MAINE REPORTS

99

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1905

CHARLES HAMLIN

REPORTER TO BUTLER *v.* RAILWAY, PAGE 149.

GEO. H. SMITH

REPORTER.

PORTLAND, MAINE.

WILLIAM W. ROBERTS,

1905

PRESS OF
THE THOMAS W. BURR PTG. & ADV. CO.
BANGOR, MAINE.

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. HANNIBAL E. HAMLIN.

REPORTER OF DECISIONS.

CHARLES HAMLIN, to Butler v. Railway, page 149.
GEO. H. SMITH.

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1904.

LAW TERMS.

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

INHABITANTS OF MACHIAS *vs.* INHABITANTS OF WESLEY.

Washington. Opinion April 25, 1904.

Contagious Diseases. Board of Health. *Towns*, when not liable for expenses. *R. S. (1883), c. 14, § 1; c. 24, §§ 3, 29. Stat. 1887, c. 101; 1903, c. 148.*

The right of towns to recover expenses incurred in cases of contagious diseases is governed by statute.

One Day, resident of an unincorporated township in Washington County, went to Machias for the purpose of consulting a physician. The physician found that he was suffering with varioloid and immediately reported the case to the local board of health, who, acting in conjunction with the overseers of the poor, and for the purpose of providing for the safety of the inhabitants, removed said Day to a separate house, where he was quarantined, and provided with nurses, medical treatment and other necessaries.

In an action by the town of Machias against the town of Wesley, which is the oldest incorporated adjoining town to the unincorporated township in which Day was resident, to recover the expense thus incurred by Machias, *it is held;* that whether these expenses were incurred in relieving Day as a person found destitute in the plaintiff town under the pauper statutes, or were incurred by the local board of health in the performance of the powers and duties imposed upon it by R. S. (1883), c. 14, § 1, relating to a person who is, or has recently been infected with any contagious disease, there is no statute which gives a right to recover such expense of the oldest incorporated adjoining town to the unincorporated place in which the person cared for has his domicile. In the absence of such statute, no such remedy or liability exists.

The fact that the statute gives to the overseers of the poor of the oldest incorporated adjoining town the care of persons found needing relief in unincorporated places, does not make such adjoining town liable to reimburse another town for the expenses incurred in relieving such destitute person.

The result is the same if the expenses were incurred by the local board of health.

Agreed statement. Plaintiff nonsuit.

This was an action of assumpsit brought to recover the sum of four hundred eighty-six dollars and thirty-three cents ($486.33) which is the sum expended by the plaintiff town, through its local board of health, in providing nurses and other attendants and necessaries for one Charles Day, a small-pox patient, at Machias during the months of June and July, 1902.

The case is stated in the opinion.

C. B. Donworth, for plaintiff.

Day had not removed from township 31 where he lived, nor had he any intention of removing, even temporarily, from his home. Finding himself stricken with disease while working in the woods in a neighboring township, he hastened to his home and there, finding it necessary to consult a physician, proceeded to Machias for that purpose, and for that purpose alone, and with no intention of remaining longer than was necessary to accomplish his object. Upon his arrival at Machias, the nature of his malady becoming known to the authorities, the law cast upon them the duty of restraining and isolating the patient, and upon him the duty of submitting. It is therefore contended that R. S., ch. 24, § 29, applies, and that the sick man, being at his home in township No. 31, and stricken with small-pox, on June 16, 1902, was there "found . . . and needing relief" to the same intents and purposes as though he there remained and sent to Machias for a physician, instead of going himself. He was, therefore, "under the care of the overseers" of Wesley, and it was their duty to furnish the necessary relief, but which the law for the special protection of the public compelled Machias to provide, through force of circumstances over which neither of the towns, nor the patient, had any control.

We therefore submit that the defendant town is liable from every point of view, and that the action can be maintained. The burden

thereby cast upon Wesley, however, is more apparent than real for, as Day has no legal settlement in the state, Wesley has the right to recover compensation from the state by virtue of R. S., ch. 24, § 29, as amended by ch. 303, P. L. 1897. The plaintiff town can have no such relief.

H. H. Gray, for defendant.

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

WISWELL, C. J. On June 16, 1902, one Charles Day, a resident of an unincorporated Township in Washington County, went to the plaintiff town for the purpose of consulting a physician; the physician found that Day was suffering from varioloid, and immediately reported the case to the local board of health, "who, acting in conjunction with the overseers of the poor, and for the purpose of providing for the safety of the inhabitants, removed said Day to a separate house, where he was quarantined, and provided with nurses, medical treatment and other necessaries," at an expense, as claimed by the plaintiff town, of nearly $500. The expense thus incurred is sought to be recovered in this action of the defendant town, which is the oldest incorporated adjoining town to the unincorporated township in which Day was a resident. The case comes to the law court upon an agreed statement of facts, from which the foregoing material facts appear.

Whether these expenses were incurred in relieving Day as a person found destitute in the plaintiff town, under the statutes in relation to the relief of paupers, or were incurred by the local board of health in the performance of the powers and duties imposed upon it by R. S. (1883), c. 14, § 1, in relation to a person who is, or has recently been, infected with any contagious disease, there is no statute which gives a right to recover such expense of the oldest incorporated town adjoining the unincorporated place in which the person cared for has his domicile. It, of course, follows that in the absence of such statute no such remedy or liability exists.

If Day had been found needing relief in the unincorporated township of which he was a resident, he would have been under the care of the overseers of the poor of the defendant town, that being the

oldest incorporated adjoining town. R. S. (1883), c. 24, § 29. But the fact that the statute gives to the overseers of the poor of the incorporated adjoining town the care of persons found needing relief in unincorporated places, does not make such adjoining town liable to reimburse another town for the expenses incurred in relieving such person found destitute in that town. *Ellsworth* v. *Gouldsboro*, 55 Maine, 94; or, if he had been found in the plaintiff town, destitute and needing immediate relief, and had been relieved, it would be the duty of the state to reimburse the plaintiff for the relief furnished, in accordance with chapter 101 Public Laws of 1887, as amended by chap. 148 Public Laws of 1903, inasmuch as he had no legal settlement within the state.

The result is the same if the expenses were incurred by the local board of health under R. S. (1883), c. 14, § 1. That section as amended is as follows: "When any person is or has recently been infected with any disease or sickness dangerous to the public health, the local board of health of the town where he is, shall provide for the safety of the inhabitants, as they think best, by removing him to a separate house, if it can be done without great danger to his health, and by providing nurses and other assistants and necessaries, at his charge or that of his parent or master, if able; otherwise, at that of the town to which he belongs."

These words of this section, "the town to which he belongs," have been construed to mean the town in which he has his pauper settlement. *Kennebunk* v. *Alfred*, 19 Maine, 221; *Hampden* v. *Newburgh*, 67 Maine, 370. Day did not have his pauper settlement in the defendant town, and in no sense did he belong to that town,—he did not even live there temporarily. True, Day's father at one time had his pauper settlement in that town, but he had lived in this unincorporated township for more than five consecutive years prior to the time that the son became of age, so that, in accordance with R. S. (1883), c. 24, § 3, he and those who derived their settlement from him lost their settlement in that town.

It follows that the defendant town is not liable for these expenses, however incurred, and that the action cannot be maintained. In accordance with the stipulation of the report, the entry will be,

Plaintiffs nonsuit.

SARAH T. ROLLINS *vs.* OWEN E. BLACKDEN.

Penobscot. Opinion April 30, 1904.

Real Action. Damages. Easement in water determinable. *Deed,* notice.

On a hearing ordered for the assessment of damages for rents and profits in a real action, after judgment rendered in favor of demandant for the premises, the demandant can recover only such damages as are actually proved, regardless of the state of the pleadings in defense.

By means of an aqueduct defendant had drawn water to his own premises from a well on the demandant's premises. He had also supplied water thus taken to other parties.

The demandant obtained her title to the premises by a deed which contained the following covenant: "That they (the demanded premises) are free from all incumbrances except surplus water from well beside road conveyed to L. D. Hayes and the right to maintain his aqueduct." This language shows that demandant took title with actual notice of a prior grant of the water right to Hayes, the predecessor in title of the defendant. Although the deed to defendant's predecessor granting the right to take the water was not recorded until after demandant took her deed, the language above quoted shows that she took the title with actual notice of the prior grant of the water right.

The grant to defendant's predecessor to take water from the well in question contained the following reservation: "Whenever the lot on which said well is situated shall become the property of any party other than myself, then all rights hereby conveyed shall cease to this extent, viz: Whoever may occupy said lot shall have the preference of the water of said well for all purposes whatsoever useful for the accommodation of said lot, or of any buildings that may be placed thereon, and said grantee his heirs and assigns, shall have only the right to said water so far as not needed for said lot and buildings."

Held; that the grantee's right to take water from the well was determinable, as to so much of the water as might be needed for the lot on which the well was situated and the buildings thereon, whenever the lot should become the property of another than the grantor of the water right.

Also; that until the lot should become the property of another than the grantor of the water right, and afterward even, until the water should be needed for the lot and buildings, and always as to so much of the water as

should not be so needed, that is to say, the "surplus water," the grant was absolute.

Held also; that demandant had the first right to so much water as was useful and needed for the lot and buildings, but to only so much.

Also; it cannot be said that demandant has sustained damages unless she has been deprived by the defendant of her right or preference, or of water which she needed for the lot and buildings.

It is not shown that the demandant has ever sought to exercise any preference in use of water; nor is it shown that she ever needed any water for the use of the lot and buildings. In fact, no buildings have ever been erected or placed upon the lot.

What demandant's rights would be in case she needed the water for use of the lot and buildings thereon, is not decided.

There can be no damages for taking or use of water from a well unless, at the time of the taking, the party seeking to recover had some beneficial interest or right in the water taken.

On report. Judgment for demandant without damages for rents and profits.

This was a real action brought to recover a lot of land in Dexter Village, entered at the January term, 1901, writ bearing date Dec. 5, 1900. Within the first two days of the return term, the defendant filed a special plea of disclaimer, but claiming a right to draw water from a well on the demanded premises, and to take it by pipe or aqueduct across said premises to the defendant's hotel about 40 rods below. At the October term of the court, 1901, the defendant asked leave to amend his special plea, which, after argument, was allowed by the court, and the defendant filed an amended plea claiming a portion of the demanded premises, and the right to draw water from a well on said premises, and to take it by pipe or aqueduct across the same to the defendant's hotel below.

The demandant thereupon filed a motion to reject the plea as amended, as being insufficient and defective in both form and substance.

This motion was sustained, plea held bad and rejected. The defendant then moved for leave to plead the general issue of nul disseizin, which was not granted by the court; and judgment was entered for the demandant. Exceptions were then taken by the defendant to the rulings of the court rejecting the plea, and refusing

leave to allow the general issue to be pleaded, which exceptions were duly entered in the law court at its June term, 1902, and overruled by the court, with an order that the damages be assessed at nisi prius; and the evidence for that purpose was heard by the presiding justice, and, by consent of parties, was reported to the full court. At this hearing the defendant claimed the right, for the purpose of reducing the damages, to offer evidence of a prescriptive right to draw water from the well on the demanded premises and to take the water through a pipe or aqueduct across said premises for the use of his hotel below, and for other purposes. To all such evidence the demandant objected, and claimed that the defendant was concluded from offering it by the pleadings and judgment already entered in the case. She also claimed that no such prescriptive right, in fact, was ever acquired by the defendant. The presiding judge admitted the evidence de bene esse, and the evidence in rebuttal offered by the demandant, and reported the same to the full court, who were to determine the admissibility and effect of the evidence offered on both sides, and render such judgment as shall be in accordance with the legal rights of the parties.

The demandant introduced in evidence deed from Nathaniel and Adaline Bryant to herself of the premises on which the well in controversy is situate, bearing date May 4, 1882, and recorded May 11, 1882. Also deed from Adaline Bryant to Loren D. Hayes, bearing date May 14, 1881, recorded May 19, 1881; also notice to said defendant before suit brought, to remove the pipes and aqueducts from her well and premises, bearing date Oct. 27, 1900; also the writ, pleadings and proceedings, and record, in the suit, previous to this hearing in damages.

The defendant offered in evidence deed from D. D. Flynt to O. E. Blackden, bearing date Oct. 12, 1897, recorded Oct. 15, 1897; also deed from Hattie H. Holmes to Lizzie S. Hayes, dated Sept. 29, 1885, and deed from Frank H. Hayes to Owen E. Blackden, dated Nov. 5, 1900.

D. D. Stewart, for plaintiff.

L. C. Stearns and F. D. Dearth, for defendant.

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

WISWELL, C. J. Real action. After judgment was ordered for the demandant, a hearing was had on the assessment of damages for rents and profits, and the case now comes before us on a report of the evidence. The evidence tends to show that for several years prior to the commencement of the action the defendant had drawn water from a well on the demanded premises through an aqueduct to his own premises, and that he had supplied water thus taken to other parties. The defendant claimed that he had a lawful right to take the water from the demandant's well, a right which originated, at least, by prescription.

Several questions have been argued, but it is necessary to consider only one. In any event, the demandant can recover only such damages as she has proved. Whatever may be the right of the defendant to set up a right to the water, or to an easement in the demanded premises by which he could lawfully draw the water, it is, at least, his privilege to deny that the demandant had any right to the water taken by him, or that she has been damaged. And this is what the defendant denies here. We think it requires no argument to show that the demandant has suffered no damages from the taking and use of the water from the well by the defendant, unless at the time of the taking she had some beneficial right or interest in the water, which was interfered with by the defendant.

The case shows that the demandant obtained her title to the demanded premises from Nathaniel Bryant and Adaline Bryant by deed dated May 4, 1882. Among the covenants in that deed is the following: "that they (the demanded premises) are free from all incumbrances except surplus water from well beside road conveyed to L. D. Hayes and the right to maintain his aqueduct." It further appears that on May 14, 1881, Adaline Bryant had conveyed by deed to L. D. Hayes "the right to draw water by an aqueduct" from the well in question for all purposes, "with the right to convey the same on the southerly side of said road, but within the limits of the road as far as my land extends westerly, with right of ingress and

egress for the purpose of repairing said well or aqueduct." This deed contained the following reservation: "Whenever the lot on which said well is situated shall become the property of any party other than myself, then all rights hereby conveyed shall cease to this extent, viz: whoever may occupy said lot shall have the preference of the water of said well for all purposes whatsoever useful for the accommodation of said lot, or of any buildings that may be placed thereon, and said grantee, his heirs and assigns, shall have only the right to said water so far as not needed for said lot and buildings."

This grant of the right to draw water from the well was determinable as to so much of the water as might be needed for the lot on which the well was situated and the buildings thereon, whenever the lot should become the property of another than the grantor of the water right; but until the lot should become the property of another, and afterwards until the water should be needed for the lot and buildings, and always as to so much of the water as should not be so needed, that is to say, the "surplus water," the grant was absolute.

This latter deed was not recorded until after the demandant took her deed, but the language we have quoted from her deed shows that she took title with actual notice of the prior grant of the water right to Hayes. The "surplus water" which had been conveyed to Hayes was expressly mentioned and excepted from the covenant against incumbrances. The demandant therefore took her deed subject to the right created by the deed of Bryant to Hayes. *McLaughlin* v. *Shepherd*, 32 Maine, 143, 52 Am. Dec. 646; *Rich* v. *Roberts*, 48 Maine, 548. She did not acquire an absolute right to the water from the well, but only "to have the preference of the water of said well for all purposes whatsoever useful for the accommodation of said lot or any buildings that may be placed thereon." Assuming that her rights remain as they were when she took her deed, it must be held that she had the first right to so much water as was useful and needed for the lot and buildings, but to only so much. Only in case she has been deprived by the defendant of her right of preference, or of any water that was needed for the lot and buildings, can it be said that she has sustained damages. It is not shown that the demandant has ever sought to exercise any prefer-

ence, in the use of water, nor that she has ever needed any of the water for the use of the lot and buildings. In fact, no buildings have ever been erected or placed upon the lot. What her rights would be in case she needed the water for the use of the lot and buildings thereon, we do not decide.

The demandant will have judgment for the demanded premises, but is not entitled to damages for rents and profits.

Judgment accordingly.

JOHN PHILLIPS, and others *vs.* MATTHEW LAUGHLIN.

Penobscot. Opinion announced May 11, 1904.

Deed. Real Action, declarations of predecessor in title not admissible. *Evidence. New Trial.*

In the trial of an action involving the title to real estate, the declarations of a predecessor in title of either of the parties, made while in possession and against his interest, are generally admissible in evidence when such declarations relate to matters which must be proved or disproved by parol, such as the nature, character or extent of the declarant's possession, the identity or location upon the face of the earth of boundaries and monuments called for in the deed, or in regard to any material matter concerning the physical condition or use of the property.

But such declarations made out of court by the predecessor in title of a party to an action in court, as to the invalidity of a deed which appears to be sufficient in all respects, which bears all the insignia of genuineness and which has been duly recorded, are not admissible.

A new trial will be granted, when the court is satisfied that the great preponderance of the evidence was contrary to the finding of the jury, and a consideration of all the circumstances surrounding the transaction and which throw any light upon the question involved, show that the improbability of the demandant's position is so great that the court is forced to the conclusion that justice requires that the motion should be granted.

Motion and exceptions by defendant. Sustained.

Real action, to recover lot numbered sixty-nine on the corner of York and Pine Streets, Bangor, Penobscot County.

Plea, the general issue.

The plaintiffs claimed title as heirs of their father, John Phillips, who lived in California from about the year 1867 up to the time of his death which occurred some time in the year 1893, the exact time of his death not appearing in evidence.

The defendant claimed title under a foreclosed mortgage, executed by Catherine Phillips March 13, 1894, and then duly recorded. She died February 22, 1901, in Bangor, Maine, where she had lived.

One essential link in the chain of the defendant's title was what purports to be a deed of the premises from John Phillips to Catherine Phillips dated October 3, 1885, and executed, if at all, in the State of California, and bearing a notarial certificate of acknowledgment of the same date and recorded in Penobscot Registry of Deeds, October 17, 1887. The plaintiffs claimed that Catherine Phillips forged the signature of John Phillips to said deed bearing date of October 3, 1885, and had the notary place his false certificate of acknowledgment upon it, and she caused the same to be recorded in said Registry about two years later, viz: October 17, 1887. The defendant claimed that the deed was duly executed and duly acknowledged by John Phillips and mailed to Catherine Phillips and duly recorded by her.

