues. Second: What are the yearly damages done to the complainant by the flowing of his lands described in the complaint? Third: How far is the same necessary? Fourth: For what portion of the year ought such lands not to be flowed? Fifth: What sum in gross would be a reasonable compensation for all the damages if any occasioned by the use of such dam and for the right of maintaining the same forever estimated according to the height of the dam and flash-boards as then existing?

Practice as to trial of these issues when the Maine Constitution was adopted: The Massachusetts statute then in force under which the first issue was triable was the statute of Feb. 28, 1798. Under its provisions the first issue was triable by a common law jury at the bar of the Court of Common Pleas, with a right of appeal and trial before another common law jury at the bar of the Supreme Judicial Court. In all preceding mill acts in Massachussets the right to

have this question determined by a common law jury at the bar of the court was given either originally or by right of appeal to the Supreme Court of Judicature.

This statute had been construed to this effect while Maine was a part of Massachusetts. *Van Dusen* v. *Comstock*, 3 Mass. 184 (1807).

By the Maine laws the trial of this issue was taken from the common law jury and given first to the sheriff's jury and then to commissioners as at present provided. Stat. 1821, c. 45; 1825, c. 976; R. S. 1840, c. 126, § 9; Stat. 1856, c. 269.

This important change is uniformly recognized by the Maine Court. *Cowell* v. *Great Falls*, 6 Maine, 282; *Nelson* v. *Butterfield*, 21 Maine, 220; *Underwood* v. *Scythe Co.*, 41 Maine, 297; *Prescott* v. *Curtis*, 42 Maine, 70. The history of this change is traced at some length in *Nelson* v. *Butterfield* cited above.

The constitutional question was not raised in any of these cases for the reason that, until the decision in *Bryant* v. *Glidden* excluding evidence tending merely to contradict the report of the commissioners and the present statute making it incumbent to "show misconduct, partiality or unfaithfulness" (ch. 269 Public Laws of 1856), it mattered little whether this issue was decided by a common law jury at the first or the second trial. It will be noted that the present statute requiring proof of misconduct, &c., has never received judicial construction.

To summarize as to the fifth issue: We claim first, that it was a novel controversy, unknown at the adoption of the Constitution; and second, that its determination, aside from the assessment of damages, involves the determination of several questions of fact, among which are the height of the dam and flash-boards as then existing, and the nature and extent of the prospective injury forever. Further, that under the present law, the plaintiff is nowhere entitled to a trial by the jury upon these issues; that such trial is guaranteed him by the Constitution, and that therefore the second clause of sect. 12, as applicable to the statute, must be unconstitutional.

A complaint for flowage is a civil suit: *Clement* v. *Durgin*, 5

Maine, 15; *Bryant* v. *Glidden*, 36 Maine, 44. This case declined to sustain a motion in arrest of judgment on the ground that no motion in arrest could be sustained in a civil action. *Hall* v. *Decker*, 48 Maine, 255. This holds that a complaint for flowage is a personal action and may therefore be served by a constable if otherwise within his jurisdiction. R. S. 1883, c. 77, §§ 63–67, give the Superior Courts jurisdiction over "all civil actions except complaints for flowage, real actions," &c.

While the case of *Henderson* v. *Adams*, 5 Cush. 610, cited without comment in *Kennebec Water District* v. *Waterville*, 96 Maine, 249, holds the contrary, this must be considered in connection with the important case of *Howard* v. *Proprietors*, 12 Cush. 263, in which Chief Justice Shaw says: "The complaint for flowing is essentially a civil suit. It is a remedy afforded to an individual, to recover damages in a special form for a private injury, in a case where, but for the special provisions in the mill act, founded upon well considered reasons of expediency, he would have a remedy in an action on the case." *Hersey* v. *Packard*, 56 Maine, 395.

We have found no case in which the sovereignty of the State is delegated to the citizens at large by a general act. In *Kennebec Water Dist.* v. *Waterville*, supra, the right to trial by jury is denied because the plaintiff is seeking to exercise the sovereign power granted it by the State, and there can be no controversy between the sovereign and the citizen. We submit that the man who owns a mill is no more entitled to exercise sovereign power than is a land owner.

There is another element of eminent domain which is lacking. There is no taking. The mill owner does not even get an easement in the plaintiff's land. It is sometimes said loosely that he obtains a right to flow the land, but he really gets no such right. He obtains simply a right to raise the water, and if the plaintiff sees fit he can build a dike and keep the water off his land. He cannot use the plaintiff's land as matter of right for the storage of water if the plaintiff sees fit to keep him out. *Jordan* v. *Woodward*, 40 Maine, 323.

If by prescribing a default at an early stage of the proceedings, and that the default shall admit nothing as to the main issue, the legislature can take away the right to a trial by jury on such issues

in a complaint for flowage, it can do the same in any other class of actions, and thus totally defeat the provisions of the Constitution.

Orville D. Baker, for defendant.

Counsel cited: *French* v. *Braintree Mfg. Co.,* 23 Pick. 220; *Jordan* v. *Woodward,* 40 Maine, 317; *Ken. Water Dist.* v. *Waterville,* 96 Maine, 246–251; Cooley's Const. Lim. pp. 534–5.

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

PEABODY, J. This was a complaint for flowage of the plaintiff's land by the defendant's mill-dam under the Mill Acts of Maine, filed in the Supreme Judicial Court for the County of Kennebec. The defendant was defaulted at the return term of said court. Commissioners were appointed and made their report awarding as damages $3 annually and $60 in gross. At the request of the plaintiff, a jury was impanelled to try the cause. The report of the commissioners was under the direction of the court given in evidence to the jury, and evidence was offered by the plaintiff tending to contradict the report. The court ruled that such evidence could not be received unless misconduct, partiality, or unfaithfulness on the part of some commissioner was shown; and to this ruling the plaintiff excepted.

The question raised by the exceptions is whether the second clause of sec. 12, chap. 92 of the R. S. 1883, relative to mills and mill-dams is constitutional. The section is as follows:—

"Section 12. If either party requests that a jury may be impanelled to try the cause, the report of the commissioners shall, under the direction of the court, be given in evidence to the jury; but no evidence shall be admitted to contradict it, unless misconduct, partiality, or unfaithfulness on the part of some commissioner is shown." This section is claimed by the plaintiff to be inconsistent with the provisions of Sec. 20, Article 1, of the Constitution of Maine which is as follows:—

"Section 20. In civil suits and in controversies concerning property, the party shall have a right to a trial by jury except in cases where it has heretofore been otherwise practised; the party claiming

the right may be heard by himself and his counsel, or either at his election."

The Mill Acts of Maine originated under the laws of Massachusetts two hundred years ago when the conditions of the country and the very great necessity of utilizing water power were reasons therefor, which since the introduction of steam and electrical power do not so obviously exist, but they have been so long recognized and upheld by judicial decisions that in their general scope their constitutionality is no longer debatable. The principle on which these laws is founded is the right of eminent domain, the sovereign right of taking private property for public use. Cooley's Const. Limitations, §§ 534, 535; *French* v. *Braintree Mfg. Co.*, 23 Pick. 216; *Jordan* v. *Woodward*, 40 Maine, 317; *Great Falls Mfg. Co.* v. *Fernald*, 44 N. H. 444; *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Equity, 695, 23 Am. Dec. 756; *Olmstead* v. *Camp*, 33 Conn. 532, 89 Am. Dec. 221. Their validity implies the power of the legislature to authorize a private right, which stands in the way of an enterprise to improve the water power, to be taken without the owner's consent, if suitable provision is made for his just compensation.