The question at issue was whether the signature "John Phillips" upon said deed was forged. The plaintiff offered in evidence the two following letters of Catherine Phillips, exhibits 16 and 17, and which were admitted by the court against the defendant's objection and exception thereto duly taken.

Exhibit No. 16, Plaintiff.

This place is worth twenty thousand dollars I wont let it go less
the 20, 1893.
Bangor Octobe
Dear Brother I write those few lines to not to sell this place where I am If you can come I would like to have you the want to take it
rember
from me, it is ten thousand dollars, rember, 10,000. Dont sell if the writ to for it (do as I tell you) The want to take it from me for nothing.

The are going to write to you for it be shure and don't sell for your life.

Tell them that it is yours Daughters Dont sell it is worth ten thouse Dollars. Tell them you canot sell it that it belongs to your Daughter. Dont answer there letter I will send you three thouse Dollars I would like to have you come on if you can but dont sell nor answer there lette they want to take it from me your Sister Catherine Phillips.

answer

Tall them that you dont want to sell it dont aswer there letter this place is Fifteen thousend Dollars.

I would have written to you befre this only they are trying to get it for nothing.

Be shure and dont let them know that I have writte to you you can live on the money it is wort Fifteen thouse Dollars dont you

soon as

sell it for your life but come on if you can writ to me as you get this and dont delay.

Dont you write and give them yor money for nothing tall them That it is your Daughters and you cannot sell It they want to take it For nothing Catherine Phillips

Your Sister Catherine.

be shure and dont write To them mind what I say

Your Sitert Catherine

do as I tell you

I wish you could come Dont you lat them have It now it is wort more than I can tell you now tall them you cant sell it write to me without delay.

Yours Caister catherine

It is worth $25. thousand Dollars and I wont sell It less mind what I tall you, do as I say Dar Brother I wish you could come here But do as I tell you. If you should write to them tall them That you cant sell and your Daughter dont want to sell her

Exhibit No. 17 Plaintiff.

Bangor May the 18, 1893.

Dear Brther I write these few lines to not to sell this house of yours worth eight thousand dont write any lawyr or Regiser Deeds

here me first If you do write tell them you cant sell it and your daughter wont sell hers for your life dont give it away here from me first dont mind

Jow Tainey dirty raskeel and when you do want and must To sell it you will let me know but dont answer there Latter but write to me as soon as you can you have a lot Of money here and dont throw It away mind what I tell you Yours sister Catherine Phillips come on I have done wall for you dont give one Corper for them to have it See what you are doing first They would cut the very soule out of you come on if you can dont delay but write to me dont write them until you heer from me

CATHERINE PHILLIPS.

If you do write tell them you dont wont to sell you place that can give you all a good living keep sill dont say anything about it I will send you rant write when you get this

PHILLIPS

Your Sister CATHERINE

Taber D. Bailey, for plaintiff.

These two letters were written in 1893, before the defendant's claim of title originated, but while she was in possession of the property and apparently claiming to own it. They were admissible to contradict her claim of ownership. They were her admissions that she did not own the property although apparently standing in her name on the records. *Hosmer* v. *Groat,* 143 Mass. 16; *Secor* v. *Pestana,* 37 Ill. 525; *Brown* v. *Calumet River Co.,* 125 Ill. 600; *Gregory* v. *Commonwealth,* 121 Pa. St. 611, 6 Am. St. Rep. 804: *Abbott* v. *Pratt,* 16 Vt. 626; *Reed* v. *Reed,* 46 Pa. St. 239.

A forged deed is absolutely void; the conveyance is void as to all subsequent purchasers of the property and evidence to show that the first conveyance is void is competent against all subsequent purchasers. Her admissions, therefore, whether made after the defendant's chain of title started or before are admissible. *Jackson* v. *Titus,* 11 Wend. (N. Y.) 533.

If the parties to the case were Catherine Phillips or her heirs and the defendant, the objection of the defendant would lie, but the question at issue is not in relation to the conveyance from her but the alleged conveyance to her.

Evidence admissible for one purpose if offered in good faith for that purpose is not made inadmissible by the fact that it could not be used for another with regard to which it has a tendency to influence the mind. *Whipple* v. *Rich*, 180 Mass. 477.

These letters were admissible as suggesting a strong inference that John Phillips did not sign the disputed deed, and the fact that they are declarations of a grantor against her own deed does not render them inadmissible. But, as a matter of fact, when these letters were written defendant's chain of title had not started.

Again, these letters are admissible because they are declarations made by a person deceased against her interest, concerning facts which she above all others had knowledge, and it makes no difference whether made at the time of the alleged transaction or afterward. 9 Am. & Eng. Ency. of Law, 2nd ed. p. 8.

Matthew Laughlin, for defendant.

Counsel argued: (1) A preliminary question of fact as to the competency of evidence should be decided either by the court or by taking the opinion of the jury upon it before admitting it all.

(2) The court erred in permitting the letter with the illegible date, Octobe, 1893, (1895?), to be admitted in evidence until its date had been shown.

Counsel cited: *Walsh* v. *Wheelwright*, 96 Maine, 174, 187; 15 Genl. Digest. Am. & Eng. (1903) p. 1686, § 89, (b); *O'Donnell* v. *Hall*, 154 Mass. 429; *Rawson* v. *Plaisted*, 151 Mass. 73, and cases; *Steinbach* v. *Stewart*, 11 Wall. p. 566; *Royal* v. *Chandler*, 83 Maine, 150; *Walker* v. *Curtis*, 116 Mass. 98; *Com.* v. *Gray*, 129 Mass. 474; *O'Connor* v. *Hallinan*, 103 Mass. 548; *Gorton* v. *Hadsell*, 9 Cush. 508; *Foster* v. *Mackay*, 7 Met. 531, 538; 1 Greenl. Ev. § 49, (15th ed.) note f; 11 Am. & Eng. Ency. (2nd ed.) p. 496; Id. 23, p. 556; *State* v. *Thompson*, 80 Maine, 194.

(3) Resolving every doubt in favor of the plaintiffs, then both letters should have been excluded being declarations of our grantor in disparagement of her record title. 1 Am. & Eng. Ency. Law, (2nd ed.) p. 680, note 3, and cases; *Carpenter* v. *Hollister*, 13 Vt. 552; *Ware* v. *Brookhouse*, 7 Gray, 454, 456.

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

WISWELL, C. J. Real action in which the demandants are the heirs at law of John Phillips who, admittedly, was at one time seized in fee of the demanded premises. The defendant claims under a deed from John Phillips to Catherine Phillips, he having acquired title to the premises from Catherine, if the deed to her was a valid one and conveyed the title. This was the sole question at issue at the trial, viz, whether or not the deed which purports to have been signed by John Phillips on October 3, 1885, acknowledged by him on the same day before a notary public in the state of California, where the alleged grantor then lived, and received for record in October, 1887, at the Penobscot County Registry of Deeds, in which county the land was situated, was the deed of John Phillips. The demandants claim that Phillips' signature to this deed was forged. The trial resulted in a verdict for the demandants, and the defendant brings the case to the law court upon motion and exceptions.

A careful examination of all the evidence, an analysis of which would not be here profitable, satisfies us that the great preponderance of the evidence was contrary to the finding of the jury upon this question; and a consideration of all the circumstances surrounding the transaction and which throw any light upon the question, shows that the improbability of the demandant's proposition, that the deed was forged, is so great that we are forced to the conclusion that the verdict was erroneous and that justice requires that the motion for a new trial should be granted.

Although this disposes of the case, we think it proper that an important question relating to the admissibility of evidence offered should be considered and decided, as the same question will undoubtedly arise in a subsequent trial, if there should be one.

While Catherine was in possession of the premises, subsequent to the conveyance above referred to from John Phillips to her, and before she parted with her title, she wrote to the grantor, her brother, two letters which, it is claimed, have some tendency to support the

demandants' proposition that the signature of John to the deed in question was forged. These letters were offered and admitted in evidence subject to the defendant's exception, although the precise point subsequently argued, and which we now propose to consider, was not stated as a reason why these letters should not be admitted in evidence. This raises the question as to whether the declarations of a party in possession of and claiming to own land, against his interest, as to the validity of a duly recorded deed which purports to convey the title to him, are admissible in evidence against a party to a suit who claims title under such declarant.

In other words, is a purchaser for value from one who apparently has the record title to land, in the trial of a case involving his title, liable to be confronted, and to be divested of his title, by a declaration made by his grantor to the effect that a conveyance to that grantor, which, so far as appears, is in due form and sufficient in all respects to convey the title, is, for any reason invalid? A doctrine which would admit evidence of such a character would certainly be a most dangerous one, since it would allow the most reliable evidence of title to land to be contradicted and overcome by evidence of alleged declarations, and admissions of his grantor, made perhaps many years before, and which is recognized as a most unreliable species of evidence. It would permit the title of an innocent purchaser for value, which depended upon records and deeds, and which had been acquired by a purchaser after first taking every precaution possible, to be overcome by the mere oral evidence of alleged declarations as to the validity of the deed under which his grantor acquired his title.

We are unable to perceive any good reason why, and we are not aware of any general rule under which declarations of this character should be admissible, while the reasons already suggested why a purchaser's title should not be divested by evidence of this character, are most obvious. This evidence at best is hearsay evidence and should be excluded under the general rule in relation to such evidence, unless it comes within some well recognized exception to that rule, and exceptions to this salutary rule should not be multiplied or extended. The exception to the effect that the declarations of a party to a suit contrary to his interests are admissible, a well recog-

nized rule, is not sufficient to make admissible the declarations of a third person, the party's grantor, which have a tendency to contradict records and matters which can only be proved by deeds and by records.

It is true that numerous cases contain the general statement that declarations made by a person while in possession of land in disparagement of his title are admissible against those claiming under him. But an examination of a large number of cases wherein this general statement is made, or which are cited in support of such a statement in digests and text books, shows that in almost every case the declaration held admissible is in regard to the nature, character or extent of the declarant's possession, or as to the identity of monuments or the location of boundaries called for in a deed. For instance, in *Osgood* v. *Coates*, 1 Allen, 77, the court said in referring to a declaration of such a character which was held admissible: "It tended to show that his occupation was not adverse to the record owners." In *Blake* v. *Everett*, 1 Allen, 248, the question was as to whether a right of way had been gained by prescription, and it was held that the declarations of a former owner of the land made during his ownership and tending to prove the existence of such a right of way, were competent evidence against the person claiming under him. In *Hyde* v. *County of Middlesex*, 2 Gray, 267, it was held that the declarations of a former owner of land in regard to a dedication of the land to a public use were admissible in evidence against a subsequent owner. In *Simpson* v. *Dix*, 131 Mass. 179, the question was as to who in fact was the grantee intended in a deed, there being two persons of the same name, and it was held that the admissions of one made while he was occupying the premises that the premises belonged to the other were competent against a person claiming under the declarant. In *Horner* v. *Stilwell*, 35 N. J. 307, the question involved was as to the height at which the defendant was entitled to hold the water in his pond by means of a dam, and the declarations offered and admitted were in relation to this question, and as to the previous height at which the dam had been maintained. In *Cook* v. *Knowles*, 38 Mich. 316, the court went rather further than in most of the other authorities which we have

noticed, and held that such a declaration tending to show the true date of the delivery of a deed was admissible. In this case the dissenting opinion of Judge Cooley contains a very full analysis of the authorities up to that time, 1878, upon this question, at the conclusion of which he says, "but an examination of the cases will show, I think, that not more than one or two go to the extent here claimed." This opinion contains a valuable discussion of the question here involved. But the extent to which a majority of the court went in that case, in holding that declarations tending to show the true date of the delivery of the deed are admissible, falls short of the position of the plaintiff in this case, to the effect that declarations tending to show that the deed which conveyed to the declarant an apparently perfect record title, was forged, are admissible.

But these are all matters that must be proved or disproved by parol evidence. Every purchaser knows that however perfect a record title he may have acquired, this title may be affected by parol evidence of disseizin, or of an easement gained by prescription, or as to a right of flowage lost or gained by user, or as to the location upon the face of the earth of monuments and boundaries called for in his or some prior deed. So that if any of these questions are involved, which can only be proved or disproved by parol evidence, the declarations of a person against interest, who had been in possession, as to the character of that possession or as to its extent, are admissible on sound reason. So too, if the question at issue is as to the location or identity of monuments, it is obvious that the declarations of a person in possession, who has peculiar opportunities for knowledge in regard to such matters, are also admissible for equally good reasons. But a purchaser who has obtained a deed of real estate from one who has the record title thereto cannot, and ought not to be obliged to, anticipate that he may be confronted by the declarations claimed to have been made out of court, by a predecessor in title, to the effect that a prior deed in the chain of title, which bears all the insignia of genuineness, and which has been held out as such, is, for any reason, invalid.

And this is the extent to which the authorities have gone in the vast majority of cases, although the courts have frequently been con-

tent to make the general statement, that declarations made by persons while in possession of land, against his interest, are admissible against any one claiming under him, because the circumstances of the particular case have not required a more precise statement of the rule. We cheerfully agree to this statement limited and qualified to the extent above claimed, that such declarations against interest in regard to the nature, character or extent of the declarant's possession, the identity or location upon the face of the earth of boundaries and monuments called for in a deed, or in regard to any matter concerning the physical condition or use of the property, which must be, from the nature of things, proved by parol, are admissible. But we decide that it is not competent to prove declarations made out of court by the predecessor in title of the party to an action in court, to the effect that a deed which appears to be sufficient in all respects which is duly recorded and which a purchaser has been led to rely upon as one of the necessary links in its chain of title, from the very fact of its being recorded, is not what it, and the record of it, purports to be.

While, as we have said, no case, with one or two possible exceptions, that we are aware of, goes to the extent of permitting declarations of this character to be admitted, the authorities where this precise question has been considered have almost universally held that such declarations were not admissible. In many cases where the general rule as to the admissibilty of such declarations has been stated, this sentence from 1 Greenleaf on Evidence, § 109, is quoted, "declarations in disparagement of the title of the declarant are admissible, as original evidence." But an examination of the whole section shows that the learned author was referring to the declarations of persons in possession of land "explanatory of the character of their possession." The author goes on to say in the same section: "Possession in prima facie evidence of seizin in fee simple; and the declaration of the possessor, that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good

faith, should not be received as part of the res gestae; leaving its effect to be governed by other rules of evidence."

In 2 Wharton on Evidence § 1157, the author quotes from *Cook* v. *Harris*, 61 N. Y. 448, this statement in regard to the admissibility of such declarations: "The declarations of a party in possession are admissible in evidence against the party making them, or his privies in blood or estate, not to attack or destroy the title, for that is of record and of a higher and stronger nature than to be attacked by parol evidence. They are competent simply to explain the character of the possession in a given case." The rule is thus concisely stated, but with the necessary qualification, in 1 Am. Eng. Encyl. of Law 2d. ed. 680: "The admissions of a person in disparagement of his title, but not in contradiction of a record title, are competent evidence against those claiming under or through him so far as there is identity of interests." And see the cases cited in support of the qualification.

In *Dodge* v. *Freeman's Saving & Trust Co.*, 93 U. S. 379, it was decided that: "The declarations of a party in possession of land are, as against those claiming under him, competent evidence to show the character of his possession, and the title by which he held it, but not to sustain or destroy the record title."

In the case of *Carpenter* v. *Hollister*, 13 Vt. 552, 37 Am. Dec. 612, a very closely analogous question was presented. The issue of fact in the case was as to the competency of a prior grantor in the chain of title to make a deed. The declarations against his interest of the grantee in that deed, a predecessor in title of the defendant, were offered upon that question. The court after reviewing the authorities and calling attention to what in fact had been decided in the cases cited, said: "In this case, the plaintiff insists that the concessions of the grantor made while in possession not explaining or qualifying that possession, are admissible to defeat his title, apparently good of record, even against an innocent, bona fide purchaser, on good consideration. This we think dangerous and unprecedented." In the case cited the person whose declarations were offered was living at the time of the trial, while in this case Catherine Phillips was dead at the time that these declarations were offered; but in our opinion

this in no way affects the question, the objection is to the character of the alleged declarations as bearing upon the validity of a deed apparently sufficient, and it can make no difference as to the admissibility of such declarations, whether the declarant is living or dead.

We are therefore satisfied, both upon reason and the great weight of authorities in cases where this question has been considered, that the declarations of Catherine Phillips, made while the record title was in her, as to the validity and genuineness of the deed from John Phillips to her, were not admissible against this defendant.

Motion and exceptions sustained.

GEORGIE HEWINS, and another, Exrs.

vs.

FRED WHITNEY, and another.

Kennebec. Opinion May 11, 1904.

Insolvency. Discharge, Name of creditor omitted. *R. S.* (*1883*), *c. 70, § 49.*

The omission of the name of a creditor by an insolvent in his schedule of creditors, under the state insolvency laws, where such omission is not wilful or fraudulent, does not affect the validity of a discharge duly granted to the insolvent debtor, in a suit brought by the creditor whose name was omitted.

Agreed statement. Judgment for defendant, Fred Whitney.

This action is on a promissory note dated January 11th, 1892.

Case reported from Superior Court, Kennebec County, on the following case stated by the parties:—

"On October 7th, 1895, the defendant, Fred Whitney, filed his petition in insolvency in the insolvent court in Kennebec County under the State law, and on March 9th, 1896, received his discharge in the ordinary form. The names of the plaintiffs were not included in his list of creditors and they had no actual notice of the insolvency proceedings or of his discharge. Otherwise all his insolvency pro-

ceedings were regular, all notices required by law to be published in the newspaper having been so published. The debt represented by this note was due and outstanding and was not on the list of creditors filed by said Whitney, neither was George E. Hewins, deceased, nor his executrix, listed as creditors, nor was the note sued for in this action in any way returned by said Whitney as one of his liabilities in his schedule filed under oath or in any proceedings in said insolvency. In case the plaintiffs are entitled to recover under the above statement judgment is to be issued against both defendants; in case the plaintiffs are not entitled to recover under the above statement judgment is to issue only against Nellie Whitney, and in favor of said Fred Whitney."

S. and L. Titcomb, for plaintiffs.

Jos. Williamson and L. A. Burleigh, for defendants.

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

WISWELL, C. J. One of the two defendants in this suit upon a promissory note, dated January 11, 1892, relies upon a discharge in insolvency granted to him on March 9, 1896, in insolvency proceedings commenced by him on October 7, 1895, in accordance with the insolvency laws of this State, as a bar to the maintenance of the action against him. The only question presented by the agreed statement of facts, upon which the case comes to the law court, is whether or not the validity of this discharge as a bar to the maintenance of this suit, is affected by the fact that the insolvent debtor, in his schedule of creditors, omitted all mention of this note in suit, or of the creditor to whom it belonged. There is no intimation in the agreed statement of facts that this omission was wilful or fraudulent.

Our insolvency statutes contain no provision to the effect that the omission of the name of a creditor from the list of creditors, which the insolvent debtor is required to furnish, shall affect or invalidate the discharge in insolvency as a bar to a suit brought by the omitted creditor. Upon the contrary it is provided by R. S. (1883), c. 70, § 49: "A discharge in insolvency duly granted shall, subject to the

limitations in the two preceding sections, within this state, release the insolvent from all debts, claims, liabilities and demands, which were or might have been proved against his estate in insolvency." The claim sued in this action might have been proved against the insolvent's estate in insolvency, the discharge was duly granted, it is consequently a bar to the maintenance of this action against him.

It has been almost universally held by all of the courts of this country, that the omission of the name of a creditor in the insolvent's schedule of creditors, not wilful or fraudulent, does not affect the validity of the discharge in insolvency, duly granted, in a suit brought by the creditor whose name was thus omitted. See *Symonds* v. *Barnes*, 59 Maine, 191, 8 Am. Rep. 418; *Whiton* v. *Nichols*, 3 Allen, 583, and the cases cited in 16 A. & E. Ency. of Law, 2d. ed. p. 770.

In accordance with the stipulation of the agreed statement, the entries will be,

Judgment in favor of the defendant Fred Whitney.
Judgment against the other defendant.

PARSONS P. DAVIS *vs.* DAVID W. ALEXANDER.

Franklin. Opinion May 11, 1904.

Trespass, q. c. When title is not involved. *Evidence,* immaterial is not exceptionable.

In an action of trespass quare clausum, which is the proper form of action to recover for injuries done to the plaintiff's possession of real estate, title is not necessarily involved. It is sufficient if the plaintiff shows that he was in actual and, so far as the defendant is concerned, lawful possession of the locus at the time of the trespasses complained of.

But it does not follow that the admission of deeds of the locus, or of any part of it, from the plaintiff, or from a person under whom he claims, to third parties is an exceptional error. If the question of the plaintiff's actual possession was in controversy, the deeds would be competent upon that issue, since there is some presumption that the real owner is in possession.

Held; that the deeds admitted in evidence were immaterial, if appropriate instructions were given, as it must be assumed were.

The admission of testimony that is merely irrelevant or immaterial, is not the subject of exception.

Exceptions by plaintiff. Overruled.

Trespass quare clausum.

From the exceptions and reported testimony it appears that the land described in the writ, and on which the alleged trespass was committed, was originally owned by one Jesse R. Bean, the deceased husband of Helen Bean. Prior to the trespass complained of he had plotted the greater part or all of the same into house lots, bounding all of them by streets or land dedicated to public use for streets, as indicated by a plan duly recorded, and references in deeds of lots embraced in said tract. Quite a portion of the premises was dedicated in this manner and in use for public travel. Quite a portion of the premises so plotted into lots had been sold and conveyed by deed by Jesse R. Bean in his lifetime. Some of the lots had buildings upon them. The plaintiff in evidence claimed that defendant's horse passed from the street upon some of these lots, and depastured

the land, which was unfenced and adjoining the street or road, and that he (the plaintiff), was in possession of the premises so depastured by virtue of an agreement to buy the grass on the same made with Helen Bean, she giving him license to enter and cut the same. The defendant contended that Helen Bean could give no right of possession to plaintiff in and to the lots, the title to which was in others, merely by virtue of said agreement, as she never was in possession, nor exercised any acts of ownership over them, but was merely a trespasser against the real owner; that his horse did not pass from the street on to any lots except those the use of which had been granted him by the actual owners; that his horse was not upon any land except said last named lots and said streets and that there was no actual or exclusive possession by the plaintiff sufficient to support an action, whatever possession he had or claimed to have, being wrongful. To support these contentions defendant offered in evidence the plan referred to and the records of deeds. The defendant's attorney stated the purpose of offering the deeds was not only to show the title to be in some persons other than the plaintiff or his grantor, but to show that he was not—that he had no right of possession,—and to show also that the lands surrounding the property conveyed were dedicated to public uses in the deeds of the grantor of the plaintiff.

All the records of land were of lots in the land described in the writ and were introduced for the same purposes and to each objections were made. There was evidence of possession by owners of said lots, and that the dedicated streets were used as such by the owners of lots adjoining them, and by the general public.

The only evidence of possession on the part of plaintiff or of his grantor was that the previous year, she, or some one else, cut off a little grass on some of the vacant lots. They were not fenced and there was no control or actual possession, otherwise, by either of them.

The verdict was for the defendant.

B. Emery Pratt, for plaintiff.

E. E. Richards, for defendant.

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

WISWELL, C. J. In an action of trespass quare clausum, the plaintiff introduced evidence tending to show that he was in actual possession of the locus for the purpose of cutting and taking away the grass growing thereon, under a license from the widow of a former owner. The defendant offered in evidence a number of deeds from the deceased husband of the licensor of portions of the locus described in the writ; the same being objected to, defendant's counsel in answer to an inquiry by the court as to the purpose for which these deeds were offered, replied: "The purpose is to show that the title to a large portion of the land described in the writ is in some one other than the plaintiff or the plaintiff's grantor." Later he stated that they were offered not only to show that the title was in some other person or the licensor, but also that the plaintiff had no right of possession, and stated other purposes for which they were offered. It was not claimed that the title to any of the lots conveyed by these deeds had ever come by mesne conveyances to the defendant, or that he had any right, title, possession or right to the possession of any portion of the locus, under these deeds, or that the acts complained of as trespasses were done under the license or permission of any person who owned any portion of the locus under these deeds. The deeds were admitted in evidence subject to the plaintiff's objection and exception, and the trial resulted in a verdict for the defendant.

It is undoubtedly true that this form of action is to recover for injuries done to the plaintiff's possession. Title is not necessarily involved, and it is not necessary for the plaintiff to prove title to the locus provided he shows that he was in actual, and, so far as the defendant is concerned, lawful possession thereof at the time of the trespasses complained of.

But it does not follow that the admission of deeds of the locus, or of any part of it, from the plaintiff, or from a person under whom he claims, to third parties is on that account an exceptionable error. If the question of the plaintiff's actual possession was in controversy, as

it may have been so far as we can tell from the exceptions, the deeds would be competent upon that issue, since there is some presumption that the real owner is in possession.

At most, the deeds admitted were immaterial, because we must assume, no exception having been taken to the charge, that appropriate instructions were given to the jury to the effect that the real question involved was as to the plaintiff's possession, and that he could recover, if he were in actual possession, against a defendant who had no right of possession, provided the latter was guilty of the trespass complained of.

The admission of testimony that is mere irrelevant or immaterial, and which is not shown to have been prejudicial, is not the subject of exception.

Exceptions overruled.

CHARLES STEVENS *vs.* DAVID D. WALKER.

SAME *vs.* SAME.

York. Opinion May 11, 1904.

New Trial. Jury. Verdicts, set aside as inconsistent. *Trespass and Malicious Prosecution.*

Inconsistent verdicts, rendered by the same jury and upon the same testimony that are irreconcilable with each other, should be set aside.

Two cases were brought by the same plaintiff against the same defendant, were tried together and submitted to the same jury. One was an action of personal trespass to recover for an alleged assault, the other was an action for malicious prosecution. The question of probable cause in the latter suit, the only question at issue in that suit, depended upon the same facts that were in controversy in the action of trespass. If the plaintiff's story as to the alleged assault was believed by the jury to have been the true one, there should have been a verdict against the defendant in both actions, because then the defendant did not have probable cause for instituting the criminal proceedings upon which the action for malicious prosecution was based. The jury rendered a verdict for the plaintiff in the

action of trespass for $1,487.50, and a verdict for the defendant in the other action.

Held; that these two verdicts rendered by the same jury and upon the same testimony were absolutely inconsistent and irreconcilable with each other; that by reason of such inconsistency the value of each verdict has been destroyed by the other and that both verdicts should be set aside.

It is, of course, true that if one of these verdicts had been unmistakably right and the other manifestly wrong, one might have been sustained and the other set aside, notwithstanding this inconsistency; but where, as in these cases, there was sufficient evidence to justify either verdict standing by itself, and, except for this inconsistency, the court would have been disinclined to disturb either, the weight and value of each verdict is impaired to such an extent by the other, that it is considered by the court that both should be set aside.

Motion by defendant. Sustained.

Action of trespass, for an assault and battery, and malicious prosecution, both growing out of the same facts and tried together. The jury returned a verdict of $1,487.50 for the plaintiff in the first case and for the defendant in the second case.

Robt. B. Seidel, Geo. F. and Leroy Haley, for plaintiff.

Hampden Fairfield and Luther R. Moore; B. F. Cleaves, H. T. Waterhouse and G. L. Emery, for defendant.

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

WISWELL, C. J. These two cases were tried together before a jury. One is an action of personal trespass for an alleged assault and battery, the other is an action upon the case for malicious prosecution.

At the time of the alleged assault by the defendant upon the plaintiff, the latter was in the service of the former as a coachman at his summer residence at Kennebunkport. While the plaintiff was sitting upon the coachman's seat of a carriage standing in front of the door of defendant's house, a controversy arose between the parties, during which, it is claimed by each, that the other made an assault upon him. The plaintiff's contention is, that, after some words between them, he was discharged by the defendant from his employment; that after he stepped down from the carriage, and as

he was passing by the defendant on his way off of the latter's premises, going towards the main road, the defendant made an assault upon him with his cane and then followed him to and along the road, throwing stones at him and hitting him twice; that he also called him vile names and made threats of further and more serious injury.

The defendant says, upon the other hand, that the plaintiff made the first attack upon him; that he jumped down from the carriage and rushed towards him in a violent, angry and threatening manner, and that whatever he did, at least in the immediate vicinity of the house, was necessarily and properly done in his own protection and defense.

After the affair was over the defendant sent for an officer, had the plaintiff arrested, lodged in a lock-up, and later prosecuted criminal proceedings against him for an assault and battery. Upon the hearing before the magistrate, the respondent, the plaintiff in this action, was adjudged not guilty and was discharged. For this alleged malicious prosecution, the second of these two actions was brought. The trial of the two cases, upon the same evidence, and before the same jury, resulted in a verdict for the plaintiff in the action for assault and battery, damages being assessed for the plaintiff in the sum of $1,487.50, and in a verdict for the defendant in the action for malicious prosecution.

It is obvious that these two verdicts, returned by one jury in the trial of the two cases together, are inconsistent and cannot be reconciled. If the plaintiff's story of the whole affair is the true one, he was entitled to a verdict in his favor in both cases. If his story is true, the institution and prosecution of the criminal proceedings by the defendant was without probable cause and was malicious. If, upon the other hand, the plaintiff was the aggressor, having made the first assault, and the defendant was only subsequently in fault in following the plaintiff to and along the road, and in making an assault upon him there, after he had been struck and knocked down by the plaintiff, as claimed, although the plaintiff would be entitled to a verdict for this subsequent assault, the damages awarded, under such circumstances, were grossly excessive, because the actual physi-

cal injury was trifling; and he should not be allowed large damages for the injuries to his feelings, the indignity, if he made the first assault and was to a considerable extent the cause of the whole trouble.

It follows, as we have already said, that these two verdicts are entirely inconsistent with each other, the plaintiff should either have had a verdict in both cases, or the damages in the personal trespass case should have been much smaller.

In the opinion of the court, there was sufficient evidence to justify either verdict, standing by itself, but standing together, each contradicts the other, and this contradiction deprives both of the weight that a verdict is ordinarily entitled to. Of course, if one of these verdicts had been unmistakably right, and the other manifestly wrong, one might have been sustained and the other set aside, notwithstanding this inconsistency; but where the testimony is so evenly balanced, and the contradictions are so great, that the court would be disinclined to disturb either, standing alone, in such case, each has been deprived of its entire weight and value by the other, and we are of the opinion that both should be set aside.

Motion for a new trial in each case granted.

CHARLES W. ROBINSON

vs.

ROCKLAND, THOMASTON AND CAMDEN STREET RAILWAY.

Knox. Opinion May 16, 1904.

Street Railways. Country Crossings. Contributory Negligence. Traveler, Bank intervening between him and car.

The conditions of a country crossing of an electric railway in some respects more nearly resemble the crossings of steam railways than they do the situation in city streets, where persons and teams are constantly traveling across and upon the tracks.

If the traveler about to cross the track cannot see an approaching car on account of an intervening bank, he cannot therefore in the exercise of ordinary prudence assume that it is impossible for a car to be behind the bank.

In conditions of known peril, prudent men are vigilant for their own safety; and one who drives into a place of known peril as he would into one of assured safety, doing nothing whatever to safeguard himself or to ascertain if the danger be imminent, does not exercise the measure of ordinary care which the law requires.

Motion by defendant. New trial granted.

Case for injuries to a traveler on the highway and to his horse and wagon, alleged to have been caused by defendant's negligence.

The plea was the general issue. The verdict in favor of plaintiff was for $1,116.38.

L. F. Starrett and L. M. Staples, for plaintiff.

Counsel contended that the court having decided that there was an issue on the question of contributory negligence, and such issue having been submitted to the jury under proper instructions, their verdict should not be disturbed. Counsel reviewed exhaustively the testimony and contended that the verdict was fully justified by the evidence.

O. D. Baker; C. E. and A. S. Littlefield, for defendant.

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

POWERS, J. Action on the case to recover for injuries to the plaintiff and his team received in a collision at Walker's crossing in Thomaston, alleged to have been caused by the negligence of the defendant in the running and management of one of its construction cars on the morning of July 16, 1902. The verdict was for the plaintiff and the defendant moves to set it aside as against evidence.

While the evidence as to the defendant's negligence is very conflicting, yet the jury had the advantage which we cannot have of seeing and hearing the witnesses, and if they believed those of the plaintiff we think they were fairly justified in finding that, in view of the conditions existing at this crossing at the time of the collision, the car was running at such a high rate of speed as was inconsistent with a reasonable regard for the lives and safety of persons having occasion to cross the track at this point.

This brings us to the principal ground relied upon in support of the motion, that the plaintiff was not in the exercise of due care and that such want of due care on his part, contributed directly to cause the injury complained of.

The place where the injury occurred was a country crossing. The car was going from Thomaston to Warren in a general northwesterly direction, and several hundred feet south-easterly of the crossing, the track leaves the side of the road and continues through the fields to, across and beyond the south Warren road. The plaintiff testified that he was traveling along this road in an easterly direction walking his horse, and did not see or hear the approaching car until his horse's feet were on the track and the car itself only about one hundred and forty feet away. Judging it safer to go ahead than attempt to back or turn, he shouted to and struck his horse with the reins; but before he could cross the track the car struck his team. Just before coming to the crossing, the car ran through a cut, the bank of which as it existed at the time of the collision, the plaintiff claimed prevented his seeing more than 140 feet through the cut until his horse was upon the track. The defendant's

witnesses testified that from twenty-five to thirty feet westerly of the track one traveling in the road could see entirely through the cut and many hundred feet up the track, but there was much conflicting evidence at the trial as to whether the bank of this cut had been altered since the accident so as to change the range of vision of one in the plaintiff's position. The hour was about half past five in the morning and the plaintiff knew the conditions existing at this crossing, as he had been over it in a team to his work each morning for several months. He knew that this construction car ran on no regular time, but generally passed along about this hour in the morning for the purpose of carrying the men to their work. He was familiar with the car, the crossing and the track along which the car was approaching. He must have known that it was a place of danger, and he was chargeable with the knowledge that any moment a car might be approaching the crossing although temporarily hidden from his view by the bank.

What did he do to sustain the burden which the law imposes upon him to exercise due care? He says he did not hear the sound of the car or of the gong. Notwithstanding similar negative evidence from some other witnesses, the positive affirmative testimony of numerous witnesses, who testify that they did hear the gong, establishes overwhelmingly that fact that it had been sounded from a distance of several hundred feet southerly of this crossing. Mr. Welt, the plaintiff's father-in-law, was running down the road, shouting and waving his arms in plain sight of the plaintiff who was coming up the road, but the plaintiff neither saw nor heard him until Mr. Welt was within three or four rods of him and immediately before he saw the car. It is not surprising that the plaintiff neither saw nor heard anything to warn him of the approaching car, for he does not claim that he either looked or listened for either sight or sound until Mr. Welt attracted his attention just as his horse was stepping over the first rail of the track. He remained inert and inattentive; he did nothing; he used no one of the senses with which nature had endowed him to protect himself, until his horse's feet were actually between the rails. According to his own testimony he drove into this place of known peril as he would into a place of assured safety, doing noth-

ing whatever to safeguard himself or to ascertain if the danger were imminent, acting precisely as a man would act who had never seen or heard of an electric car or crossing.

There is no absolute rule of law that it is negligence for a person not to look or listen for an approaching car before attempting to cross a street railway; but it may be determined as a matter of fact that in some situations the measure of ordinary care is not fulfilled by a person who crosses without doing either. *Warren* v. *Bangor, Orono & Old Town Railway Co.*, 95 Maine, 115. The conditions of a country crossing of an electric railway in some respects more nearly resemble the crossings of steam railways than they do the situation in the city streets where persons and teams are constantly traveling across and upon the tracks. A greater speed may be reasonable upon the part of the electric car calling for a corresponding increase in vigilance on the part of the traveler. If, as the plaintiff contends, the bank of the cut was such that he could not have seen the approaching car, if he was deprived of the protection of one of his senses, so much the more he was bound to use the one which remained. If it was impossible on account of the bank to see a car, he had no right in the exercise of ordinary prudence to assume that it was impossible for a car to be behind the bank. It is to be noted, however, that he looked for no car until his attention was attracted by Mr. Welt and his horse actually upon the track. If he had listened he must have heard the swish of the electric current, the rumble of the car, the sound of the gong, and the shouting of Mr. Welt. If he had even looked ahead in the direction of the crossing he would have seen Mr. Welt running toward him throwing up his arms, a sufficient warning to a prudent man in approaching a place of known danger.

We are of the opinion that the circumstances would have suggested to a reasonably prudent man that he should either look or listen or do both. The plaintiff did neither. Whether lost in reverie or engrossed in conversation with his companion, or from some other unknown and unexplained cause, he did nothing but drive straight on without paying any attention to the perilous conditions which attached to the crossing of the street railway upon which he was

entering. If this is due care, it would be impossible to define negligence. Prudent men in such conditions of known peril are vigilant for their own safety.