The construction which the courts have generally given to the words "property taken" in the constitution is that they include permanent damage to property. In *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308, it is held that an injury to the property of an individual is equivalent to taking, if it deprives him of its ordinary use, and entitles him to compensation. *Nichols* v. *Somerset, etc., R. R. Co.*, 43 Maine, 356; *Cushman* v. *Smith*, 34 Maine, 247; *Hazen* v. *Essex Co.*, 12 Cush. 475; *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Belknap* v. *Belknap*, 2 John. Ch. 463, 7 Am. Dec. 548. Chief Justice Shaw in *Murdock* v. *Stickney*, 8 Cush. 113 makes a distinction between the taking of the corpus of the property of an owner and incidental damages caused to his land by the mill-owner. But he decides that it is now too late to inquire whether if this were an original question this legislation would be considered as trenching too closely upon the great principle which gives security to private rights. Whatever the principle upon which the Mill Acts is founded, the right thereby granted

is restricted by the constitutional condition that the person whose land is flowed shall receive just compensation; and here an important controversy centres upon the tribunal which is to assess the damages. If the damages must be determined, as issues of fact are decided at common law, a jury is the only proper tribunal. In a complaint for flowage there are some elements of a suit at law. *Clement* v. *Durgin*, 5 Maine, 9; *Bryant* v. *Glidden*, 36 Maine, 36; *Hall* v. *Decker*, 48 Maine, 255; *Henderson* v. *Adams*, 5 Cush. 610; *Kennebec Water District* v *Waterville*, 96 Maine, 234. But there are others which might be only within the jurisdiction of a process in equity. The damage already sustained, which might be determined by an action at law, is not the full measure of compensation which the land owner is entitled to receive. There are yearly damages thereafter and damages in gross to be assessed. *Moor* v. *Shaw*, 47 Maine, 88; *Hill* v. *Baker*, 28 Maine, 9.

A careful examination of authorities satisfies us that it is not a case where as a matter of right a party is entitled to a trial by jury. The claim for damages is not a civil suit or a controversy concerning property within the meaning of the constitution. The proceeding is judicial in character, and it is sufficient if the designated tribunal is impartial. 2d. Dillon on Municipal Corps., 482; Cooley's Const. Limitations, § 563; *Mason* v. *Kennebec & Portland R. R. Co.*, 31 Maine, 215; *Rhine* v. *McKinney*, 53 Texas, 354; *Petition of Mt. Washington Road Co.*, 35 N. H. 134; *Rich* v. *Chicago*, 59 Ill. 286; *Stowell* v. *Flagg*, 11 Mass. 364; *Stevens* v. *Middlesex Canal*, 12 Mass. 466; *Backus* v. *Lebanon*, 11 N. H. 19; *Dalton* v. *Northampton*, 19 N. H. 362; *American Print Works* v. *Lawrence*, 21 N. J. 248; *Livingston* v. *Mayor of New York*, 8 Wendell, 85; *Adolphus Koppikus* v. *State Capital Com'rs*, 16 Cal. 249; *Whiteman's Executors* v. *Will. & Sus. R. R. Co.*, 2 Har. (Del.) 514, 33 Am. Dec. 411; *Central Branch U. P. R. R. Co.* v. *Atch. Top. & Santa Fe R. R. Co.*, 28 Kan. 453; *Balt. Belt R. R.* v. *Baltzell*, 75 Md. 94; *Bruggerman* v. *True*, 25 Minn. 123.

It is claimed on behalf of the plaintiff that he is absolutely entitled to a jury trial, because under the statutes other issues beside the question of damages which are not admitted by the default

remain to be tried, namely, how far the flowing of the complainant's land described in the complaint is necessary, and for what portion of each year such land ought not to be flowed. These questions are involved in estimating the damages, and their determination serves to make the rights of the parties specific by showing how far the payment of annual or gross damages is a bar to further proceedings.

It is also contended that the provision of statute which authorizes the assessment of gross damages is a new issue which requires decision by a jury; but we think it is only a judicial question. Gross damages are simply the equivalent of annual damages which are to be ascertained by the same mode and upon the same facts. The finding and report of the commissioners may upon the application of either party be reviewed by a jury. This would meet the points raised by the complainant's counsel already considered, if the trial was unfettered.

It is said that the provision which authorizes the introduction of the commissioner's report in evidence before the jury, and making it conclusive unless misconduct, partiality, or unfaithfulness is shown, deprives the trial of the character of a common law jury trial. *King* v. *Hopkins*, 57 N. H. 334; *Plimpton* v. *Somerset*, 33 Vt. 283; *Howard* v. *Moot*, 64 N. Y. 262. This is undoubtedly true. But the report of the commissioners is competent evidence, and it is something more; it is the finding of a tribunal selected as required by law, whose formal statement of their conclusions of fact is decisive of the rights of the parties, until its decisive effect is overcome by being impeached by evidence. *Bryant* v. *Glidden*, 36 Maine, 36. The authorized re-trial of the cause by a jury is a statutory proceeding designed to insure the decision of an impartial tribunal. The statute in question secures the constitutional rights of the complainant, and the ruling of the court being in accordance with its provisions, is correct.

Exceptions overruled.

SUSAN R. WHITMAN *vs.* JOSEPH H. FISHER.

Androscoggin. Opinion April 25, 1904.

Way, duty of travelers in same carriage to avoid danger. *Negligence,* contributory.

A person who is riding with another in the same carriage, and who has an opportunity to observe and give notice of dangers that may be avoided, is not in law relieved of all care because of the fact that the other is the one that is driving, although he may not be held to the same degree of responsibility as the driver.

It is the duty of the passenger, when he has opportunity to do so, as well as of the driver, to learn of danger and avoid it if practicable.

In an action on the case by the plaintiff to recover for bodily injuries, sustained by reason of the overturning of the one-horse open wagon in which she was traveling with the husband who was driving, it appeared that the wagon struck a pile of dirt in the highway which the defendant caused to be placed there; also that the other facts in this case are the same as those in the case of *Whitman* v. *City of Lewiston*, 97 Maine, 519.

Held; that independently of the question of the plaintiff's reponsibility for the husband's want of care, the plaintiff herself was negligent and her negligence contributed to the injury.

Also; that this inference from the undisputed facts is so irresistible that a verdict to the contrary cannot be allowed to stand.

The plaintiff was riding in the same carriage with her husband in the evening; he was driving, but they were both upon the same seat of a single-seated wagon. It was an extremely bright moonlight night without a cloud in the sky to obscure the moonlight; there was practically no more difficulty in avoiding the obstruction in the street than there would have been in the daylight; the horse that was being driven was wholly blind and had to be entirely guided by the driver; upon this account great care was required whether driving in the daytime or nighttime, because no reliance whatever could be placed upon the horse; the plaintiff had practically as good an opportunity of observing obstructions in the road as did her husband; she was aware of the fact that the horse was totally blind, and knew that upon this account great care was necessary to avoid obstacles of all kinds. *It is considered by the court,* that if either of the occupants of the carriage had been exercising the degree of care that the situation demanded, the obstruction complained of would have been seen and could easily have been avoided by simply turning slightly aside in a broad street. The accident would not have happened if the horse had not been blind, or

if either of the occupants of the carriage had been watchful of the street ahead in the direction that the horse was going. *Held;* that the verdict be set aside.