From the plaintiff's own testimony and those facts which are either undisputed or established by the overwhelming weight of evidence, it is clear that the plaintiff failed to exercise that degree of care which common prudence and the law requires, and that such want of care was the proximate cause of his injury.

Motion sustained. Verdict set aside. New trial granted.

ABRAHAM RICH *vs.* ALVAH R. HAYES, Admr.

Kennebec. Opinion May 16, 1904.

Contracts, between mortgage parties. Subsequent rights. *Fraud*, effect of on contracts executed and executory. *Mortgages. New Trial.*

The legal representative of the plaintiff's mortgagees agreed not to enforce at law or in equity any of the unsecured claims of the mortgagees against the plaintiff's equity of redemption.

Held; that there is nothing in the contract to prevent such representative or the heirs of the mortgagees acquiring subsequently the legitimate claims of other parties, and unless at the time the contract was made such representative entertained the design by thereafter acquiring and enforcing such claims to prevent the plaintiff from obtaining the benefit of the contract, their subsequent acquisition would not be in violation of it.

Between the parties to a contract fraudulent as to creditors so far as it is executory it cannot be enforced; so far as it is executed, the law leaves the parties where it finds them. Its aid cannot be invoked to restore to a party property with which he has parted in pursuance of his fraudulent contract and design.

A verdict which is unsupported by the evidence cannot be sustained by the assumption as a fact of a controverted point that was not submitted to the jury.

See *Same* v. *Same*, 97 Maine, 293.

Motion by defendant. Sustained and new trial granted.

This was an action on the case to recover on a promissory note for $3,000. The plea was the general issue with a brief statement that

the note had been settled by reason of an agreement entered into between the parties, two years previous to the commencement of the action. The verdict was for the plaintiff in the sum of $2,581.75.

It came before the law court on a motion for a new trial as against evidence. The case appears in the opinion.

Jos. Williamson and L. A. Burleigh, for plaintiff.

Geo. W. Heselton, for defendant.

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

POWERS, J. Assumpsit on a promissory note for $3,000 and interest, dated Dec. 29, 1894, payable to the plaintiff and signed by Dingley Brothers. The verdict was for the plaintiff and the defendant moves to set it aside as against evidence.

The following facts are uncontroverted. On Dec. 28, 1894, the plaintiff gave to Dingley Brothers his three notes of $1,000 each secured by a mortgage on his homestead, receiving as the consideration therefor the note in suit. Fred B. Dingley, the administrator of Fuller Dingley, who was the surviving partner of Dingley Brothers, brought a writ of entry to foreclose this mortgage. The case went to trial at the March term, 1898, of this court in Kennebec, upon the question of the amount due upon the mortgage, and the genuineness of a certain agreement, produced by Rich and purporting to be signed by Dingley Brothers, to the effect that the mortgage should not be foreclosed without his consent in writing being first obtained. A settlement was made by which the case was dismissed without cost and the following agreement under seal signed by the parties and extended on the back of the mortgage:

"In consideration of one dollar to the other paid by each Fred B. Dingley, Administrator de bonis non of Fuller Dingley, who was surviving partner of the within named Dingley Brothers, mortgagee, and Abraham Rich, mortgagor within named, hereby modifies the terms and conditions of this mortgage as follows:

First: The amount due at this date on the mortgage debt is three thousand dollars.

Second: Interest is to be paid on said three thousand dollars at the rate of three per cent per annum, payable semi-annually.

Third: The mortgagor is to pay the taxes, insurance and keep the premises in repair.

Fourth: The mortgagor shall not commit strip or waste, and the mortgagee agrees not to enforce at law or in equity any of the unsecured claims of Dingley Brothers against the right of redemption on said premises.

Fifth: In case of default in performance of any of the foregoing agreement by the mortgagor for sixty days, the mortgagee may thereupon take actual possession of the premises and the mortgagor agrees to so surrender possession.

Sixth: The principal of said debt (said three thousand dollars) shall not be due until default in the foregoing agreement, and sixty days thereafter, but shall become due on the death of said Rich and possession shall be surrendered in ninety days after such death."

At the same time, and as a part of the same settlement, the note in suit in this case and the controverted agreement purporting to be signed by Dingley Brothers were delivered to the clerk of courts in a sealed envelope with this memorandum thereon signed by the attorneys for the several parties: "To be kept on file, not to be delivered to either party." It was also understood and agreed, though not reduced to writing, that if the agreement indorsed upon the mortgage was violated, then Rich was to again have the possession of the papers in the envelope with all his original rights under the same.

Before this settlement, one Hilton as an administrator, had attached the equity of redemption in the mortgaged premises in a suit against Rich, which suit was then entered and pending in court. Judgment was afterwards rendered, execution issued, and the equity of redemption sold for $76.59 on June 27, 1898, to Mr. Heselton, who had been the attorney for the administrator in the writ of entry. This sale was not redeemed from, and on Aug. 5, 1899, a writ of entry was brought by Heselton, judgment for possession obtained, and execution issued Jan. 1, 1900. Jan. 9, 1900, Heselton quitclaimed the premises to the heirs of James B. Dingley, who when living was

one of the firm of Dingley Bros., for $80 consideration. March 19, 1898, said equity was also attached upon a writ issued out of Mr. Heselton's office against Rich and in favor of one Robbins. In this suit judgment was rendered, execution issued and the equity of redemption sold to Fred B. Dingley May 30, 1899, for $100. The writ in the present case is dated April 9, 1900.

The plaintiff claims to maintain the present suit on two grounds.

I. It is claimed that the purchase of the equity of redemption by the heirs of James B. Dingley and by Fred B. Dingley was a violation of that part of the agreement of March 30, 1898, which says: "The mortgagee agrees not to enforce at law or in equity any of the unsecured claims of Dingley Bros. against the right of redemption on said premises." Dingley Bros. had at the time certain unsecured claims against the plaintiff Rich. The letter of the agreement applies to these and to these alone. Neither the Hilton nor the Robbin's claim on which the equity of redemption was sold was among the number; and there is no evidence that Dingley Brothers or their heirs or legal representatives had at that time any interest in either of these claims. The object of that agreement was however to give to the plaintiff the right to enjoy the equity of redemption during his life upon his complying with its terms as to the interest, taxes, insurance, strip and waste, all of which it is admitted he fulfilled.

The jury were instructed that "if at this time Fred B. Dingley fraudulently, for the purpose of depriving Capt. Rich of what they were purporting to give him, then and there had devised the scheme and had contemplated the programme of buying in judgments of the other independent creditors, and that was a part of his fraudulent intention at the time he signed these stipulations upon the mortgage and at the time of the settlement, if he did have this fraudulent intention to in this way deprive Capt. Rich of what apparently he was giving him, and if he carried that out, then I instruct you for the purpose of this trial that it would be a failure on his part to keep the spirit of his part of the contract and this suit may be enforced upon the note." The jury were further instructed that the effect would be the same if such an intention was entertained by Mr. Dingley's

attorney at the time of the settlement and that intention was afterwards adopted and carried out by Mr. Dingley.

It is evident that these instructions were sufficiently favorable to the plaintiff. There was nothing in the contract to prevent the mortgagee acquiring subsequently the legitimate claims of the other parties, and unless he at the time entertained the design by thereafter acquiring and enforcing such claims to prevent Mr. Rich obtaining the benefit of the contract, their subsequent acquisition would be an innocent transaction.

In order to return a verdict for the plaintiff the jury must have found that such a design was entertained at the time by either Mr. Dingley or his attorney. This finding is wholly unsupported by the evidence. After a careful examination of the printed case we cannot find in the record any testimony tending to show such a design or any fact or circumstance from which it can follow as a legitimate inference. The seizures, sales and purchase of the equity of redemption appear to have been in the ordinary course of business. In enforcing the claims of his clients, Hilton and Robbins, against the equity, Mr. Heselton did nothing but what his duty to them required him to do. At the time the heirs of James B. Dingley purchased the equity of redemption, the plaintiff's right of redemption from the sheriff's sale had expired. There is no evidence that the administrator ever heard of this claim prior to that date. When the administrator bought the Robbins claim, Robbins, after execution issued, sought him out at his house where he was sick and after several meetings made arrangements with him to take the claim for a note for $150 owed by Robbins to Dingley Brothers. Robbins then notified his attorney to sell the premises to Fred B. Dingley for $100 if there were no other bidder. There is no evidence that Mr. Dingley ever heard of the Robbins claim until Mr. Robbins came to to his house. The jury must have misapprehended the evidence or disregarded their duty.

II. The plaintiff's counsel claim to sustain the verdict on the ground that the settlement of March 30, 1898, was in fraud of his own creditors, in that it recited that the amount due upon the mort-

gage was $3,000, when in fact it was only $1,500 for the purpose of having the evidence of the incumbrance appear greater than it actually was.

This fact however is not admitted, and a sufficient answer to the plaintiff's position is that the question was not submitted to the jury and non sequitur that the jury would have found in favor of the plaintiff's contention. The plaintiff testifies positively that there was $3,000 due on the mortgage. It was given for that sum and the note of Dingley Bros. which the plaintiff received for it was for that amount. There is no evidence coming from the plaintiff or anyone else that anything had ever been paid on it. At the trial of the writ of entry, the representative of Dingley Bros. contended that some $2,800 had been advanced upon the mortgage; Mr. Rich claimed that it was only $1,377.45. For the purpose of the settlement the sum was finally fixed at $3,000 at 3 % instead of $1,500 at 6 %. It is not certain that in doing this Fred B. Dingley intended to act in fraud of Mr. Rich's creditors. It represented in amount simply what it was claimed had been advanced by Dingley Bros. with the accumulated interest, and Mr. Rich now swears positively that there was $3,000 due.

Even if the truth of the counsel's contention were admitted or so clearly proven that a verdict based upon a contrary conclusion could not stand, it would not help the plaintiff in this case. An examination of the indorsement upon the envelope, together with the deposit of the note in suit with the clerk of courts, shows that the plaintiff did something more than merely enter into an agreement not to sue so long as the agreement in regard to the mortgage was kept. He agreed to surrender and did in fact surrender his possession and property in the note in suit until breach of the mortgage agreement. To this extent the contract of the parties, even though fraudulent as to creditors, was executed, and the law will not interpose to restore to the plaintiff that with which he had parted in pursuance of his fraudulent contract and design. Without such possession or property the plaintiff cannot maintain his suit. He did something more than agree not to sue; he put it out of his power to sue. The note was "to be given up to neither party." This necessarily imports that it

had been already given up by the plaintiff. In order that he may maintain this suit, he asks the law to undo what he had done, to give back to him what he had given up. This the law does not do. So far as the contract, if fraudulent, is executory it cannot be enforced, so far as it is executed the law leaves the parties where it finds them. Its aid cannot be invoked to restore to the plaintiff the property in and the possession of the note which he surrendered for the purpose of defrauding his creditors. From this part of the contract which he has executed he can be relieved only in accordance with the terms of the contract, viz, by showing a breach of the terms of the mortgage agreement, and of this there is no evidence.

Motion sustained. Verdict set aside. New trial granted.

HENRY J. CONLEY, Admr. *vs.* PORTLAND GAS LIGHT COMPANY.

Cumberland. Opinion May 16, 1904.

Evidence. Witness, Qualification of as expert. *Negligence.*

When a witness is offered as an expert, the presiding justice is not bound to determine whether he is qualified to so testify in advance of the question to the witness which calls for expert testimony. The question itself will then show in what capacity as an expert he is asked to testify, and the ruling of the presiding justice, admitting it is ipso facto a decision that the witness has qualified upon that subject, and that the subject is one proper for expert testimony.

Expert capacity is a matter wholly relative to the subject of the particular question. A witness may be sufficiently qualified for one question and totally unqualified for the next.

Special skill and knowledge in regard to a particular subject can only come from experience or special study or both. Mere casual observation, superficial reading, or slight oral instruction is not sufficient.

It is clearly error to permit a witness to testify as an expert in regard to the manufacture of water gas, its pressure, composition, dangerous nature and the dangers attendant upon its manufacture, and to give his opinion as to what would happen and what would be the proper thing to do in various hypothetical conditions, when his only knowledge of the subject was

acquired by having seen, and had explained to him, the apparatus used for its manufacture and transmission.

See *Same* v. *Same*, 96 Maine, 281.

On motion and exceptions by defendant. Exceptions sustained.

Action at common law to recover damages for negligence resulting in the death of the plaintiff's intestate, caused by an explosion of gas August 11, 1900, at the defendant's works in Portland, and alleging that death was not immediate and that it was attended with conscious suffering.

The jury returned a verdict for the plaintiff in the sum of $7,500. The defendant filed a general motion for a new trial and was also allowed exceptions which appear in the opinion. The court having sustained the exceptions did not consider the motion for a new trial.

D. A. Meaher, for plaintiff.

A. F. Moulton, for defendant.

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

POWERS, J. This is an action to recover for injuries alleged to have been caused by the negligence of the defendant in the management of its works at its gas plant in Portland. The writ alleges negligence in regard to employment of servants, defective condition of piping and appliances of the works, and that by reason of such negligence an explosion occurred resulting in the death of the plaintiff's intestate, an employee of the defendant at its works.

The case comes before the law court on motion and exceptions by defendant. The first exception relates to the refusal of the presiding justice to rule in what capacity one Richard H. Walsh was competent to testify as an expert. When a witness is offered as an expert it is the duty of the presiding justice to hear and consider the testimony as to his qualifications and to decide whether the witness is qualified to so testify. He is not, however, bound to determine the fact in advance of the question to the witness which calls for expert testimony. The question itself will then show in what capacity as an expert he is asked to testify, and the ruling of the presiding jus-

tice, admitting it, is ipso facto a decision that the witness has qualified upon that subject, and also that the subject is one proper for expert testimony.

"There are no fixed classes of expert persons, in one of which a witness finds himself and remains permanently. A person may be sufficiently skilled for one question and totally unqualified for the next. . . . . The witness may from question to question enter or leave the class of persons fitted to answer. It is desirable to appreciate that expert capacity is a matter wholly relative to the subject of the particular question; that therefore the existence of the capacity arises in theory as a new inquiry from question to question; and that a particular person is not to be thought of as objectively or absolutely an expert, in the sense that he is absolutely a German or a negro or six feet high." 1 Greenleaf Ev. 16 ed. 430a.

The remaining exceptions are to the admission of over sixty questions to the same witness and his answers thereto as an expert upon a great variety of topics. It would be as unprofitable as interminable a task to examine these in detail. Whether a witness called as an expert possesses the necessary qualifications to enable him to testify, is a preliminary question addressed to the discretion of the presiding justice, and his decision must be final and conclusive unless it is made clearly to appear from the evidence that it was not justified or was based upon some error in law. *Marston* v. *Dingley*, 88 Maine, 546. The evidence in this case is not made a part of the exceptions. As to most of the subjects to which the testimony relates the exceptions fail to show what was the evidence of his qualifications, and therefore necessarily fails clearly to show that the decisions of the presiding justice were not justified.

The exceptions do show, however, that Walsh testified as an expert in regard to the manufacture of water gas, its pressure, composition, and dangerous nature, and the dangers attendant upon its manufacture, and gave his opinion as to what would happen and what would be the proper thing to do in various hypothetical conditions of water gas and the machinery used in its manufacture and transmission. His qualifications also appear. He stated that all he knew about water gas was what he had learned at the Portland gas works, that

he there had no experience in its manufacture, but had there seen the apparatus and had the whole thing explained to him some three years before.

When the nature of the question at issue is such that men of ordinary experience and intelligence may be supposed to be incapable of drawing conclusions from the evidence without the assistance of some one who has special skill or knowledge in the premises, witnesses possessing such skill and knowledge are permitted to give their opinions. *State* v. *Watson,* 65 Maine, 74. Such skill and knowledge can only come from experience or special study or both. Mere casual observations, superficial reading or slight oral instruction is not sufficient. In the present case the witness was a day laborer. He had no experience in regard to the manufacture of water gas. This excludes him from the class of experts qualified by experience. He had made no special study of the subject. In fact he does not appear to have made any study of it. His only knowledge of the subject was received from having seen the apparatus and hearing it explained. This was no more than the jury might obtain by a view and the testimony of a single witness. Experts cannot be manufactured by the momentary use of the eye and ear. Such mental application as the witness had given to water gas and its manufacture could have brought him no special or peculiar knowledge on the subject. Exceptions to the salutary rule of evidence, which requires witnesses to testify only to facts within their personal knowledge, should not be so extended as to embrace the opinions of such ready made experts. Clearly it was error to admit such a witness as an expert, and it is equally clear that his opinions upon the vital questions of the case must have been prejudicial to the defendant.

It is unnecessary to examine the motion.

Exceptions sustained.

STATE OF MAINE *vs.* MICHAEL O'CONNELL.

SAME *vs.* SAME.

Androscoggin. Opinion May 6, 1904.

Intox. Liquors. Common Seller. Nuisance. Malt Liquor. Uno Beer. *R. S. (1883), c. 17, § 1; c. 27, §§ 33, 35.*

Revised Statutes 1883, c. 27, § 33, amounts to a prohibition of the sale of malt liquor. While the legislature cannot make that intoxicating which is in fact not intoxicating, it may prohibit the sale of a specific article.

Upon trial under indictments for maintaining a nuisance under R. S. 1883, c. 17, § 1, and for being a common seller of intoxicating liquor, if the liquor sold by the respondent was malt liquor, it is not necessary for the jury to determine whether it was or was not intoxicating in fact. The prohibition of the statute is absolute, and it is not dependent upon the amount of the alcohol which malt liquor contains.

While the court should define to the jury legal terms to which the law has attached a specific meaning, it is not required to define words in common and ordinary use, the definition and meaning of which jurors are presumed to understand as well as the court.

Exceptions by defendant. Overruled.

Indictments for the illegal sale of intoxicating liquors, one being under the nuisance act, R. S. (1883), c. 17, § 1, and the other for being a common seller, under R. S. (1883), c. 27, § 35. The evidence disclosed that the article sold was "Uno Beer," a malt liquor.

The case appears in the opinion.

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

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

Counsel argued:

1. That the beer in question is admittedly not intoxicating in fact. The State does not claim that it is intoxicating.

2. The only claim of the State is that there is some malt in the beer in question and because it has any malt in it, it comes within the prohibition of the statute under the clause "and all other malt liquors."