See *Whitman* v. *City of Lewiston*, 97 Maine, 519.

On motion and exceptions by defendant. Motion sustained and new trial granted.

Action on the case to recover damages for injuries received by reason of an obstruction in the highway on Main Street, in the City of Lewiston.

The obstruction and accident are the same which formed the basis of the action in *Whitman* v. *Lewiston*, 97 Maine, 519. The verdict for the plaintiff in that case was set aside by the law court on the defendant's motion as being against the law and evidence.

This action was subseqently brought against the defendant Fisher, abutting owner, who was alleged to have caused the obstruction.

The obstruction was a pile of dirt from two and a half to three and a half feet high at its highest point and extending from the outer edge of the sidewalk into the street some eight or ten feet. It was barricaded on three sides by planks resting on barrels, the fourth side being the outer edge of the sidewalk. Other facts appear in the opinion. The jury rendered a verdict of $500 for the plaintiff.

The decision of the defendant's motion for a new trial by law court renders a statement of the exceptions unnecessary.

Tascus Atwood, for plaintiff.

Ralph W. Crockett, for defendant.

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

WISWELL, C. J. The facts in this case are the same as those in the case of *Whitman* v. *City of Lewiston*, 97 Maine, 519.

That action by the same plaintiff against the city, was to recover for injuries claimed to have been sustained by her on account of an alleged defective condition of the highway. The court decided that a verdict for the plaintiff could not be sustained, because it appeared clear to the court that the negligence of the plaintiff's husband, who was driving, contributed to the injury, and in a statutory action of

that kind a plaintiff cannot recover if any efficient cause, for which neither the plaintiff nor the municipality is responsible, contributes to produce the injury. In this case the plaintiff seeks to recover for the same accident against the person who caused the obstruction to be placed in the street; this is consequently a common law action to recover for injuries caused by the alleged negligence of the defendant. The trial resulted in a verdict for the plaintiff, and the case comes to the law court upon the defendant's exceptions and motion for a new trial.

The defendant contends that the plaintiff ought not to be allowed to recover because the negligence of her husband, who was driving the horse, is imputable to the plaintiff, and because the plaintiff was herself negligent. The defense of imputable negligence is more especially raised by exceptions to the refusal of the presiding justice to give certain requested instructions to the effect that the negligence of the driver of the horse and vehicle was attributable to her.

The doctrine of imputable negligence, as announced in the case of *Thorogood* v. *Bryan*, 8 C. B. 115, which for a while prevailed in many of the courts of this country, was expressly rejected by this court in *State* v. *Boston & Maine R. R.*, 80 Maine, 430, and is contrary to the great weight of authority at the present time, at least, in this country as well as in England, where the doctrine was first promulgated. Although the negligence of one person may be properly imputable to another under some circumstances, as where both are jointly and mutually assuming the responsibility of care in the particular situation, it does not by any means necessarily follow that a wife who is riding with her husband, and who is herself in the exercise of reasonable care, is legally responsible for the negligence of her husband as to acts over which she has no control.

But in the present case, independently of this question of the plaintiff's responsibility for the husband's want of care, we think that she was herself negligent and that her negligence also contributed to the injury, and that this inference from the undisputed facts is so irresistible that a verdict to the contrary cannot be allowed to stand.

A person who is accompanying another upon a drive, and who

has an opportunity to observe and give notice of dangers that may be avoided, is not in law relieved of all care because of the fact that the other is the one that is driving, although he may not be held to the same degree of responsibility as the driver.

"It is the duty of the passenger, when he has the opportunity to do so, as well as of the driver, to learn of danger, and avoid it if practicable," as said by this court in *Smith* v. *Maine Central Railroad Company*, 87 Maine, 339, citing *Brickell* v. *N. Y. Central and Hudson River R. R. Co.*, 120 N. Y. 290, 17 Am. St. Rep. 648. See also *Dean* v. *Pennsylvania Railroad Company*, 129 Pa. St. 514, 15 Am. St. Rep. 733, 6 L. R. A. 143; *Hoag* v. *N. Y. Cent. and H. R. R. Co.*, 111 N. Y. 199.

In this case, the plaintiff was driving with her husband in the evening; he was driving, but they were both upon the same seat of a single-seated wagon. It was an extremely bright moonlight night without a cloud in the sky to obscure the moonlight; there was practically no more difficulty in avoiding the obstruction in the street than there would have been in the daylight; the horse that was being driven was wholly blind and had to be entirely guided by the driver; upon this account great care was required whether driving in the daytime or nighttime, because no reliance whatever could be placed upon the horse; the plaintiff had practically as good an opportunity of observing obstructions in the road as did her husband; she was aware of the fact that the horse was totally blind, and knew that upon this account great care was necessary to avoid obstacles of all kinds.

We are satisfied that if either of the occupants of the carriage had been exercising the degree of care that the situation demanded, the obstruction complained of would have been seen and could easily have been avoided by simply turning slightly aside in a broad street. The accident would not have happened if the horse had not been blind, or if either of the occupants of the carriage had been watchful of the street ahead in the direction that the horse was going.

For these reasons we are satisfied that the verdict should not be allowed to stand. The entry will accordingly be,

Motion sustained. New trial granted.

FRED T. ULMER AND MARY F. ULMER, In Equity,

vs.

LIME ROCK RAILROAD COMPANY.

Knox. Opinion April 25, 1904.

Railroads. Branch Track. *Eminent Domain. Public Use,* Tests of. Legislative Determination. *Intercorporate Relations,* Control of Corporate Property. *Right of way. New Construction,* Cost and income of. *Directors*— Good faith. *Procedure. R. S. 1903, c. 51, § 30. Special Laws, 1889, c. 418.*

The mere fact that a railroad company builds a branch track for the immediate purpose of accommodating a private business enterprise, is by no means a controlling test to determine whether the right of way therefor is taken for private purposes, or for public use, by right of eminent domain.

While the power of eminent domain should not be so extended as to allow the taking of private property of one for the private benefit of another, it should not be so abridged as to interfere with the development of enterprises of a public nature, within the meaning of the Constitution.

By the great weight of authority, the decisive tests as to whether a branch railroad track is for public or private purposes, are these: Is the track to be open to the public, on equal terms to all having occasion at any time to use it, so that all can demand that they be served without discrimination, as of right? If so, and the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is public, and the case a proper one for the exercise of the right of eminent domain.

In *Farnsworth* v. *Lime Rock Railroad Company,* 83 Maine, 440, the purpose of this particular railroad, so far as its main line is concerned, viz., the transportation of lime stone and other freight to and from the lime kilns and stores along its line, was declared to be a public use. In order to perform business of this nature, it is absolutely essential that connections should be made with the different lime kilns, in many instances by branch tracks.

While legislative determination that the use for which property authorized to be taken by eminent domain is a public one, is, undoubtedly, subject to review by the courts, yet it is a familiar principle that all reasonable presumptions are in favor of the correctness of the legislative decision; and the act must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution.

The exercise of the power of eminent domain for the purpose of acquiring a right of way for a branch track, is, in effect, a declaration by the railroad

company that such track is to be open to the public and operated as a public way and subject to all public rights and public control.

If the purpose of a railroad corporation in building any particular branch track, is to operate the same in conformity with the foregoing requirements, the power of eminent domain granted by the legislature, may properly be exercised, even though few may have occasion to be served by the branch, outside the owners of the quarry to which it is to be constructed.

A business or manufacturing corporation, by owning nearly all the stock of a railroad corporation, does not thereby become the owner of the railroad company's road, franchises, or other property. A railroad company, whoever may be the owner of its stock, still owns its property.

Control of the property of a corporation is not in its stockholders. Of course, a majority of stockholders control the election of its officers and agents. But the control of the company's property is in the corporation itself, and in its officers and agents, who are intrusted with such control by virtue of the by-laws.

Railroad franchises must be exercised by the corporation to which they are granted, and by it alone.

A corporation is an entity, irrespective of the persons who own all of its stock; and the fact that one person owns all the stock does not make such owner and the corporation one and the same person. Neither is there any identity between the individual or the corporation which owns such stock in another corporation, and the latter corporation.

If a railroad corporation unreasonably fails to perform the public duty for which it was chartered, and the management makes discrimination clearly showing an intention to exclude from the benefits of the road all except its principal stockholder, for the purpose of preventing competition, it might be sufficient to work a forfeiture of the railroad company's franchises.

It cannot be the duty, however, of a railroad company to build a branch track to connect with some particular lime quarry simply because such connection may be desired by the owner, independently of the question of the cost of construction and the probable income to be derived.

It is the duty of the management of a railroad company, before entering into new construction to take into consideration both the probable cost of the same and the amount of freight which would be obtained therefrom for transportation.

So long as the directors of a railroad corporation act in good faith upon such questions, their determination is conclusive and is not subject to review by proceedings in court.

The question whether or not a railroad corporation has done, or failed to do, anything which should result in a forfeiture of its franchises can only be inquired into by a proceeding appropriate for that purpose, such as an information in the nature of quo warranto, instituted by the proper authorities in behalf of the State.

On report. Bill in equity. Dismissed.

Bill in equity asking that respondent railroad corporation be enjoined from constructing a branch track across plaintiff's premises, and for general relief.

The facts appear in the opinion.

D. N. Mortland and J. E. Moore, for plaintiffs.

Pursuing the policy adopted throughout the country to develop resources and encourage enterprise, our legislature in passing the Mill Act then "push the power of eminent domain to the very verge of constitutional inhibition." *Jordan* v. *Woodward,* 40 Maine, 317, 323.

Plaintiffs contend that in sustaining railroad legislation too, the court went "to the very verge of constitutional inhibition" in respect to the main line of this very enterprise. *Farnsworth* v. *Lime Rock R. R.,* 83 Maine, 440.

Yet the decision in that case was not in respect to a spur track to one quarry merely, as here; but was in relation to the general enterprise itself, to taking a right of way for the main line. The court said "though not so significant an example as many railroad enterprises, it falls on the side of public use. It is of that stamp."

The plaintiff contends that the stamp is now obliterated. The reasons then given for holding this defendant corporation to be a public enterprise do not now exist. At the time of the decision the interests of the community were to be subserved. Today, under the present ownership and control, as the evidence shows, the design is directly to the contrary. All the reasons then given by the court for holding this corporation to be a public enterprise, related to the enterprise itself. Today this railroad is designed to reach the quarries and kilns of its chief stockholder, the Rockland-Rockport Lime Co., and none other if the latter company can prevent it.

In the case at bar a private business corporation has by purchase acquired the stock and control of a railroad corporation, chartered ostensibly for a public purpose, and having the power of eminent domain. It now asks to exercise and enjoy the privileges granted to the railroad corporation which it has absorbed, for its own advantage and gain.

The Ohio court in a case similar to the one at bar, held that "a railroad used exclusively for transportation of coal or freight for its stockholders, and which had no depots, freighthouses or facilities for doing a public business, is a private enterprise." *State* v. *Ry. Co.*, 40 Ohio, 504; Vol. 2 Wood on Railroads, p. 835; *In re Niagara Falls & W. R. Co.*, 108 N. Y. 375.

In a West Virginia case where a railroad corporation sought to condemn land to build a switch and a branch track to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from said steel mill, it was held that the use to which the land was to be subjected, was a private, not a public use. *Pittsburg, Wheeling & Kentucky Railroad Co.* v. *Benwood Iron Works*, 31 W. Va. 710, 2 L. R. A. 680.

Counsel contended that one body corporate having the right of eminent domain cannot sell or lease to another their corporate powers and privileges and thereby disable themselves from performing their public duty without legislative authority. *Brunswick Gas Light Co.* v. *United Gas, Fuel and Light Co.*, 85 Maine, 532, 35 Am. St. Rep. 385; R. S. 1903, c. 52, § 30.

Counsel contended that such abuses of corporate rights and privileges under the conditions of control shown by the case, takes from this railroad corporation its former character of being a public enterprise, and subverts it franchises to private use for purposes of private gain.

The question presented in the case at bar is whether trade combinations created for private purposes shall be permitted to buy up and absorb public franchises and avail themselves of the powers and privileges of eminent domain to further their own private interests.

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

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

WISWELL, C. J. The defendant, the Lime Rock Railroad Company, is a corporation organized under chapter 418 of the Private and Special Laws of 1889, and the amendments thereto, and was

given power by its charter, "to construct, maintain and use one or more lines of railroad to be operated by steam or horse power, with single or double tracks, from the lime quarries in the city of Rockland and town of Thomaston, in such direction as may best convene the transportation of lime stone from said quarries to the various lime kilns in said city and town, together with other freight, with convenient branches to accommodate each kiln." It was also authorized, "to construct, maintain, use and operate all side tracks, spurs, turnouts and branches, and to make such additions to its present location, from time to time, as may be necessary or convenient in order to reach the various lime quarries and lime kilns that are now opened or built, or that may be hereafter opened or built, in said city and town." The corporation was also given power to purchase and hold such real estate as might be necessary and convenient for its purposes; "and in case said corporation cannot agree with the owners of land necessary and convenient for said road, it may be taken for the aforesaid purposes, as and for public uses, subject to the same damages and proceedings as when land is taken by other railroads under the general laws of the state."

The corporation soon after the date of its charter filed locations for the lines of its roads in accordance with the provisions of its charter, and has since, from time to time, made additional locations, in each case stating therein that such location was a partial location and that it reserved the right thereafter to make additional locations. The road has been built and has been in operation for a number of years, and now consists of about thirteen miles of track extending from various lime quarries in Rockland and Thomaston to the lime kilns; it also connects with the Maine Central Railroad at Rockland and with an electric street car line extending through the two towns. The principal business of the road has always been the transportation of lime rock from the quarries to the kiln, but it has also been engaged to a considerable extent in the transportation of other freight between the Maine Central Railroad station and the places of business of various persons, firms and corporations.

On January 20, 1903, the railroad company commenced proceedings to condemn, under its power of eminent domain, a right of way

over the land of the complainants, for the purpose of building thereon a branch track from one of its main lines to a lime quarry owned by the Rockland-Rockport Lime Company. No question is raised as to the form or sufficiency of the proceedings commenced by the railroad company for the purpose of acquiring by condemnation this easement; but in this bill the complainants ask that the railroad company may be restrained from further proceedings and from taking possession of any portion of the complainant's premises for this purpose. The prayer for this relief is based upon many reasons set out in the bill which will be considered; the principal ground for relief is that the easement in the complainants' real estate is not to be taken by the railroad company for a public use, but solely for the private use and benefit of the railroad company and of the owner of the quarry to which a branch track is to be constructed.