3. We claim that under any reasonable or legal construction of the statute in question the beer, although it contains some malt, is not within the prohibition of the statute. In other words that it is not a malt liquor under the statute.

4. In the construction of any statute the court will always give effect to the intention of the legislature, if it can. In regard to the statute in question it was plainly the intention of the legislature to prohibit the sale of intoxicating liquors. This was the whole purpose and the only purpose of the legislature in the whole law. We think the State will not seriously contend but that was the intention of the legislature. But the State's attorney will contend that whatever was the intention of the legislature the statute reads "and all other malt liquors," and that this means all liquors in which there was any malt, no matter how little. We say such a construction of the statute is unreasonable and that the language of the statute will not bear out any such interpretation. The statute says "no person shall . . . sell any intoxicating liquors of whatever origin, etc. . . . wine, ale, porter, strong beer, lager beer, and all other malt liquors . . . are declared intoxicating within the meaning of this chapter." It will be seen that the statute clearly has reference to intoxicating liquors. It enumerates in order to make sure that no intoxicating liquor should escape and declares wine, ale, porter, strong beer and lager beer to be intoxicating. All these liquors are intoxicating in fact; immediately following this enumeration it says, "and all other malt liquors." It does not say and all malt liquors. Now what does that word "other" in the statute mean and what is the interpretation of this statute with this word "other" in it? We say that it means all other malt liquors of the nature of those in the preceding enumeration, that is, those that are intoxicating.

This construction of the wording of the statute is reasonable and gives full force to the plain intent of the legislature. If the legislature meant to include all liquors made from malt no matter how small an amount of malt might be in them, the statute would have read "and all malt liquors" but the statute does not say "all malt liquors" but says "all other malt liquors," and this word "other"

following the enumeration of liquors that are intoxicating can have no other reasonable meaning except to include such malt liquors as are of the nature of the liquors named in the enumeration, that is, intoxicating liquors. Any other construction of this statute would be senseless.

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

POWERS, J. Two indictments,—one for maintaining a nuisance under R. S. (1883), c. 17, § 1, and the other for being a common seller of intoxicating liquors under R. S. (1883), c. 27, § 35. The evidence in each case was of the sale by the respondent of Uno beer, brewed from malt and containing 2.36 per cent of alcohol. A verdict of guilty was returned in each case. Counsel for the respondent requested the following instructions:

"That the jury must be satisfied beyond a reasonable doubt:—

A. That malt entered into the composition of this beer as a substantial ingredient.

B. That if malt was used, but to such a small amount that the alcohol germinated therefrom was not sufficient to produce intoxication, then the respondent must be discharged.

C. That if malt was used to such a small amount that the alcohol germinated therefrom together with the alcohol germinated from the glucose, admittedly in the beer, amounted together but to 2.36 per cent, then the jury must be satisfied that the beer is intoxicating in fact before they could find the respondent guilty." The presiding justice declined to so instruct the jury, and to such refusal exceptions were allowed in each case.

Request A was not given in terms. The jury were instructed that if the beer was malt liquor the statute declared it to be intoxicating; "Therefore the question for you to consider is whether this beer was a malt liquor and is a malt liquor, whether it was produced from malt. If it was, then it is intoxicating." If it was "produced from malt," malt must have entered into it as a substantial ingredient. The instruction actually given was quite as favorable to the

defendant as the instruction requested, and it is no ground for exception that the exact language of the request was not adopted by the presiding justice.

Requests B and C are based upon the ground that notwithstanding the jury might find that the beer was a malt liquor, which the legislature has declared to be intoxicating and the sale of which it has by express act prohibited, in order to convict the respondent the jury must go further and find that it was intoxicating in fact. Revised Statutes 1883, c. 27, § 33, amounts to a prohibition of the sale of malt liquor. While the legislature cannot make that intoxicating which is in fact not intoxicating, it may prohibit the sale of a specific article, as it has done in this case; and its right to do so is clearly a constitutional exercise of the police power. The issue was whether the defendant sold malt liquor. If he did sell it, it was in violation of the statute, and it was not necessary in order to establish his guilt, for the jury to go further, revise the judgment of the legislature and determine whether malt liquor was or was not in fact intoxicating. *Com.* v. *Anthes*, 12 Gray, 29; *State* v. *Guinness*, 16 R. I. 401; *State* v. *Gravelin*, 16 R. I. 407; *Com.* v. *Brelsford*, 161 Mass. 61. The jury were properly instructed that if it were a malt liquor it was immaterial how much alcohol it contained.

Later the jury presented the following question to the court:

"Did the court rule that, if the beer in question contained any malt, it was a malt liquor?"

In reply the presiding justice said: "I instructed you, and I now instruct you, that if you find beyond a reasonable doubt that the beer in question was brewed from malt, it was a malt beer and comes within the prohibition of the statute."

The presiding justice was not bound to define the term "malt liquor." *State* v. *Starr*, 67 Maine, 242; *State* v. *Wall*, 34 Maine, 165. While the court should define to the jury legal terms to which the law has attached a specific meaning, it is not required to define words in common and ordinary use the definition and meaning of which jurors are presumed to understand as well as the court. *Darling* v. *Dodge*, 36 Maine, 370; *Com.* v. *Blos*, 116 Mass. 56; *Com.* v. *Carroll*, 145 Mass. 403.

By necessary implication a malt beer is a beer brewed from malt and the statement of that fact could not have been prejudicial to the respondent. The presiding justice did not undertake to answer the question propounded, but simply reiterated in another form the instruction already given. He said: "I instructed you, and I now instruct you," that malt liquor comes within the prohibition of the statute. The jury must have so understood him. We perceive no error in the instructions given. In both cases,

Exceptions overruled.

JOHN C. STEWART, and another, Appellants,

vs.

MARTHA ISABEL SKOLFIELD.

York. Opinion May 24, 1904.

Descent and Distribution. Rights of widower prior to Stat. 1903, c. 160. *Husband and Wife. Wills.* Surviving husband waiving provisions had no distributive share. *R. S. (1883), c. 75, §§ 8, 9; Stats. 1897, c. 221; 1903, c. 160.*

Successions to estates of deceased persons are wholly governed in this State by statute.

Sections 8 and 9, c. 75, R. S. 1883, apply only to intestate estates.

Prior to the Stat. 1903, c. 160, § 1, there was no statute in this State which gives a widower a distributive share in the widow's personal estate after having waived the provisions of her will in his favor.

Mary H. Norton made certain provisions in her will in favor of her husband Jotham P. Norton, which he seasonably waived and thereupon claimed his distributive share in her estate as if she had died intestate. Her executors accordingly made payments to him from her estate. Upon petition of a residuary legatee of Mary's will the probate court disallowed the payment. An appeal to this court sitting in probate having been denied, exceptions were taken to its rulings. *Held;* that the appellants could not, under the statute then in force, sustain the claim of the widower to a distributive share of his widow's estate.

Exceptions by appellants. Overruled.

Appeal in probate for York County by the executors of the will

of Jotham P. Norton. Upon the hearing of the appeal in the court below the presiding justice dismissed the appeal, and the appellants took exceptions.

The case appears in the opinion.

John C. Stewart, for appellants.

Weston Thompson and E. W. Wheeler, for appellee.

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

SPEAR, J. Mary H. Norton of the town and county of York died testate, March 24, 1899. In her will she made certain provisions for her husband, Jotham P. Norton, which he seasonably waived and thereupon claimed his distributive share in her estate as if she had died intestate. Before having obtained a decree upon his contention he died testate. John C. Stewart was duly appointed executor of Mary's will; and John C. Stewart and Fessenden I. Day, executors of Jotham's will. The executor of Mary's will paid to said Jotham in his lifetime the sum of $1,583.75 on account of his claimed distributive share of his wife's estate, and was allowed the same in his first account of the administration of her estate; he also paid to him $97.75 as a legacy, which was allowed in his second account.

Upon petition of Martha Isabel Skolfield, residuary legatee of Mary's will, the judge of probate ordered the executor of Mary's estate to charge back to himself in his third account both of the above items. From this order the executors of Jotham's will appealed. The second and third reasons of appeal are the only ones to which we need allude. The essential part of the second one is, "that by reason of his said waiver the said Jotham P. Norton became entitled to his distributive share of both the real and personal estate of his deceased wife; that said Mary H. Norton died, leaving no children; that said Jotham P. Norton's distributive share in said estate was one half;" and of the third one, "that said payments of $1,583.75 and $97.75 were paid to said Jotham P. Norton in his lifetime as portions of his distributive share of his deceased wife's estate and

should be allowed." The appellate court filed a decree affirming the judgment of the court below to which the appellants seasonably took exceptions which present for consideration the single question of whether the husband, by his waiver of her will, became entitled to a distributive share in his wife's estate. We think he did not. Succession to estates of deceased persons is wholly governed, in this State, by statute, and the appellants' rights in this case must be governed entirely thereby. They contend that a logical construction of the different provisions of the statute, in pari materia, sustains their position.

They assert that the last clause of section 9, R. S. (1883), chapter 75, "and the widower has the same share in his wife's estate" is a provision placing the widower on equal terms with the widow with regard to his rights in her personal estate; and that chapter 221, Public Laws of 1897, gives the widow, waiving the provisions of her husband's will, "the same distributive share of the personal estate of the testator as is provided by law in intestate estates;" and that, therefore, the widower, having the right of waiver, and being entitled to "the same share in his wife's estate," is, as a corollary, entitled to his distributive share.

But the error in the position of the appellants is not in their logic, but in their premises. Section 9, chapter 75, does not apply to the descent of an estate testate, at all. By a reference to the preceding section of the same chapter it will clearly appear that both sections, 8 and 9, apply only to intestate estates. If there could be any doubt, the above construction is emphatically confirmed by the action of the legislature of 1903 in enacting a statute identical in effect with that under which the appellants seek to sustain their claim. Public Laws, 1903, chapter 160, section 1. It is hardly presumable that the legislature would have done this had there been existing statutes accomplishing the same end. But the statute of 1903 does not apply to the case at bar.

There was, therefore, no provision of the statute in this State under which the appellants could sustain the claim of their testator to a distributive share of his widow's estate.

Exceptions overruled.

STATE OF MAINE *vs.* GLEASON B. CATES.

Knox. Opinion May 24, 1904.

Indictment. Pleading. Larceny, when it becomes *Embezzlement,* Form of declaring. *R. S. 1883, c. 128, § 13; 1903, c. 121, § 10.*

When a statute defines an offense and states one or more modes in which it may be committed, and prescribes but one penalty therefor, a single count in an indictment may contain a statement of facts which show that the offense has been committed by all the modes named in the statute.

Although it appears upon the face of the indictment that the acts set forth constituted several modes by which the defendant committed the offense, yet if it also appears that the acts were committed at the same time, were connected and parts of the same transaction, the charge is not subject to the objection of duplicity.

Larceny by one intrusted with property is declared to be embezzlement by R. S. (1903), c. 121, § 10, as follows: —

"Whoever embezzles, or fraudulently converts to his own use, or secretes, with intent to embezzle or fraudulently convert to his own use, moneys goods or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny, and shall be punished accordingly."

An indictment charged that the defendant "with force and arms took a certain pocket book containing a large sum of money, to wit, the sum of fifty dollars, of the goods and chattels of one A. B. then and there being, did then and there embezzle and fraudulently convert to his own use, and did then and there secrete with intent to embezzle and convert to his own use said pocket book, etc." The statute under which the indictment is found clearly states that embezzlement or secreting with intent to embezzle are but different ways of committing, one and the same offense, which offense is a statutory larceny and to which is attached but one and the same penalty.

The defendant may have committed the offense charged in this statute by one of the modes or both of them. If he secreted with intent to embezzle he would be guilty of the offense charged, and if he executed the intent he would be guilty of no more. The only effect of proving both offenses would be to show circumstances of aggravation.

Held; that the indictment is not bad for duplicity.

Also; that the indictment sets out every fact required by the statute to con-

stitute the offense charged. It is not necessary that it should allege the offense of larceny, nor specify the value of the pocket book, nor the amount it contained.

Demurrer to an indictment under R. S. (1903), c. 121, § 10, for embezzlement. Demurrer overruled.

The case is stated in the opinion.

Philip Howard, County Attorney, for State.

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

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

SPEAR, J. This case comes up on demurrer to an indictment the substantial part of which is as follows:

That Gleason B. Cates . . . . with force and arms took a certain pocket book containing a large sum of money, to wit, the sum of fifty dollars, of the goods and chattels of one Augustus H. Ulmer, then and there being, did then and there embezzle and fraudulently convert to his own use, and did then and there secrete with intent to embezzle and convert to his own use said pocket book, etc.

The respondent contends that the indictment sets out two distinct offenses and is therefore bad for duplicity. The claim is that the allegation that the respondent "did embezzle and convert to his own use" sets out one offense, and that the averment "that he did then and there secrete with intent to embezzle and fraudulently convert to his own use," charges another distinct offense. We think the difficulty with the respondent's position is his failure to distinguish between the acts which constitute different modes of committing the offense charged and the offense itself. Neither of the above averments in the indictment sets out any offense at common law. It was not such an offense to embezzle or to secrete with intent to embezzle. "It was the fraudulent breach of duty and trust, which, but for the statute, could not be held to amount to larceny, that the legislature wanted to punish." *State* v. *Walton*, 62 Maine, 111. "The law of embezzlement is statutory. It sprang from attempts to amend the law of larceny and is indeed a sort of statutory larceny." 2 Bish. Crim. Law, § 318. "What persons may be guilty of it and what

property is subject of it cannot be discriminated with precision, except by reference to the statutes of the jurisdiction." Id. § 325.

The statute under which the above indictment is found is as follows: "Whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or convert to his own use, money, goods or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny." The offense charged in this statute, as suggested by Bishop, may be defined as statutory larceny. It is not embezzlement nor secreting with intent to embezzle. These phrases simply describe the modes by which the single act of larceny may be committed, the acts which constitute the offense. The penalty for larceny, by necessary implication, follows the offense. But it should be observed that the acts, whether done together or separately, constitute but one offense, larceny, and are subject to but one and the same penalty. If the statute prescribed that each of the prohibited acts should be punished by the same or different penalties, the defendant's contention would be sound. But, as before observed, neither of these acts, per se, is followed by a penalty, but, when committed, constitute an offense which is. There is a distinction to be noted between the acts which constitute the different modes of committing an offense and the offense itself. This distinction, we think, brings the case at bar within the rule laid down in *State* v. *Willis*, 78 Maine, 73. The court say, "The indictment avers that the defendant was concerned in a lottery by printing, publishing and circulating an advertisement of it; and also in other ways. It is argued that this is ill for duplicity. The argument is based upon a misconception of the design and scope of the law against lotteries. The statute (R. S., c. 128, § 13,) does not establish numerous independent offenses,—it established but one offense. It declares 'every lottery, scheme or device of chance' to be a nuisance. The offense to be alleged and proved is nuisance. The statute particularizes some of the modes in which the offense may be committed, and also declares generally that whoever aids in a lottery or is connected therewith shall be punished. It is but one offense and the same punishment, no matter in what form the guilty participation consists. There are not as many distinct offenses as

there are forms of offense. The indictment describes the means by which the defendant's guilt may be proved."

In the case at bar "the statute does not establish numerous independent offenses." The offense alleged is in effect larceny, and "the statute particularizes the modes in which the offense may be committed," namely, by embezzling or secreting with intent to embezzle, and the same punishment applies "in whatever form the guilty participation consists." There is but one substantive offense charged in the indictment at bar, a qualified larceny. "It was held in *Hinckle* v. *Cone*, 4 Dana, (Ky.) 518, that setting up a gaming table may be an entire offense. Keeping a gaming table and inducing others to bet upon it may also constitute a different offense; for either unconnected with the other an indictment will lie. Yet when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient and for which but one penalty can be inflicted." *State* v. *Burgess*, 40 Maine, 592, and cases cited.

We fail to find any case, when properly distinguished, not in harmony with the above interpretation. The defendant cites *State* v. *Smith*, 61 Maine, 386, as containing a contrary view. But this case is clearly distinguishable. It involved an indictment charging the defendant, in one count, with three criminal offenses, each one of which was subject to a distinct penalty. The court say, "moreover the penalty affixed to each of them is distinct and entire and cannot be apportioned upon two or more of them." But in this same case the court distinctly hold, in commenting upon the claim of the state, that the construction to be given this statute should be analogous to that given to the statute against buying, receiving or aiding in the concealment of stolen goods, that "the two statutes are clearly distinguishable in respect to the question under consideration." "In that case," that is, of the statute relating to stolen goods, "the punishment is the same for one as for all three of the prohibited acts; and though each of the acts were charged separately, in different counts, only one punishment could be inflicted. The several acts mentioned in the statute are but so many modes of describing

one and the same offense, that offense being established by proof of either of the modes."

It seems to us that the reasons for distinguishing the two statutes, above compared, clearly takes the case at bar from the purview of the statute construed, and brings it within the category of the statute distinguished.

In the case at bar the punishment is the same for one as for all of the prohibited acts; if each of the acts was charged separately, in different counts, only one punishment could be inflicted; and the several acts mentioned are but so many modes of describing one and the same offense, statutory larceny.

State v. *Haven*, 59 Vt. 399, cited by the defendant, when properly analyzed also sustains the contention of the state. That case was based upon an indictment charging the defendant, in the same count, with signing a false certificate with the intent that it should be issued, and with causing it to be issued and used by another. The court say, p. 405, "Under the statute the act of signing a false certificate with the intent that it shall be issued and used is of itself an offense, and causing it to be issued and used is another and distinct offense." But in this same opinion it is distinctly held, "When a crime may be committed in different ways, in contemplation of law the ways are the same act, so a count charging its commission in all ways is not double." In a case cited in the opinion from which the above is quoted, Redfield, C. J., uses this language: "The objection of duplicity is, at first view rather plausible. But on looking at the subject, the forging, procuring or causing to be forged, are not only the same offense under the statute, but are in legal contemplation the same act." *State* v. *Morton*, 27 Vt. 313.

Under a statute providing "that if any person shall disturb or break the public peace by tumultuous or offensive carriage by threatening, quarreling, challenging, assaulting, beating or striking any other person, he shall be punished by a fine, etc." the court say, "there is, strictly speaking, only one offense mentioned in that section of the statute, and that offense is a breach of the public peace. The statute enumerates modes of breaking and disturbing the public peace, and these modes are subdivisions of the same offense. . . . The pub-

lic peace may be disturbed or broken by one of these modes; it may be disturbed or broken by all of these modes, and yet constitute but one offense." *State* v. *Matthews*, 42 Vt. 542. We think the case at bar comes clearly within these decisions.