The charter of the company, already quoted from, authorized the railroad company, so far as it could do so within constitutional limitations, to construct and maintain branch lines to each kiln and to the various quarries then opened, or built, or that might be subsequently opened or built. Somewhat similar to this authority given to the defendant by its charter is the power conferred upon railroads by a general statute of this state, R. S. (1903), c. 51, § 30, which is as follows: "Any railroad corporation, under the direction of the railroad commissioners, may locate, construct and maintain branch railroad tracks to any mills, mines, quarries, gravel-pits or manufacturing establishments erected in any town or township, through which the main line of said railroad is constructed," etc.

But it is urged that this general statute, and that the provisions referred to in the charter of this railroad company, are unconstitutional, since it allows the private property of an individual to be taken, not for a public use, but for the private purposes of the railroad corporation and of the manufacturer or mine owner who is primarily accommodated by the construction of such branch track; or, that at least in this particular case, the land sought to be taken by the railroad company for the purpose of constructing a branch track from its main line across the plaintiff's land to the lime quarry is for

the sole use and benefit of the railroad company and the lime company, and will in no sense serve any public purpose or use.

The question thus presented, as has been frequently decided in this and many other states of this country, is a judicial one. The legislature has the power to take, or to delegate to another the power to take, private property for public purposes, provision being made for the payment of just compensation therefor, but it cannot take, or delegate to another the right to take, private property for anything but a public purpose. Whenever, therefore, it is contended that this power of eminent domain is attempted to be improperly exercised under legislative authority, it is necessary for the court to determine whether or not the legislature in granting such authority has acted within the limitations of the Constitution, and whether or not in the exercise of this power the corporation is in fact carrying out the public purpose on account of which the power was granted. It is, of course, important in the determination of such a question that this essential attribute of sovereignty should not, upon the one hand, be so abridged as to interfere with the development of enterprises which are of a public nature, within the meaning of the Constitution, or, upon the other hand, so extended as to allow the taking of the private property of one for the private use and benefit of another.

That the ordinary purposes for which railroads are constructed and operated, the transportation of freight or passengers, are essentially public in their nature and of great public convenience and utility is, of course, conceded. "They are public highways; great thoroughfares of public travel and convenience." *In re Railroad Commissioners*, 83 Maine, 273. These great thoroughfares of public travel could not be constructed if the acquisition of their necessary rights of way depended upon the whim, caprice or unreasonable demands of the owners of all lands over which it is necessary for them to be constructed. For this reason public railroad corporations are very properly endowed by the legislature of all states with the power to exercise the right of eminent domain. It is plain that such transportation lines from place to place, whether in the same or in different towns, are as much a public enterprise and use as are public roads con-

structed for the same purpose. That the purposes of this particular railroad, so far at least as its main lines are concerned, are public and therefore that the corporation was properly invested with the right of eminent domain, was decided by this court in 1891. *Farnsworth* v. *Lime Rock Railroad Company*, 83 Maine, 440.

The general question is then presented, whether or not a railroad corporation, organized under legislative authority for the purpose of constructing and operating a public railroad, with express authority to build a branch track to a private manufacturing establishment, mine or quarry, and invested with the right to take by eminent domain lands necessary for such purposes, may take the private property of an individual, under such right for the purpose of the construction of such a branch track, even if the primary purpose for such taking and construction is to accommodate such manufactory, mine or quarry, and of obtaining the business of the transportation of freight therefrom. There is no arbitrary rule by which this question can be determined in all cases. It must be decided by the application of general principles to the particular facts of each case. Of course the general question is, whether such track is to be constructed for private purposes or for public use. If the branch track is to be built solely and exclusively for the benefit and accommodation of the railroad company and of the owner of the private business enterprise, it may well be said that it would serve no public purpose and would be of no public use, although the existence of such a track might be of great but indirect benefit to the community by enabling the private enterprise to be carried on, and in thereby giving employment to labor. But the mere fact that the primary purpose of such a branch is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If it is a public way in fact it is not material that but few persons will enjoy it. When such a branch track is first constructed, and the right of way necessary therefor is taken, it may in fact be used only for the business of the plant to which it is constructed, because at that time no other busi-

ness enterprise may exist in that vicinity to furnish freight for transportation, but in the future other enterprises may spring up, either upon the line or upon the extension thereof, so that a branch track which in the first instance is primarily constructed for the accommodation of one, may become of equal accommodation, benefit and use to others. As illustrative of this, the directors of the railroad company have said in their location filed in this particular case: "This location is a location also in part. The line and locations of said railroad are to be extended and additional locations made as soon as the proper course and location of such extensions and additional locations are determined upon, so that said railroad, when the locations thereof are completed, shall reach all of the kilns, quarries and other property that can be accommodated by its southern, northern and other branches."

The tests decisive of this question, as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one and the legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track; and if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity with these requirements, then the power granted by the legislature may be exercised in that particular case.

This is in accordance with the almost unbroken line of decisions of the appellate courts of the various states of this country, brief quotations from a few of which may be advantageous. In *De Camp* v. *Hibernia R. R. Co.*, 47 N. J. L. 43, the court said: "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use

may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send material, implements or machinery for mining purposes into, or obtain ores from the several mining tracks adjacent to the location of this road, may use the railroad for that purpose and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public." To the same effect see *National Dock R. R. Co.* v. *Central R. R. Co.*, 32 N. J. Eq. 755.

In *Kettle River R. R. Co.* v. *Eastern Railway Co.*, 43 Minn. 461, the New Jersey case first above cited is quoted from with approval, the court saying: "If all the people have the right to use the road, it is a public use or interest, although the number who have business requiring its use may be very small." In *Chicago B. & Q. R. R. Co.* v. *Parker*, 43 Minn. 527, the court decided that a spur track extending from the main line of a public railroad across private property to a private manufacturing establishment was a public enterprise, the court saying:—"The switch track is to be a part of its system of tracks, all belonging to the general enterprise of maintaining and operating a railroad for public use." The court in this case also adopted the test applied in numerous other cases, to the effect that the character of the use does not depend upon the amount of business or number of persons who may have occasion to use, but upon the right of the public to use, and goes on to say that there is nothing in the evidence showing that the manufacturer is to have any control over or management of the road, or any right in it other than that of any person or corporation having business establishments along its line.

In *Phillips* v. *Watson*, 62 Iowa, 28, the court said: "The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which the right is exercised. If all the people have the right to use it, it is a public way although the number who have any occasion to exercise the right is very small." The earlier Iowa case of *Bankhead* v. *Brown*, 25 Iowa, 540, is cited by the court in support of this doctrine. In the case last quoted from the spur track from the railroad to the private property was constructed by the owner of the private business

enterprise under a statute authorizing such construction and the condemnation of property therefor. But the right to take private property, even under such circumstances, was sustained, the court saying: "We conclude, therefore, that a road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it, and that the mine owner who procured it to be established must use the special privilege which the act confers on him in such manner as not to destroy this right of the public or prevent its enjoyment."

The public character of the use of such a branch track, built under similar circumstances, was sustained in the case of *Chicago Dock & Canal Co.* v. *Garrity*, 115 Ill. 155, in which the court said: "We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as materially affecting them and giving a private character to their use. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases that it is expected or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment; yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it can not affect the question." Numerous other Illinois cases are cited in that opinion.

In a recent Illinois case, announced October 26, 1903, *Gaylord* v. *Sanitary District of Chicago*, 204 Ill. 576, 68 N. E. R. 522, the general doctrine is thus stated: "It is also the settled doctrine of this court that, to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right." To the same effect is the case of *Butte, etc., Railway Co.* v.

Montana, etc., Railway Co., 16 Montana, 504, 50 Am. St. R. 508, in which many of the cases already referred to, as well as others, are cited and the constitutionality of legislative authority, and the public character of the use for which the land was to be taken, under circumstances similar to those in the case at bar, are upheld.

In a recent case in Wisconsin, decided in November, 1901, *Chicago and North Western Railway Company* v. *Morehouse*, 112 Wis. 1, 88 Am. St. Rep. 918, in which this particular question was involved, it was decided that: "A statute authorizing railroad companies to condemn land for branches and spur tracks to any 'mill, elevator, store-house, or other industry or enterprise,' is valid and constitutional, and the taking of land for a spur track to connect with a single industry, is a taking for public use, if the purpose of the company is to maintain and operate such track as an integral part of its railway system, so as to serve all who may desire it, and all can demand, as a right, to be served without discrimination." Many cases are cited by the court in support of this doctrine, some of which have already been referred to.

To the same effect, either upon the particlar question here involved or upon the general question as to when an enterprise is of such a public character as to authorize the grant of the right of eminent domain, and the exercise of such right for its necessary purposes, are the following cases: *St. Louis, etc., R. R. Co.* v. *Petty*, 57 Ark. 359, 20 L. R. A. 434; *Bridal Veil Lumbering Co.* v. *Johnson*, 30 Ore. 205, 60 Am. St. Rep. 818; *Toledo, &c., R. R. Co.* v. *East Saginaw, etc., R. R. Co.*, 72 Mich. 206; *Dietrich* v. *Murdock*, 42 Mo. 279; *Hays* v. *Richer*, 32 Penn. St. 169; *Talbot* v. *Hudson*, 16 Gray, 417; *Denham* v. *County Commissioners*, 108 Mass. 202.

In opposition to these authorities, and numerous others to the same effect that might be cited, we are aware of but two cases directly in point wherein different views have been expressed. These cases are, *Pittsburg, etc., Railroad Co.* v. *Benwood Iron Works*, 31 W. V. 710, 2 L. R. A. 680 and *Kyle* v. *Texas & New Orleans Railroad Co.*, 4 L. R. A. 275, not officially reported. As to these cases we only need to say that the reasoning of the opinions is not satisfactory to us. They both proceed upon the theory that because the primary and

immediate purpose of building the branch tracks in question was to accommodate the railroad and the private business enterprise, to which they were extended, they were necessarily for a private purpose and could not under any circumstances be for a public use. This is not in conformity with the weight of authority.

Adopting these general principles and the tests determinative of the question involved, which have been almost universally laid down by the courts of this country, we come to the question as to whether in this particular case an easement in the plaintiff's land may be taken by the defendant corporation, for the purpose of building this branch track, as for public uses. And this question may perhaps be resolved into two, first, as to whether the legislative authority was constitutional; and, second, if it should be held to be, whether or not in attempting to exercise that right, in this particular instance, the railroad company is in fact carrying out one of the public purposes for which it was chartered.

It, of course, must be conceded that the legislature, in so far as it could do so, delegated this power to the railroad company in the most express and explicit terms. And in determining the question of the constitutionality of this legislation it must be remembered, that, although the court must finally determine the constitutionality of any legislation, all reasonable presumptions are in favor of its validity, and the courts will not declare an act of the legislature to be invalid, because contrary to the provisions of the organic law, unless it is clearly so. This is a familiar principle recently stated by this court in *State* v. *Rogers*, 95 Maine, 94. And this is as true respecting legislative enactments by which the power to exercise the right of eminent domain is delegated as in regard to any other species of legislation. The determination by the legislature that the use for which property is authorized to be taken is a public one, is, undoubtedly, subject to review by the court, but all reasonable presumptions are in favor of the validity of such determination by the legislation, and the act must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. *Hazen* v. *Essex County*, 12 Cush. 477; *Talbot* v. *Hudson*, 16 Gray, 422; *Moore* v. *Sanford*,

151 Mass. 285; *United States* v. *Gettysburg Electric Railway Co.* 160 U. S. 668.

That the legislature in granting these powers and privileges to the defendant did not transcend its constitutional limitations, must, we think, be obvious. The power was granted to a public railroad corporation, the principal purpose of which was the transportation of lime stone and other freight for all persons whom it could accommodate. This, as we have seen, is universally conceded to be a public purpose. The nature of the business of the corporation was to be such that it was absolutely essential, in order to perform that business that connection should be made with the different quarries and lime kilns, in many instances by a branch track. In fact the constitutionality of this legislation was sustained by this court in *Farnsworth* v. *Lime Rock Railroad Co.*, 83 Maine, 440, a decision which there is certainly no reason to question.

But, it is argued that even if the original legislation was constitutional, the authority granted being somewhat general in its character, and no reference being made, necessarily, to this particular quarry or branch track, that the exercise of this right by the railroad company is not within the terms of the charter, because the purpose of the management of the railroad company, in taking this land and in building this branch track, was not to serve a public purpose, but to accomplish its own private ends for its own benefit.

It is undoubtedly true that for the present, at least, few persons may have occasion to be served by this branch track, except the owner of the quarry to which it is to be constructed, and we assume that it is equally true that the primary purpose in the construction of this track is to obtain the transportation of freight from this quarry to and over the main lines of the railroad company's road. But, as we have already seen this is by no means decisive of the character of the use of the road, or branch track; and there is nothing further to indicate that it is to be for the sole and exclusive benefit of the quarry owner, or that all members of the public will not be entitled to demand of right, whenever they may have occasion to do so, that their freight of all kinds shall be transported to the quarry over this branch road; or that the owners of other quarries that may be

opened either upon the branch track or any extension thereof, shall not have the right to demand that the product of their quarries shall be transported without discrimination over the same. In fact this track must be operated by the railroad company for the benefit of all persons that may have occasion to use it; it must be operated by the railroad company as an integral part of its entire system, and as much subject to public control as any other part of the road, because the directors of the railroad company in acquiring this right of way for the track have exercised the right of eminent domain, and have thereby in effect declared that it is to be open to the public and operated as a public way subject to all public rights and public control. This action of the directors has some tendency to show their purpose. If it were not their intention that the branch should be open to the public and operated for the benefit of all members of the public who may have occasion to use it, they would not have attempted to acquire the right of way in this manner.

Again, the directors of the road in the location filed by them have said that this was a partial location only, to be extended and additional locations made as soon as the proper courses and locations for such extensions are determined upon, so that this branch track when completed "shall reach all of the kilns, quarries and other property that can be accommodated by its southern, northern and other branches." We are aware of no reason why the truth of this statement should be disputed. For these reasons we are of the opinion that the legislative grant of the right of eminent domain to the railroad company was constitutional, because it authorized the taking of private property for public purposes, and that in the exercise of that right in this particular case the railroad company was carrying out one of the public purposes for which it was chartered, and to accomplish which this power was granted to it.

Another cause of complaint, much relied upon in argument, and which appears in different forms of allegation throughout the bill is, that all of the stock of the railroad company is at the present time owned by the Rockland-Rockport Lime Company. It appears from the evidence that each of the directors of the railroad company is the owner of one share of its capital stock and that all of the rest of the

stock is owned by the Lime Company. It is argued from this that the Lime Company, a corporation organized purely for private purposes, with no duties to perform of a public nature, is in fact the owner of and is in possession and control of the railroad and of all the franchises and privileges that were granted by the legislature to the railroad company, and that as such owner it is operating and managing the same for the sole benefit of the Lime Company, to the exclusion of all others.