The statute under which the indictment is found clearly states that embezzlement, or secreting with intent to embezzle, are but different ways of committing one and the same offense, an offense which "shall be deemed larceny," and to which is attached but one and the same penalty. The defendant may have committed the offense charged in this statute by one of the modes or both of them. If he secreted with intent to embezzle he would be guilty of the offense charged, and if he executed the intent he would be guilty of no more. The only effect of proving both offenses would be to show circumstances of aggravation. When the statute defines an offense and states one or more modes in which it may be committed, and prescribes but one penalty therefor, a single count in an indictment may contain a statement of facts which show that the offense has been committed by all the modes named in the statute. And although it appears upon the face of the indictment that the acts set forth constitute several modes by which the defendant committed the offense, if it also appears that the acts were committed at the same time, were connected and parts of the same transaction, the charge is not subject to the objection of duplicity.

But it is further claimed that if the indictment is not bad for duplicity, it fails to properly allege the offense of larceny. It is not necessary that it should. The offense in itself is not larceny. "More or less of the elements necessary to constitute the crime of larceny, as elsewhere defined, are wanting in each of these cases. But it was clearly competent for the law making power to extend the definition of the offense, so as to include these cognate cases. In order to ascertain whether an indictment can be maintained against an offender of either of these three classes, we must look to see whether it includes allegation of those facts which the legislature have declared essential to constitute the offense which it purports to charge. Beyond these we are not to seek. It is not for the court to require either allegation or proof of that which the legislature have

omitted in their definition of the crime." *State* v. *Walton*, 62 Maine, 108.

The indictment in the case at bar sets out every fact required by the statute to constitute the offense charged. It is not necessary that the indictment should specify the value of the pocket book, nor the amount it contained. The statute does not require it. The question here is, did the defendant receive the pocket book in trust, was it the subject of larceny, and did he embezzle or fraudulently convert it to his own use, or conceal it with intent to embezzle it, or convert it to his own use? The indictment clearly sets forth that he did do these acts, and then brings them within the definition of the statute by averring that the defendant "feloniously did steal, take and carry away, against the peace of the state and contrary to the statutes in such case made and provided."

The demurrer cannot be sustained. As stipulated upon the docket, the defendant may have leave to withdraw his demurrer and plead anew.

Exceptions overruled.

SELDEN E. WHITCOMB, and another,

vs.

CITY OF WATERVILLE.

Kennebec. Opinion May 24, 1904.

Assignment of Wages. Double assignment held void. *R. S. 1903, c. 113, § 6.*

The statute, R. S. (1903), c. 113, § 6, provides that no assignment of wages shall be valid against any other person than the parties thereto unless properly recorded.

When two assignments of wages are made by the same person running to two different persons, each dated the same day, against the same employer, covering the same period of time, embracing the same services and recorded in the same town and at the same hour and minute, *held;* that the employer is not liable to an action thereon.

The employer is not subject in such case to the liability of twice paying the debt due to the assignor. The object of the statute was to prevent such a case; nor does knowledge, or want of knowledge, on the part of the assignees affect the employer's liability.

If an assignor sees fit to make two assignments covering the same contract, simultaneous in date and record, scienter on the part of the assignees is not a matter of discovery by the employer, nor one which affects his right of defense.

On report from the Superior Court for Kennebec County.

Judgment for defendant.

Assumpsit on account annexed to recover wages earned by one Thomas Landry, Jr. and claimed by the plaintiffs under an assignment dated May 8, 1900, and recorded on that day at 3.30 o'clock P. M.

The case also disclosed another assignment of these wages by said Landry to one Charles Coro, dated and recorded at the same time.

Harvey D. Eaton, for plaintiffs.

Warren C. Philbrook, for defendant.

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

SPEAR, J. This is an action brought by the plaintiffs, as assignees

of the wages of Thomas Landry, Jr. upon an assignment executed and recorded May 8, 1900, at 3.30 o'clock P. M., in Book 3, page 123, in the town of Winslow, Maine. Several defenses are raised in the case, but as they involve no new principle we pass directly to the consideration of the one which is vital and decisive of the question at issue.

The statute provides that no assignment of wages shall be valid against any other person than the parties thereto unless properly recorded. The record is absolutely essential to the validity of an assignment of wages involving the rights of a third party, and the prior will prevail. *Peabody* v. *Lewiston*, 83 Maine, 286. The case at bar discloses two assignments of wages made by Thomas Landry, Jr., running to two different persons, each dated the same day, against the same employer, covering the same period of time, embracing the same services and recorded upon the same day, in the same town and at the same hour and minute. If we stopped right here the two assignments would operate as a felo de se,—they devour each other. The object of the statute was to prevent just such a case. "To prevent the mischief of double assignments, and the uncertainty of assignments, the statute was passed requiring them to be in writing and recorded." *Wright* v. *Smith*, 74 Maine, 495.

It is well settled that courts of law do not recognize an assignment of a part only of an entire demand. It may be good between the parties, but the assignee has no legal remedy against the debtor who does not become a party to the arrangement. "The reason for the legal doctrine is obvious. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor would have to deal with a plurality of creditors. . . . He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear." *National Exchange Bank* v. *McLoon*, 73 Maine, p. 498, 504, 40 Am. Rep. 388; *Getchell* v. *Maney*, 69 Maine, 442.

A fortiori, should the debtor be released from bearing the burden of two equally valid assignments, each transferring all the future

earnings of the assignor, between the same dates, to two entirely distinct persons,—if this could be done and each assignment is valid, the debtor, instead of pursuing different parties whom to pay, *once*, the wages earned under the assignment, would be compelled to discover the different parties whom to pay, *twice*, the full amount of such wages.

The plaintiffs claim in their brief that the Coro assignment is inadmissible as they had no knowledge of it. But we hardly see how knowledge or lack of knowledge on the part of the assignees, as to their respective assignments, could in any way affect the liability of the defendant city. The city had no means of knowing and was not, on its part, bound to know of the assignments. It was incumbent on the assignor and assignees to do whatever was necessary to make their assignments legal and binding upon the city. It had a right to remain perfectly passive with respect to the whole transaction. If made liable at all, it must be by a compliance by the parties to the assignment with the requirements of the statute. If the assignor saw fit to make two assignments covering the same contract, simultaneous in date and record, scienter on the part of the assignees was not a matter of discovery by the debtor nor one which could affect its right of defense.

The defense set up by the defendant is, that it should not be subject to the liability of paying the debt due the assignor twice. It seems to be a valid one. If the city is held liable on the plaintiff's assignment, why not on Coro's? They are exactly alike. For anything that appears in the case one is as valid as the other. Neither has been paid. The statute of limitations is not yet a bar. It may be, as the plaintiffs claim, that Coro will never attempt to collect under his assignment, but the law cannot so assume. It must take cognizance of Coro's legal rights and act upon the presumption that he may, at any time, undertake to enforce them. It is not what he may do but what he can do that determines his legal relation to the city.

Under the evidence in this case the defendant cannot be made liable to either assignee.

According to the stipulation in the report, the entry must be,

Judgment for defendant.

CHARLES E. ATWOOD *vs.* CITY OF BIDDEFORD.

York. Opinion May 24, 1904.

Drains and Common Sewers. To be constructed by municipal officers. *Municipal Corporations,* when not liable for nuisance. *R. S. 1903, c. 21, § 2.*

A city in its corporate capacity, without special charter privileges, is not invested, either by statutory provisions or by the exercise of the authority necessarily incident to the discharge of its corporate rights and the performance of its duties, with the power to lay out and construct drains and sewers in such a manner as to impose any legal liability upon the city for a nuisance created thereby.

There is no general statute in this State conferring upon a city in a corporate capacity any authority to lay out and construct sewers and drains. There is, on the other hand, an express provision of the statute which lodges this power in the hands of the municipal officers. R. S. 1903, c. 21, § 2.

Held; that the act of the city, in its corporate capacity, in laying out and constructing sewers which creates a nuisance upon the plaintiff's land as alleged in his writ, was ultra vires and therefore void. The city cannot be made liable for such an unauthorized act.

Exceptions by plaintiff. Overruled.

Action on the case, heard on demurrer to declaration, claiming damages for unlawfully constructing and maintaining divers sewers upon the plaintiff's premises in the City of Biddeford by the defendant city.

The presiding justice sustained the demurrer and the plaintiff took exceptions.

The case appears in the opinion.

Robt. B. Seidel and C. Wallace Harmon, for plaintiff.

John F. Burnham, City Solicitor, for defendant.

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

SPEAR, J. This case involves an action of tort against the City of Biddeford in its corporate capacity, and comes up on demurrer.

The plaintiff alleges that the "defendant has without lawful authority and against the wishes and contrary to the rights of the plaintiff constructed and now maintains divers sewers and connected the same with said brook and which thereby empty their contents into said brook at divers points above the land of the plaintiff." He also avers that by reason of the wrongful acts of the city the water of the brook became polluted and defiled and thereby created a nuisance upon his land. The demurrer admits the truth of the above allegation, but denies that it sets out any legal cause of action against the city.

The demurrer must be sustained. In coming to this conclusion we may assume, for the purposes of this case, that the action of the city was duly authorized by the city council. This at once raises the question whether a city in its corporate capacity, without special charter privileges, is invested, either by statutory provision or by the exercise of the authority necessarily incident to the discharge of its corporate rights and the performance of its duties, with power to lay out and construct drains and sewers in such a manner as to impose any legal liability upon the city for a nuisance created thereby.

We find no general statute in this State conferring upon a city in its corporate capacity any authority to lay out and construct sewers and drains. There is, on the other hand, an express provision of the statute which lodges this power in the hands of the municipal officers. Revised Statutes 1903, c. 21, § 2, contains this provision as it stood when this action was brought: "The municipal officers of a town, or a committee duly chosen by the town, may, at the expense of the town, construct public drains or sewers along or across any public way therein; and through any lands of persons or corporations, when they deem it necessary for public convenience or health; but neither the municipal officers of the town, nor such committee, shall construct any public sewer therein until the same shall be authorized by vote of said town, and an appropriation made for the purpose; and when constructed such sewers shall be under the control of the municipal officers." It will be observed that this provision of the statute instead of placing this authority in the power of the city council has expressly conferred it upon the municipal

officers, an entirely distinct tribunal, although the municipal officers in a city, composed of the mayor and alderman, may be a constituent part of the city council. But their action, to be of any avail, must be separate.

"It is true, as contended, that the municipal officers are a part of the government, and as such assented to the building of the drain. But to act as a distinct and separate body is one thing; for the same persons to act in connection with and as a part of another body, is another and a very different thing. A drain cannot have the sanction of the statute, unless it is built by the authority and under the sole responsibility of the body therein provided and in pursuance of the provisions therein prescribed." *Darling* v. *Bangor*, 68 Maine, p. 110.

"There is no general statute authorizing towns in their corporate capacity to lay out or construct drains or sewers, as there is respecting ways. It is only when such drains have been constructed and persons have paid for connecting with them, that the town becomes responsible in regard to maintaining and keeping the same in repair, and assume responsibilities in reference thereto." *Bulger* v. *Eden*, 82 Maine, p. 355, 9 L. R. A. 205. And after all this, the authority over sewers and drains still remains in the hands of the municipal officers by the express provision of the statute which provides in the last clause of section 2, supra, "and when constructed such sewers shall be under the control of the municipal officers." That cities and towns have no statutory authority empowering them to lay out and construct sewers and drains is too well established to require further citation.

Our court have also held that the authority of cities and towns incident to the discharge of their municipal duties does not extend to the laying out and construction of sewers and drains. "Provision being made by general statute law for the laying out and construction of public drains and sewers by the municipal officers, no such authority can properly be claimed as necessarily incident to the town in the exercise of its corporate powers, or the performance of its corporate duty. The municipal officers in the performance of these duties and in the exercise of the authority with which they are invested by gen-

eral law, act not as agents of the town but as public officers, deriving their power from the sovereign authority." *Bulger* v. *Eden*, supra, p. 356.

The case at bar in respect to both the facts and the law comes clearly within *Lemon* v. *City of Newton*, 134 Mass. p. 476. In that case the statement of facts shows that "the brook in question was a natural watercourse which ran through the most populous portion of Newton and over the plaintiff's land into the Charles River;" that the town at a legal meeting authorized the conversion of this brook into a sewer and by virtue of the authority so converted it; that "the plaintiff contended and introduced evidence tending to show that, as a consequence of this work, the brook through his land had been rendered filthy; that his premises had been rendered unhealthy by stench coming from the brook," and that "the defendant was liable for such damages as the plaintiff had sustained." Although the meetings of the town authorizing the construction of the sewers were legal, yet the court held, "the town having no authority by statute to lay out and construct drains or sewers, and such authority not being necessarily incident to the exercise of its corporate rights and the performance of its duties, and ample provision having been made for their laying out and construction by the selectmen, we are of opinion that the votes of the town except perhaps that of March 10, 1873, which is unimportant in this case, are illegal and void." The same case holds "that the town cannot be held responsible for damages resulting from work done under the authority of illegal and void votes."

It therefore seems to be well settled that the act of the city, in its corporate capacity, in laying out and constructing sewers which created a nuisance upon the plaintiff's land as alleged in his writ, was ultra vires, and therefore void. The city cannot be made liable for such an unauthorized act.

Exceptions sustained. Demurrer sustained.

RACHEL YORK *vs.* INHABITANTS OF ATHENS.

Somerset. Opinion May 25, 1904.

Way. Notice of defect. Questions for jury. *Exceptions*, not supported by testimony. *New Trial*, denied.

In an action to recover damages received through a defect in the highway, the defect relied upon and the one specified in the fourteen days notice was described as follows. "Numerous large pieces of granite piled up along the edge and in the wrought part of the highway, for a distance of two hundred feet southerly from the south end of the bridge in the traveled part, and on the westerly side and in the westerly ditch of said highway. Said stone or pieces of granite being from four to ten and twelve feet in length, and varying in width and thickness from one to three feet. In consequence of which the horse became frightened" and caused the accident that produced the injury complained of.

Held; that a pile of rocks or any other obstruction, partly within and partly without the wrought part of the way, the part within constituting a defect per se, constitutes a defect, provided the proof goes further and shows that it is calculated, as a whole, to present an appearance that would be likely to frighten ordinary horses; and the appearance of the object is such that it should be reasonably expected by the town that it might naturally have that effect.

Held; that the notice was sufficient to require the submission to the jury of the questions of fact, first, whether a part of the granite was so placed in the wrought part of the way as to constitute a defect, per se; and second, whether the pile of rocks as a whole was calculated to frighten ordinary horses.

The object of that part of the notice here considered is simply to describe the nature and location of the defect. It is not for the court to say primarily whether what it describes is a defect or not,—that is ordinarily a question of fact for the jury. The province of the court is to determine whether the notice upon its face describes with sufficient accuracy the nature and location of the defect alleged to warrant a submission to the jury of the question whether, what is described is a defect, and *the* defect claimed.

Exceptions will be overruled for refusing to give an instruction to the jury when not supported by the testimony in the case.

It is considered by the court, upon a motion for a new trial, that careful reading of the testimony and an examination of the photographs of the locus, do not show that the jury so erred in finding a verdict for the plaintiff as to warrant its being set aside.

On motion and exceptions by defendant. Overruled.

Case to recover damages for injury sustained by the plaintiff on the 13th day of June, 1900, by a defect in the highway in the defendant town, leading from Athens Village to Brighton. The jury returned a verdict for the plaintiff for $687.50.

The case is stated in the opinion.

CHARGE.

Gentlemen of the Jury:—

The plaintiff in this case, in her writ, complains in substance that on the 13th of June, 1900, as she was traveling along a country road between Brighton and Athens,—a road which the defendant town was bound to keep in repair so that it would be safe and convenient for travelers with their teams,—that the horse which was being driven by her husband, who accompanied her, became frightened by numerous blocks of granite extending southerly from the bridge along the highway for a distance of two hundred feet; some in the traveled path, and some on the edge or bank of the road and some in the ditch; and that, in consequence of that fright, she was thrown from a carriage and received severe bodily injury. That, in substance, is her complaint, and that, in substance, together with some other things which the law imposes, she is bound to prove by a preponderance of the evidence in order to establish her case. Now, in this case, there is no question made by counsel but what this was a road that the town of Athens was to keep in repair. They are bound to keep their roads in repair so that they shall be safe and convenient for travelers with their horses, teams, and carriages, but that does not mean absolutely safe. Towns, as has been said to you, are not insurers and the law imposes no such burden upon the municipalities of this State as that they are obliged to keep their roads absolutely safe.

They are bound to keep them reasonably safe and convenient for those who travel upon them with their teams and with horses which are reasonably kind and gentle, safe and broken to travel along our public highways, and driven by those who are themselves in the exercise of due care at the time. So you see, in determining the ques-

tion of whether a highway or road is safe within the meaning of the law, and that is the definition which I have given you as reasonably safe, it is necessary for you to take into consideration all the attendant facts, conditions and circumstances, and determine whether the road, under all those circumstances, was reasonably safe for a traveler.

In the first place, as I have said, no question is made in regard to the road but that the defendant town was bound to maintain it. No question is raised in this case but what the plaintiff was a traveler upon the road, one towards whom that obligation was due at the time of this alleged injury and accident. It is incumbent upon the plaintiff to satisfy you by a preponderance of evidence, that this defect which she has set up in her writ existed upon the face of the earth substantially as she has set it out. That is, the proof must correspond substantially to the allegation in that respect as to the defect, which is alleged to be numerous large blocks of granite for a distance of two hundred feet along the highway and in it, and on the westerly side of it, south of the bridge. It is incumbent upon her, in order to recover, to satisfy you — always by a preponderance of the evidence, which you understand does not necessarily mean by more witnesses than are produced by the other side upon a given point, but by evidence, whether it comes from more or less witnesses which, after carefully weighing and considering in your minds and judgments, is entitled to greater weight than that which is opposed to it — that those rocks situated in substance as she has described them in her writ, frightened the horse which was being driven there by her husband. If the horse was frightened by something else, then the plaintiff could not recover in this case, and upon that the parties, as you will recollect, are sharply at issue. The plaintiff claims, relying upon the testimony of herself and her husband, upon the conduct of the horse and the attendant circumstances, that the horse was frightened by those blocks of granite. The defendant, on the other hand, claims that it was not the blocks of granite, but that it was the bridge which frightened the horse, — a swaying, and teetering of the bridge, as it has been called; and the defendant also relies upon the testimony of the plaintiff and her husband to establish

its side of that proposition, claiming that when closely scanned and analyzed it shows that the defendant's contention is correct in that. The defendant also relies upon the conduct of the horse and the attendant circumstances. It is for you to determine who is right in regard to that, that is, what is the truth in regard to it. Truth is always right in cases between parties and towns, or anyone else, and unless the plaintiff satisfies you by a preponderance of the evidence upon that branch of the case, then she could not recover in this suit.