But the argument is based upon a wrong assumption. Whoever may be the owner of the stock of the railroad company, or however many or few such owners there may be, that corporation still continues to exist as a separate and independent corporation; it preserves its corporate existence, it operates its own road, it has its own officers and makes its own contracts. Although the Lime Company is the owner of nearly all of its capital stock, that company does not thereby become the owner of the railroad company's road, franchises, or other property. That corporation, whoever may be the owner of its stock, still owns its property. Neither do the stockholders of a corporation control the property of the corporation. Of course, a majority of the stockholders control the election of directors and other officers and agents of the corporation, but the control of the property of the corporation is in the corporation itself and in its officers and agents who are invested with such control by virtue of the by-laws of the company.

The franchises granted to a railroad corporation must be exercised by that corporation and by it alone. There is no identity between the individual or the corporation which owns stock in another corporation and that latter corporation. A corporation is an entity, irrespective of the persons who own all of its stock, and the fact that one person owns all the stock does not make him and the corporation one and the same person. It would seem that the citation of authorities in support of these well established principles would be unnecessary, but we call attention to a few of the many that might be referred to. *Pullman Palace Car Company* v. *Missouri R. R. Co.*, 115 U. S. 587; *McTighe* v. *Macon Construction Company*, 97 Ga. 7, 33 L. R. A. 800; *Button* v. *Hoffman*, 61 Wis. 20, 50 Am. Rep. 131; Morawetz

on Private Corporations, § 227, et seq. We cannot, therefore, see how this allegation can in any way affect the question here involved.

Still another allegation in the complainant's bill is that the Rockland-Rockport Lime Co. in January, 1900, acquired by purchase or otherwise, and is now the owner and in possession and control of all the lime quarries which are now reached by or connected with the railroad, or any of its branches, and that the railroad company has since that time, "refused and neglected to extend or connect its line of tracks with any lime quarry not owned or controlled by said Rockland-Rockport Lime Co."

It is clear, we think, that the first part of this allegation cannot in any way affect the question involved, or the railroad company's right to take the complainants' land for its purposes. If at one time the railroad served a considerable number of independent lime quarries, owned by different owners, and subsequently the ownership of such quarries has been acquired by one person or corporation, the powers, privileges and duties of the railroad company are precisely the same as before, and cannot have been affected by such consolidation of ownership.

As to the second part of the allegation, that the company now refuses to connect with any quarry not owned by the Lime Company, this is a matter which must necessarily depend to a large extent upon the discretion of the management of the railroad company. It cannot be the duty of that company to build a track to connect with any particular quarry simply because such connection may be desired by the owner, independently of the question of the cost of construction and the probable income to be derived therefrom. It is certainly the duty of the management of a railroad company, before entering into new construction, to take into consideration both the probable cost of such construction and the amount of freight for transportation that would thereby be obtained. So long as the directors act in good faith upon any such question, their determination is conclusive and is not subject to review by the court in proceedings of any kind.

If, of course, the railroad company should unreasonably fail to perform the public duty for which it was chartered, and the management should make such discriminations as to clearly show an inten-

tion to exclude from the benefits of the road all persons and corporations, except the Lime Company, its principal stockholder, for the purpose of preventing any competition with the latter company, it might be sufficient to work a forfeiture of the franchises granted to the railroad company. For, as we have seen, the railroad company, irrespective of the fact that substantially all of its capital stock is owned by another corporation organized purely for private purposes and profits, continues to exist as an independent corporation, with public duties to perform, and, because of that fact, invested with valuable franchises. It cannot, therefore, while exercising the franchises and rights with which it has been endowed, because of the public nature of the duties to be performed, conduct the management of its road so as to result in the benefit of one person or corporation, the owner of its stock, and to the exclusion of all others from the benefits which they are entitled to derive therefrom. The public nature of the business of a railroad company depends upon the right of any member of the public to use the road, and to require the company as a common carrier to transport his freight.

But the question whether or not the railroad company has done, or failed to do, anything which should result in a forfeiture of its franchises can only be inquired into in a proceeding appropriate for that purpose, such as an information in the nature of quo warranto, instituted by the proper authorities in behalf of the state. It is not competent in a collateral proceeding, such as this, to show any matter affecting the forfeiture of a charter. Encycl. of Pleading and Practice, Vol. 17, page 409; *Elizabethtown Gas Light Company* v. *Green*, 46 N. J. Eq. 118; *Sewalls Falls Bridge* v. *Fiske*, 23 N. H. 171; *Frost* v. *Frostburg Coal Company*, 24 Howard, 278; *Lee* v. *Drainage Commissioners*, 125 Ill. 47; *Commonwealth* v. *Union Insurance Company*, 5 Mass. 230, 4 Am. Dec. 50; *Attorney General* v. *Adonai Shomo Corporation*, 167 Mass. 424.

We have considered all the reasons set out in the complainants' bill why the relief asked for should be granted. In our opinion it should not be granted for any of these reasons. The bill will therefore be dismissed with costs.

So ordered.

GEORGE A. SMITH *vs.* JOHN B. SMITH.

Androscoggin. Opinion April 25, 1904.

Tenants in Common. Landlord and Tenant, when the relation does not exist.

Tenants in common may contract with each other concerning the use of the common property, and one tenant in common can make a valid agreement with his co-tenant to pay him for the use of his undivided share. They also have the undoubted right to create the relation of landlord and tenant between themselves by an express oral agreement to that effect.

But such a contract, like all other true contracts, could only exist by virtue of the mutual intention and agreement of the parties. The mere fact that one tenant in common who is permitted to have the exclusive occupation of the entire property agrees to pay his co-tenant a reasonable compensation for the use of his undivided share, is not sufficient in itself to make his occupancy that of a tenant at will.

Neither would an agreement by one tenant in common to pay to his co-tenant a specific sum as his share of the monthly income of the property, even though the term "rent" were employed to signify such share, necessarily establish the relation of landlord and tenant unless it was so understood and agreed.

Held; that the evidence in this case failed to show any intention on either side to establish the ordinary relation of landlord and tenant between the parties, and that it would not have warranted the jury in finding that such a relation existed.

Exceptions by plaintiff. Overruled.

Assumpsit on account annexed by one tenant in common against another for use and occupation.

The case appears in the opinion.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for plaintiff.

The effect of the ruling of the presiding justice was to take the question of the relation of the parties, whether that of landlord and tenant or not, entirely from the jury. But if the facts are such that a jury may find that the understanding between the parties is that one shall occupy the whole property and shall pay the other rent

for it, then they may properly find that the relation of landlord and tenant exists. Freeman on Co-tenants, § 268; Taylor Landlord & Tenant, § 115, note and cases cited. 2nd ed. Woodf. Landlord & Tenant, p. 166; *Luther* v. *Arnold*, 8 Richardson (So. Car.) 24, 62 Am. Dec. 422; *Snelgar* v. *Henston*, Cro. Jac. 611; *Cahoon v. Kinen*, 42 Ohio, 190; *Chapin* v. *Foss*, 75 Ill. 280; *Linn* v. *Ross*, 10 Ohio, 412, 36 Am. Dec. 95; *Wilbur* v. *Wilbur*, 13 Met. 404; *Kites* v. *Church*, 142 Mass. 587; English Ruling Cases—(Landlord & Tenant,) p. 579.

The cases are numerous and uniform that under such circumstances the tenant is not entitled to abatement. *Fowler* v. *Bott*, 6 Mass. 63; *Phillips* v. *Stevens*, 16 Mass. 238; *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417; *Bigelow* v. *Collamore*, 5 Cush. 226; *Davis* v. *Alden*, 2 Gray, 309; *Baker* v. *Holtpzaffell*, 4 Taunt. 45; *Lofft* v. *Dennis*, 28 L. J. Q. B. 168; English Ruling Cases, Title Landlord and Tenant, p. 483 ff; *Kramer* v. *Cook*, 7 Gray, 550; *Wells* v. *Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Leavitt* v. *Fletcher*, 10 Allen, 119; *Hill* v. *Woodman*, 14 Maine, 38; *Gregor* v. *Cady*, 82 Maine, 131, 17 Am. St. Rep. 466; *O'Leary* v. *Delaney*, 63 Maine, 584; *Barrett* v. *Boddie*, 158 Ill. 476, 49 Am. St. Rep. 172; *Smith* v. *McLean*, 123 Ill. 210; *Chamberlain* v. *Godfrey*, 50 Ala. 530; *Wall* v. *Hinds*, 4 Gray, 256, 64 Am. Dec. 64.

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

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

WHITEHOUSE, J. This is an action of assumpsit on account annexed, and a special count for the use and occupation of a store. One of the items in the account annexed was for "seven months' rent of undivided half of building and land on Main St. Lewiston, from June 1, 1902, to January 1, 1903, at an agreed price of $20.50 per month." The building named in this item, with the land on which it stands, was owned by the parties as tenants in common, and occupied by the defendant in the conduct of his business of piping and plumbing.

It appears that in 1898 the defendant, in consideration that he should have the sole occupation of the building, and that the plaintiff should bear a certain proportion of the expense of making the changes necessary to adapt the building to his purposes, agreed to pay the plaintiff the sum of $20.50 per month for the use of his undivided half interest in the property. It was not in controversy that thereafter the defendant paid to the plaintiff's agent this sum of $20.50 a month until June, 1902 when in consequence of damage by fire the building was partially unfitted for the uses of the defendant's business, and he refused to continue the payment of the full amount of $20.50 per month, on the ground that it was more than the occupation of the plaintiff's share was reasonably worth during the process of repair when the building was not in a suitable condition for the defendant's use. But the plaintiff claimed that the relation of landlord and tenant existed between the parties, and that in the absence of any special agreement to that effect there should be no abatement of the "rent" on account of injuries from fire. Thereupon the plaintiff's counsel requested an instruction to the jury that if it was "mutually agreed that the defendant should pay rent to the plaintiff of $20.50 a month, and defendant then took possession of the premises under said agreement, they may find that the relation of landlord and tenant was created," and that there would be no abatement of rent.

The presiding judge declined to give the rule requested, but instructed the jury "that during the time of the repairs and while the building was not in a condition for convenient and full occupancy, George A. Smith would be entitled to recover only what the use of it in its then condition was fairly worth." The jury found that the use of the plaintiff's share was worth much less during the three months while the building was undergoing repairs. The case comes to this court on exceptions to the instructions given and the refusal to instruct as requested.

The characteristic feature of a tenancy in common is the unity of possession by which the owners hold the common property. Each tenant is considered to be solely or severally seized of his share, and the possession of one tenant in common is the possession of the others.

Each is entitled equally with all the others to the entire possession of the whole property, and every part of it, and no one has exclusive right to the whole or to any part of it. Each has the right to occupy the whole if his co-owners do not choose to enter and occupy with him. 4 Kent's Com. 420; 1 Wash. Real Prop. 430. In consequence of this unity of interest tenants in common sustain a sort of fiduciary relation to each other. Thus, improvements upon the common property made by one co-tenant will inure to the benefit of all, and one tenant in common is not authorized to make any contracts or perform any acts in relation to the common estate that will injuriously affect the rights of his co-tenant. 17 Am. & Eng. Enc. of Law, p. 668; *Morrison* v. *Clark*, 89 Maine, 103, 109, 56 Am. St. Rep. 395.

But with respect to his undivided share each co-tenant has substantially all the rights which a tenant in severalty would have except that of sole and exclusive possession. It is entirely competent for one tenant in common to make a lease of his undivided share to his co-tenant, and he may contract with him for that purpose as with a stranger. Taylor's Land. & Tenant, § 115. Tenants in common may otherwise contract with each other concerning the use of the common property, and one tenant in common is obviously entitled to make a valid agreement with his co-tenant to pay him for the use of his undivided share. They also have the undoubted right to create the relation of landlord and tenant between themselves by an express oral agreement to that effect. But such a contract, like all other true contracts, could only exist by virtue of the mutual intention and agreement of the parties. The mere fact that one tenant in common, who is permitted to have the exclusive occupation of the entire property, agrees to pay his co-tenant a reasonable compensation for the use of his undivided share, is not sufficient in itself to make his occupancy that of a tenant at will. It would not necessarily create the relation of landlord and tenant if, instead of agreeing in terms that the tenant in possession should pay what the use of the undivided share was reasonably worth, the parties should by mutual agreement fix the precise sum which he should pay to his co-tenant as his share of the monthly income of the property. Nor would the employment of the

more convenient but less accurate term "rent" to signify a share of monthly income, establish the existence of the relation of landlord and tenant, unless it was so understood and agreed.

In the case at bar the only evidence to support the plaintiff's contention that the relation of landlord and tenant existed between the parties, is the testimony of the plaintiff's agent, Mr. Pulsifer, who made the arrangement with the defendant for the payment of $20.50 per month for the use of the plaintiff's undivided half. This testimony is to be construed with reference to the situation of the parties and their respective rights as tenants in common. The defendant was in possession of the entire property and is presumed to have known that he was only required by law to pay his co-tenant what the use of his share was reasonably worth. It is improbable that he intentionally entered into any agreement that would render him liable to pay more than that in case of a partial destruction of the building by fire. It appears that prior to 1898 the defendant had been paying $15.50 per month, and Mr. Pulsifer testifies that in consideration that the plaintiff would contribute $100 towards the improvements desired, the defendant made the "proposition to pay five dollars a month more for rent," and that the plaintiff accepted this offer "to pay $20.50 a month on those conditions." But in stating this proposition, Mr. Pulsifer does not claim that he is giving the exact language of the defendant. It does not distinctly and satisfactorily appear that the defendant ever used the word "rent" at all during the negotiations. It is not pretended that any express reference was made by either party to the question of a tenancy at will.

There is no evidence of any intention on either side to establish the ordinary relation of landlord and tenant between the parties, and it is the opinion of the court that the evidence would not have warranted the jury in finding that such a relation existed. The rulings and instructions of the presiding judge were correct.

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ERRATA.

In head note p. 145, read: *R. S.* (*1883*), *c. 6*, § *14*, *par. V.* §§ *35*, *91–93*.
In head note p. 259, 1, dele *c. 3*, § *53*.
In head note p. 268, read: *R. S.*, *1903*, *c. 9*, §§ *65*, *66*.
On p. 518 line 12 from bottom, for "*defendant*" read "*plaintiff*."

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Add at bottom p. 620 of Index-Digest:
Case of imperfect gift, *Bickford* v. *Mattocks*, 547.
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