As I have already said to you, if the fright was occasioned by any other cause, no matter if it was a cause for which the town was liable, —by a defective bridge,— then she could not recover in this case, because that is not the claim which she has made here, and for various other statutory reasons. She must satisfy you further that those rocks, through the fright of the horse, were the proximate cause of the injury which she received by her being thrown from the carriage. It is difficult to define that to you exactly. As a general proposition, what the proximate cause is depends very largely upon the circumstances of each particular case, but, in general, it is that cause which in unbroken and continuous sequence, without the intervention of any other cause, produced the result complained of—one link in the chain following another. That will give you an idea which you can apply to this case. It is necessary further that the plaintiff should satisfy you by the weight of evidence, that the injury which she received was due to no fault of the horse and in this case, as her husband was the driver of her,—of the husband in driving and managing the horse, or in the horse itself,—and there, again, the parties are at issue. You see towns are obliged to keep their ways safe and convenient, as I have said before, for travelers who are themselves in the exercise of due care, and if the injury happens through any lack of due care on the part of the plaintiff, then the plaintiff cannot recover. The burden is upon the plaintiff to satisfy you affirmatively,—as an affirmative proposition,—that she was in the exercise of due care and in this case that her husband, in driving the horse and managing the team, was in the exercise of due care, and that the injury was not due to any fault in the horse.

Some testimony has been introduced as to the conduct of this horse upon other occasions. Certain misconduct is claimed by the defendant,—certain things which indicate that the horse was an ugly, skittish and perhaps ill-broken horse. Testimony has been introduced by the plaintiff tending to support her claim that it was a proper horse to drive along our public roads,—that it was kind and gentle, and reasonably safe. The defendant, as you recollect, also, in the support of its contention upon this proposition, calls your attention to statements said to have been made by Mrs. York at the time of the injury:—immediately afterwards, to the effect that she would never ride after the horse again, and that she would not ride home after the horse; and to statements of Mr. York, alleged to have been made by him, that he would never ride after the horse again,—showing, as the defendant claims that both the plaintiff and the husband at that time knew that the injury was due to some fault in the horse, as not being sufficiently well-broken, or being shy or skittish, and not reasonably safe, kind and gentle, and at the very time of the injury attributed it to that fact. On the other hand, you recollect the plaintiff's position that, even if such expressions were made, too much importance should not be attached to them, that they would be the natural outcome of such an accident following, as the plaintiff claims upon the driving of even a reasonably safe, kind and gentle horse. Well, what was the fact, about that? Has the plaintiff satisfied you by the weight of evidence, in regard to the horse,—that the injury was due to no fault of the horse?

I understand the parties to be at issue upon the question of whether the plaintiff's husband was in the exercise of due care at the time. The burden is upon the plaintiff to satisfy you of that fact. The husband being the driver, and on account of that relation existing between them any want of due care on his part in the driving or management of the horse, would bar her recovery. Due care is that care which prudent men ordinarily exercise under similar circumstances, or like circumstances; and the want of that is negligence. Negligence is the want of due care. Now, the burden is upon the plaintiff to satisfy you affirmatively in regard to the exercise of due

care on the part of herself and her husband. You have heard their description of the accident, — his description of how he drove and managed the horse, and the behavior of the horse. You will consider all the evidence bearing upon each one of these propositions, whether it has been alluded to by counsel upon the one side or the other, or alluded to by myself. I do not intend to allude in any detail to the testimony.

On the other hand, the defendant sets up various matters, as I understand, claimed to show a want of due care on the part of the husband. There is some evidence coming from Mr. Cushman that, at one time, immediately after the accident had occurred, he saw Mr. York holding the reins with one hand, the other hand being upon the back of the wagon, or over the back of the wagon. Of course, if you are satisfied that that is the fact, that may be of importance in your minds as tending to show how he was driving at the time the accident occurred. I call your attention to the application of that testimony in case you become satisfied of the fact. It is important as tending to show how he was driving immediately before; and it would be for you to say, of course truthfully and upon your oaths, whether the manner of driving showed due care, — such care as prudent men ordinarily exercise under like circumstances. The defendant relies further upon the fact, as claimed by it, that Mr. York had been over this ground several times before, since the rocks were there; and knew that they were there; and that if they were objects such as might reasonably be expected to frighten horses, he should have known of that. Mr. York denies that, and says he never had been over the ground since the rocks were there, and upon that proposition there has been the evidence of several witnesses introduced tending to show, if you believe they are correct in it, that he was at Athens at one or more times after the rocks were there. You remember the time in reference to the town meeting, and also the testimony of Mr. Corson in regard to the time of the Grange meeting, and the testimony coming from Mr. Corson and Mr. Smith tending to show that he drove down over this road. Now, considering this testimony upon the question of due care, — and you will first determine what the fact was, and then, in case you find that he did go over the road, take into

consideration the time of day, or night as may be proved to you and the season of the year,—and determine whether he obtained such knowledge of the location and appearance of those rocks, in case you find he obtained any, as would make it a want of due care on his part to undertake to drive by there. The defendant further urges upon this point the fact, as it claims, that from opposite the Hight house, I think it is called, on the north side of the bridge, as the plaintiff and her husband drove down the road from Brighton to Athens, that those rocks were all in plain view, and could have been seen, and should have been heeded by the plaintiff and the husband, if they were such objects as might be reasonably expected to frighten a safe, kind and gentle horse. Now it is important first for you to take into consideration and determine the fact, because the law does not allow a person to drive heedlessly along a highway and recover for injuries which resulted from his own carelessness and heedlessness. He must use the senses with which nature has endowed him. It is for you to decide under the facts as you find them, the situation as it was,—whether this plaintiff and her husband on that evening, did exercise due care, providing the situation was such as they claim it to be, in driving the horse down by those rocks. If they did not, and any want of due care on her part or on his part in that respect, contributed to the accident, she cannot recover. It is simply one of those unfortunate things for which no one is legally responsible in such an event. In order to render the town liable, as I have said, she must satisfy you of these propositions, and that this line of rocks presented an appearance which would be likely to frighten a horse; and further, on the question of notice, such an appearance that the town might reasonably expect such would be its probable effect,—and by the word "town" I mean the municipal officers whom it is claimed had twenty-four hours actual notice of the defect, if any there was.

Now a great deal of testimony has been introduced in this case as to the exact location of these rocks; as to the width of the traveled way, of the wrought part of the way, and its condition as to smoothness and availability for travel. All that it is important for you to bear in mind, and consider and determine. Where the testimony conflicts, determine what the fact is,—because, as I have said before,

the town is only obliged to keep its ways reasonably safe and convenient, and in order to determine that, you see you must take into consideration all the circumstances and the situation as it existed there. Now, as bearing upon that question also, the location of the rocks may be important, as to whether they were within the traveled way,—that is, while not within that part between the wagon tracks, yet within that part which was wrought and intended and designed for public travel, or as to whether they lay outside of that, and in the ditch, some part or some portion of them. But, if, gentlemen, the plaintiff satisfies you on all the propositions which I have named, by a preponderance of the evidence,—then still it is for you to determine whether such a condition as the plaintiff claims, taken in connection with the other circumstances there in regard to that road, was in fact a defect,—whether in fact, under all the circumstances and facts of which you are satisfied, bearing upon it and relating to the condition of that road, it was reasonably safe and convenient. If it was, then notwithstanding the rocks frightened the horse, and the injury resulted from that, yet if as sound practical men you find that under the circumstances the town had provided a reasonably safe road, the plaintiff cannot recover. On the matter of the appearance of the object, you recollect I called your attention to the fact that its appearance must be such as would frighten ordinary horses. Testimony has been introduced on one side and the other as to the effect of this line of rocks upon other horses. Well, that is proper for your consideration, so far as it is shown to frighten other horses or having failed to frighten other horses. Of course, in the frightening of other horses, you should be satisfied as to the character of those horses, that they were kind, gentle and safe. You will weigh that and determine the fact, and get such light from it as you may. Now, of course, if the plaintiff has failed to satisfy you on any of these propositions, she cannot recover. She cannot recover unless you find that the way was not reasonably safe. If she has, then she would be entitled to recover, providing first that the town had twenty-four hours actual notice of the defect or want of repair. Now, I understand you claim that on two grounds, Mr. Merrill?

Mr. Merrill: Two grounds,—first they put them there—

Court: I understand the plaintiff claims that, in the first place the town is not entitled to any notice for the reason that it created the defect itself, through the municipal officers, — the parties who were to have the notice. Now, what is the fact in regard to that? If the officer to whom the notice is to be given himself creates the defect, then the law does not require notice to be given to him of something which he himself has done, and knows; it would be a useless ceremony. Mr. Tomlinson, — you recollect his testimony, says, in substance — you are to take the testimony from your recollection, not from mine, — I simply give it in substance — that he got out these pieces of granite under a contract with the selectmen, and he put them where he was to place them by that contract, — I understand his testimony to amount in substance to that. The selectmen say, — or Mr. Green, at least, — that there was nothing said about that in the contract, as to where he was to place them; that they simply hired him to get out some blocks of granite, and that it is preposterous to suppose that the contract specified he was to string them along the side of this road for two hundred feet to the south side of that bridge. You will determine what the fact is, as reasonable men. If, in the one case they were put in that place by the town, self-creating the defect, and their appearance was such as the officers of the town who had them placed there should reasonably expect that they would frighten ordinarily safe horses, — then no further notice would be required. If not, then the town would still have to have twenty-four hours actual notice of the existence of the defect; and that is notice to the municipal officers or the highway surveyor or road commissioner. In this case, the claim is that he was a municipal officer.

The plaintiff says that even if you should not be satisfied of the fact that the selectmen directed or contracted for these blocks of granite to be placed there, that Mr. Green had actual knowledge that they were there, because he says he saw them there, and that is what actual notice means. Under that statute it means that the municipal officer shall have knowledge, — not merely that he may have known, or ought to have known, — but that he shall have knowledge; and Mr. Green says he was one of the municipal officers and he saw them

there. Now, if he did, and their appearance was such that he should reasonably apprehend that the natural effect would be to frighten ordinarily safe horses, then he had notice of them as a defect providing the other propositions are made out, and the town would not be entitled to any further notice. If he did not, the plaintiff cannot recover in this action. More than that, within fourteen days of the injury there is another notice which the plaintiff is obliged to give, describing the nature and location of the defect and the time and place of the injury, and the damages; and there is no question made in this case but what a notice to that effect was given seasonably, — that is, within fourteen days after the injury. There is a contention as to its legal effect, but I instruct you the plaintiff has, in substance, sustained the allegation in her writ that this fourteen days notice is sufficient, and that she might recover so far as that is concerned.

There is another ground invoked by the defendant, as I understand, and that is that you can infer and should infer that Mrs. York, as she came upon the road or hill opposite the Hight house looked down upon those rocks and saw them and knew of their existence, and the existence of them as a defect, if they were a defect — I am not talking now about the question of defect, but upon another branch. Well, if that is so, — if you are satisfied that that is so, — that she knew of this defect, — and I am not assuming it was a defect, — but suppose you should find it is a defect, then she could not recover unless she herself gave the twenty-four hours notice, notwithstanding the selectmen had had twenty-four hours notice. But, in order to place that obligation upon her of the giving of the notice, the law requires that you should be satisfied of knowledge on her part, and that she knew or that she might have known by the exercise of reasonable care, — that is not on the question of due care and diligence. Neither upon this branch of the case, notice to be given by her, herself, would it be sufficient to put that burden upon her, even if her husband knew that the rocks were there as a defect; that would simply have a bearing upon the question of due care, which I have already explained to you. Now, if, upon any of these propositions the plaintiff has failed to satisfy you by the weight of

evidence, then she cannot recover. If upon all of them she has, then you come to the question of damages. Of course I know not what your conclusion may be.

Now the law fixes the extreme limit of damages in a case of this kind at $2,000. In no case can you go beyond that. You have heard the testimony coming from the plaintiff and from the members of the family and the neighbors, watchers and friends, as to Mrs. York's condition both before and after the accident, so far as the plaintiff's testimony goes, tending to show that prior and up to the time of the accident she had been a strong, healthy, well and robust woman, and that, since that time, she has been more or less lame, and has some nervous affection and trouble with her heart,—whatever has been described to you and you are satisfied of. On the other hand, you recollect the testimony introduced by the defense tending to show, as the defendant claims, that prior to the accident there had been some symptoms similar on the part of Mrs. York. You will determine what the fact is and what the injuries were,—what was her condition prior to the accident,—what the immediate physical effects of the injury, and what they have been from that time down to the present day,—what are they now, and what are they likely to be in the future? She is entitled to recover, if at all, compensatory damages,—that is a fair, reasonable compensation for the injuries which she has sustained. It is difficult to measure these matters in dollars and cents, but you are hard-headed, practical men of affairs, exercising your common sense.

Providing you come to this branch of the case you are to determine what is a fair, just and reasonable compensation for the injuries which she has sustained. She is entitled to recover for the physical suffering, for the amount of suffering which she has sustained, or may sustain in the future, either on account of her future physical condition arising from this injury or from any mental pain in consequence of her lameness which she may feel, or any other result. She is entitled to recover for her decrease, if any, in earning capacity, and as I say, she can only bring this one suit. Whatever damages she recovers must be final for this injury, if she is entitled to recover any.

On this branch of the case, you will recollect the testimony introduced by the defendant tending to show, as it claims, that she got up round the house early and did work in regard to the haying operations up to Gilman's and the other places, and there is some testimony about the berrying. The defendant says in the light of this testimony you should believe that her injuries had been rather exaggerated,—the facts of them, that they have been magnified for the purpose of influencing your minds. On the other hand, the plaintiff says that getting up as early as she did, while it was a quick and perhaps somewhat remarkable recovery from an accident of this kind, and as it has since proved to be,—that it was the nature of the woman,—that she was smart, ambitious and hard-working, and was not afraid of work, and that there was nothing in the whole transaction on the one side or the other contradictory to the statement she has made in this case upon the stand.

Now, take this case and do with it precisely as you would in any case between party and party. Towns have just as much rights as individuals. Individuals the same as towns. We are all members of some towns, and we are all individuals, and you need not trouble yourselves about the effect of your verdict upon towns or upon individuals. If your verdict is a true verdict, and if it is in accordance with the law and the evidence and a verdict true as upon your consciences and under your oaths you believe it, then the result will take care of itself. Justice and public interest simply require a true verdict in each case upon the law and the evidence in that case, and when you render that, you do your entire duty.

I presume you understand that if your verdict is for the plaintiff you will say that the defendants are guilty, and assess damages and the foreman sign it, and if for the defendant, you will say they are not guilty, and the foreman will sign it.

Court: I am informed that you wish to make some inquiry.

A Juror: We would like to know what you said about: If the horse was frightened at the rocks, and the road being reasonably safe.

Court: If I apprehend your question, I will try to answer it. I thought I covered that fully. Of course the question of whether the horse was frightened by the rocks is a material proposition of fact which it is necessary for the plaintiff to prove as one step in her case. Now, if she failed to prove that of course her entire case would fail; that is one step for her to prove by a preponderance of the evidence that the horse was frightened by the rocks. Now it would not follow from that necessarily that the road was not reasonably safe. You see that question depends upon all the facts and circumstances in the case, bearing upon it,—the kind of horse,—whether or not he was a reasonably safe and kind horse,—upon the appearance of the rocks, whether they were of that frightful appearance that it might be reasonably anticipated that that would be their natural effect,—upon that location in the road,—upon the width of the traveled way, and the opportunities for free and unobstructed travel,—you see the very pith of the whole question here is whether the road was reasonably safe, and that is a question for the jury to determine. If it was,—after having settled the facts bearing upon that then determine the final question. That is all the duty which the law imposes upon the town. If it was defective as alleged in the plaintiff's writ, and that frightened the horse, and the injury was caused thereby, you see the town would be liable.

Now I do not know as I have answered your question. I do not know as I apprehend it. Is there anything further?

Juror: If the road was fourteen feet wide, would you consider it safe?

Court: That is one of the facts for the jury to take into consideration. In determining that question what I might think about it is entirely immaterial. That is a question of fact submitted to the jury, not to be determined by any one circumstance, but in view of all the circumstances and the whole situation. That is one of the things to be taken into consideration, but not the sole one.

E. N. Merrill, for plaintiff.

D. D. Stewart and J. F. Holman, for defendant.

1. Whether the notice within fourteen days after the alleged accident is sufficient, is a question of law; and, if insufficient, the

action cannot be maintained, and the jury should be so instructed. *Rogers* v. *Shirley*, 74 Maine, 144; *Lord* v. *Saco*, 87 Maine, 231. (Must be of the precise spot). *Larkin* v. *Boston*, 128 Mass. 523.

In *Willey* v. *Ellsworth*, 64 Maine, 57, this court said: "The statute gives no right to, and imposes no liability upon towns, as to anything outside the limits of the road."

The notice in the present case describes the alleged defect in the road as being numerous large pieces of granite piled up along the edge, and in the traveled part, and on the westerly side, and in the westerly ditch, for a distance of two hundred feet, and alleges that the horse was frightened by these two hundred feet of granite rocks lying in and outside, of the road.

Suppose the allegation in the notice had been that all of the two hundred feet of granite blocks lay outside of the road, and caused the fright of the horse. It would be clearly bad.

It is impossible to tell, from the present notice, whether the fright was caused by the rocks in, or out of the road; while the notice states specifically that it was caused by the combined effects of both.

It is well settled law in this State and in Massachusetts that towns cannot be held liable, if the accident occured in part through causes originating out of the limits of the highway. *Titus* v. *Northbridge*, 97 Mass. 258; *Rowell* v. *Lowell*, 7 Gray, 100; *Moulton* v. *Sanford*, 51 Maine, 127; *Willey* v. *Ellsworth*, 64 Maine, 57; *Richards* v. *Enfield*, 13 Gray, 346.

In the case last cited the Supreme Court of Massachusetts said: "A city or town is not liable to an action for damages for injuries sustained on the highway, unless the accident is occasioned by causes which occurred entirely within the highway."

The alleged cause of fright in the present notice was, in part, at least, from blocks of granite outside of the highway as traveled. The blocks of granite in the west ditch were as much outside of the road as those west of the road. *Brown* v. *Skowhegan*, 82 Maine, 273.

If the statute requiring the fourteen days notice and description of the defect in the highway which caused the fright of the horse, had been in force when *Moulton* v. *Sanford*, was decided, and if the

notice had alleged that the accident occurred, and was occasioned, by the want of railing on the bridge and by the splash of the musquash in the water, the notice would have been felo de se, and bad.

In *Perkins* v. *Fayette*, 68 Maine, 152, if the notice had alleged and stated that the fright of the horse was caused by a rock in the road, and by several cows in the road with boards on their horns, it would have been equally bad.

2. The request to the court to direct a verdict for the defendants was based upon the fact that the plaintiff's evidence and photographs, show a broad smooth road, abundantly sufficient for all public travel, and that not a block of granite was in the traveled track, as shown by the public user, nor within two feet of it. And the defendants offered proof by actual measurement that the particular rock which the plaintiff claimed as the cause of his horse's fright, was six feet from, and west of any wagon track, and six feet from the traveled part of the road; and that no rock in the alleged two hundred was within two feet of the traveled part of the road.

The evidence and photographs on both sides proved beyond doubt or cavil, that not one of these two hundred rocks was within the traveled road.

It was upon this ground that the defendants asked the court to instruct the jury that the action could not be maintained, in accordance with the decision of this court in *Farrell* v. *Oldtown*, 69 Maine, 72; *Brown* v. *Skowhegan*, 82 Maine, 276, 277; and authorities already cited. *Nichols* v. *Athens*, 66 Maine, 402.

No instruction of the court presented this part of the case to the jury; but they were allowed to determine whether they considered blocks of granite outside of the traveled part of a broad smooth road, defects in the road; when this court had otherwise determined as a question of law. The verdict should be set aside as being wrong per se and against both evidence and law.

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

SPEAR, J. This is an action in which the plaintiff recovered the sum of $687.50 in damages for injuries alleged to have been received

by her through a defect in a highway of the defendant town. The case comes up on motion and exceptions by the defendants.

The exceptions are based upon the refusal of the presiding justice to give the four following instructions: First, that the fourteen days notice required by the statute, as preliminary to the plaintiff's right of action, was insufficient and illegal; second, at the close of the testimony, that the action could not be maintained because of the insufficiency of the notice; third, that the evidence shew the highway to be safe, suitable and of abundant width for all purposes of public travel; fourth, that blocks of granite outside of the traveled part of the highway, and outside of that part of the road prepared for public travel, constituted no defect in the highway; that the town could not reasonably expect that a block or blocks of granite, outside of the limits prepared by the town for public travel, would frighten ordinary safe and gentle and well-broken horses.

The defect relied upon and the one specified in the fourteen days notice is described as follows: "Numerous large pieces of granite piled up along the edge and in the wrought part of the highway, for a distance of two hundred feet southerly, from the south end of the bridge in the traveled part, and on the westerly side and in the westerly ditch of said highway. Said stone or pieces of granite being from four to ten and twelve feet in length, and varying in width and thickness from one to three feet. In consequence of which the horse became frightened" and caused the accident that produced the injury complained of. The plaintiff, in the declaration in her writ, described the defect substantially in the language of the notice.

The question raised by the first exception is whether the notice upon its face contains a description of such a defect, as will, if proven, satisfy the requirements of the statute. The statutory notice requires the averment of several distinct elements, all of which are conceded to be sufficiently stated in the notice before us, except the one relating to the nature and location of the defect. The defendant's counsel in his brief contends that the averment in the notice that the rocks, at which the horse became frightened, were located partly within and partly without the traveled part of the way, fails to describe any defect as defined by the decisions in this State. He asserts that, if

the allegation in the notice had been that all the two hundred feet of granite lay outside the road and caused the fright of the horse, it would be clearly bad. Upon the theory that this is the law, although it has not been judicially determined in this State, see *Nichols* v. *Athens*, 66 Maine, 404, and *Farrell* v. *Oldtown*, 69 Maine, 72, the defendant then proceeds further and asserts that "it is impossible to tell from the present notice, whether the fright was caused by the rocks in or out of the road; while the notice states specifically that it was caused by the combined effect of the two."

We think the plaintiff's contention requires a splitting of the hair a little too fine. Such refinement would, in this class of cases, defeat the ends of justice. The object and purpose of the notice, as defined by our court, does not contemplate the distinction as to what particular part of a defect is calculated to do the mischief. If a town sees fit to strew along the side of the road a pile of rocks, or any other obstruction, partly within and partly without the wrought part of the way, the part within constituting a defect, per se, such pile as a whole constitutes a defect, provided the proof goes further and shows that it is calculated, as a whole, to present an appearance that would be likely to frighten ordinary horses; and the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect. *Card* v. *Ellsworth*, 65 Maine, 547, 555, 20 Am. Rep. 722. The plaintiff's notice describes such a defect, namely, the pile of granite, as a whole, partly within and partly without the wrought or traveled part of the way. The object of that part of the notice we are now considering is simply to describe the nature and location of the alleged defect. It is not for the court to say primarily whether what it describes is a defect or not. That is ordinarily a question of fact for the jury. The notice may describe something that does not exist at all, that is purely imaginary. But the court has nothing to do with that question in construing the notice. Its province is to determine whether the notice, upon its face, describes, with sufficient accuracy, the nature and location of the defect alleged, to warrant a submission to the jury of the question whether, what is described is a defect, and the defect claimed.

Whether the proof sustains the notice has nothing to do with its legal sufficiency.

The notice then, we think, was sufficient to require the submission to the jury of the questions of fact, first, whether a part of the granite was so placed in the wrought part of the way as to constitute a defect, per se; and second, whether the pile of rocks as a whole was calculated to frighten ordinary horses, as held in *Card* v. *Ellsworth*, supra.

The second exception is to the refusal of the court "at the close of the evidence to instruct the jury that the action could not be maintained because of the insufficiency of the notice." We are unable to determine just what this exception means. The sufficiency of the notice has already been determined under the first exception. If it means that the proof did not sustain the declaration in the notice, that was a question of fact and was properly submitted to the jury.

The third exception clearly involves a question of fact, not of law.

The fourth is based upon the assumption that the blocks of granite that frightened the plaintiff's horse were situated wholly without the wrought part of the way. But the jury did not so find. The notice did not so state, nor did the plaintiff at the trial so contend. On the contrary, it was claimed that it was the entire line of granite blocks taken together and collectively, those within, without and on the edge of the road, and not any single or particular block that constituted the defect. The presiding justice charged the jury that the burden was upon the plaintiff to show that those rocks situated in substance, as she has described them in her writ, frightened the horse. This instruction was based upon the evidence which tended to show that it was the combined effect of all the rocks in their entirety, considered as one object, that was calculated to present such an appearance as to frighten the plaintiff's horse. The testimony therefore does not support the defendant's fourth request.

"It is well settled that, if an instruction cannot be given entire with legal propriety, no exception can be taken, because not given in a modified form." *Franklin Bank* v. *Cooper*, 39 Maine, 552. A fortiori, could no exception be taken if the modified form was not requested. The refusal to give a requested instruction, sound as an

abstract legal proposition, but inapplicable, is not open to exception. *Norton* v. *Kidder*, 54 Maine, 189. The presiding justice rightfully withheld the requested instructions.

A careful reading of the testimony and an examination of the photographs of the locus, do not convince us that the jury so erred in finding a verdict for the plaintiff as to warrant us in setting it aside. The law was clearly and carefully given by the presiding justice and every question of fact fully and fairly submitted. We do not deem it necessary or profitable to give an analysis of the evidence. There was, as there is in most cases, a conflict of testimony, but the jury found in favor of the plaintiff and we must let the verdict stand.

Motion and exceptions overruled.

JOHN WHITE *vs.* AUGUSTUS B. FARNHAM, Trustee.

Penobscot. Opinion May 25, 1904.

Dormant Partner. Chattel Mortgage. Trover. Words, "blind partner."

1. In a dormant partnership, the funds of the visible partner and those purporting to be his, although actually belonging to the partnership, are, with respect to the rights of innocent third parties, to be regarded as his sole property.
2. In an action of trover brought to recover of the defendant, as trustee in bankruptcy, the value of certain personal property which came into the hands of the defendant from the estate of M. M. Grant, bankrupt, and was duly sold by the trustee, as an asset of said estate, it appeared that the plaintiff claimed under a mortgage which, he says, at the time of the sale had vested in him a valid lien upon the whole of the property. Samuel Grant, brother to M. M. was, according to the plaintiff's own statement, "a blind partner" with M. M. in the business in which the personal property in question had been employed. Samuel Grant, the blind or dormant partner, without the knowledge or consent of M. M. executed and delivered to the plaintiff the mortgage under which he claims and thereby conveyed to him the personal property which was, at the date of the mortgage and long prior thereto had been, ostensibly the sole property of M. M. Grant, and claimed and used by him as his own individual property.

3. *Held;* that neither upon authority nor reason does the law permit a transaction so manifestly calculated to work an injury as that claimed by the plaintiff; *also;* that the defendant's title received through the ostensible partner is superior to the plaintiff's acquired through a secret partner.

On report. Judgment for defendant.

Trover for the alleged conversion of several horses and other goods and chattels.

Plea, the general issue.

Plaintiff claimed title under a recorded chattel mortgage, the signature to which was, "M. M. and Sam Grant by Sam Grant." Defendant claimed as trustee in bankruptcy of the estate of Madison M. Grant.

The case is stated in the opinion.

F. J. Martin and H. M. Cook; W. R. Pattangall; B. C. Additon, for plaintiff.

Counsel contended that under all the evidence, it is clear that the partnership, which it is admitted existed between the two Grants during the first year's operation, continued to exist after the time the mortgage in question was given to the plaintiff.

There can be no question but what a member of the partnership, although he be a dormant or secret partner, in the absence of any partnership agreement to the contrary, has authority and power to execute a mortgage of the partnership property to secure a partnership debt. Vol. 1 Bates on Partnership, 154.

This mortgage was executed by a member of the firm having authority to do so, to a creditor of the firm, to secure a debt of the firm. It was done in good faith. The mortgage was immediately recorded. It was given before any attachment, and before the other creditors had acquired any lien upon the property mortgaged. The defendant admittedly converted the property covered by the mortgage. Plaintiff then is certainly entitled to recover its value, unless, as claimed by the defendant, he is estopped either by some word or act of his.

Counsel further contended that there was no evidence that any firm creditor was in any way prejudiced because plaintiff consented to a change in the name of the firm. The fact that they discovered later

that two men were liable to them instead of one for the same debt is certainly not to their prejudice.

If the creditors were deceived in supposing that the property belonged to Madison M. Grant individually, it was not by any word or act of plaintiff. The plaintiff is not responsible nor should he be made to suffer on account of any statements made to creditors by Madison M. Grant.

Counsel cited: *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474; *French* v. *Chase*, 6 Greenl. 166; *Lord* v. *Baldwin*, 6 Pick. 348; *Cammack* v. *Johnson*, 2 N. J. Eq. 163; *Witter* v. *Richards*, 10 Conn. 37, at p. 40.

P. H. Gillin and T. B. Towle; F. H. Appleton and H. R. Chaplin, for defendant.

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

SPEAR, J. This is an action of trover brought to recover of the defendant, as trustee in bankruptcy of M. M. Grant, the value of certain personal property which came into the hands of the defendant from the estate of said Grant and was duly sold by him, as trustee, as an asset of said estate.

The plaintiff claims under a mortgage, which, he says at the time of said sale, had vested in him a valid lien upon the whole of the property sold. The facts are as follows:

M. M. and Samuel Grant were co-partners in the lumber business in the fall of 1894, and as such carried on lumbering operations, extending into 1895. After this year's business was practically concluded, in the fall of 1895, M. M. having become dissatisfied with his business associations with Sam, desired to sever his partnership relations with him, and claims that he did so in full; but the plaintiff contends otherwise and asserts that a qualified partnership between them was continued through all the years covering his transactions with M. M. Grant. His own statement of the interview which established the dormant partnership is this: "They met on the street and Madison says 'they are annoying me, Sam's creditors are annoying me every time I am here' and he says 'I would like

to have his name stricken from the firm and he remain what we call a blind partner.' I thought I understood the law that that could be done." "Well, I says, that will be all satisfactory. He told me what he had said to me, that I should have my pay first, and that would be all satisfactory, and it was left in that way, and from that time out everything was between him and I. He used his name in our settlement and that was all there was of that affair." The plaintiff therefore knew of and agreed to Sam's becoming a "blind partner" in the fall of 1895, and thereafter did all his business with M. M. not as a member of the firm but as an individual. January 26, 1898, he took, in a settlement involving these alleged blind partnership transactions, M. M.'s individual note for over eighteen thousand dollars. With respect to the signature on the note he says; "This is signed by Madison Grant. He signed that,—all of the papers to me after the first year, after we made the agreement he should be a blind partner, when Sam's name was dropped."

Thus it appears from the plaintiff, himself, that after 1895, he not only knew it, but entered into an agreement with the Grants, that Sam should be continued as a blind or dormant partner, and that M. M. should be held out to the community as doing business alone. Not only did the plaintiff agree to this, but all of his own business transactions with M. M. were entirely consistent with the agreement, and calculated to present M. M. to the public as the only visible partner. This alleged business arrangement between the plaintiff and the Grants continued until November 12, 1898, when M. M. Grant went into voluntary bankruptcy. In the meantime the mortgage, under which the plaintiff claims, was executed on the 18th day of October, 1898, by Samuel Grant, the alleged "blind partner" without the knowledge or consent of M. M. Grant. It is signed "M. M. and Sam Grant by Sam Grant," and covers all the horses, sleds, harnesses and other utensils employed by M. M. in his lumbering operations. All of this property whenever acquired was ostensibly the sole property of M. M., and he appeared to all the world to be the only owner.

For the purposes of this case, we have assumed that the plaintiff's statement of facts, as above given, is true. This was not, however, admitted at the trial, nor do we wish to be understood as finding that Sam Grant was a "blind partner." We concede it to be so for the purpose, only, of considering the issues in the light of the plaintiff's own contention with respect to the facts, and one which, if true, is decisive of this case.

Plaintiff's counsel in their brief state the issue to be "in order to prove his own title the plaintiff must satisfy the court that on October 18, at the time the mortgage was given, Sam Grant was a partner of Madison M. Grant." If counsel use the term partner in the ordinary sense, their position, as a matter of legal statement, is undoubtedly correct; but if, by the use of the term, they mean such a qualified relation to M. M. as the plaintiff has described by the phrase "blind partner," such relation, if existing, would not authorize Sam Grant to so dispose of the partnership property as to conclude the rights of an innocent third party, dealing in good faith with the ostensible partner as an individual and without knowledge to the contrary.

Neither upon authority nor reason does the law permit a transaction so manifestly calculated to work an injury as that claimed by the plaintiff. What was attempted in this case clearly illustrates the pernicious operation of a law which would allow it. M. M. Grant was ostensibly doing business as an individual. As such he established his credit. Parties trusting him had a right to rely upon his ability and honesty, as well as his property, for their security. But having given credit and acted upon the assumption that they were dealing with the visible partner only, then Sam Grant, who had never before been heard of in connection with M. M., except by the plaintiff, suddenly discloses his blind relationship and, within the time sufficient to enable him to sign two names to a mortgage, conveys to the man who was in the "blind partner" secret, every vestige of the operating property of which M. M. Grant was ostensibly or actually possessed. Those who had given credit to M. M., upon his apparent and declared ownership of this property, were, by the stroke of Sam's pen, abruptly informed that they had based their

credit upon a shifting sand. Such a transaction cannot be permitted to stand. The law will not allow it. The question involving the rights of parties in their dealings with silent or dormant partnerships was, at an early day, considered by both our own court and that of Massachusetts.

In *French* v. *Chase*, 6 Maine, 166, the plaintiff in replevin claimed title to the goods in question under a sale of them by Walter Brown. The defendant pleaded property in Brown and Quimby, as partners, and that he as a deputy sheriff attached the goods by virtue of a writ against them, issued upon a partnership note, signed by Quimby only. It was admitted that Brown and Quimby were partners and that the firm was insolvent. The partnership however was a secret one and at one time was carried on in the name of Quimby, and afterwards by Brown in his own name, Quimby having no apparent interest in it. Such was the case when the plaintiffs made the purchase. The defendant contended that he had a right to the goods by virtue of the attachment, on the ground that the note was given for a partnership debt, and came within the well known principle that partnership funds must first be applied to partnership debts, and that, until such debts are satisfied, a creditor of one of the firm cannot appropriate any portion of them. But the court say, p. 169, "The question here is, whether this principle is applicable in the present case, when Brown alone was the ostensible owner, and the existence of any partnership was wholly unknown to the plaintiffs. To extend the principle thus far would be unreasonable and unjust, and farther, we apprehend, than it has ever been carried by any judicial decision. The reason upon which the doctrine is founded, cannot exist where the business of a secret partnership is all transacted by and in the name of one of the partners, who appears to all the world as the sole owner."

The facts in that case are identical with those in the case at bar. In that case the plaintiffs obtained title to the goods from the ostensible partner, the defendant, upon a note of the silent partner upon a firm debt. In the case at bar the defendant received title through the ostensible partner; the plaintiff through a secret partner upon a firm debt.

In *Lord* v. *Baldwin*, 6 Pick. 348, the same principle is laid down as governing this class of cases. At this time, 1828, Parker, C. J., in delivering the opinion of the court took occasion to remark that "the question presented in this case is entirely new," and that "the silence of the books themselves seems evidence of the unsoundness of the doctrine now sought to be applied," which was identical with that asserted by the plaintiff in the case at bar. In applying the ordinary principles of law, relating to co-partnership matters, to the facts in the case here cited, involving a silent partner, the court on page 350 use this language: "It is only the application of this principle to cases as they arise, which can afford any room for argument or doubt, and in order to determine such question, the reason of the rule must be sought for, and the particular case must be brought within the reason, as well as within the terms of the law. The basis upon which the rule rests, is, that those funds shall be liable upon which the credit is given. Those who sell goods or make contracts with a company or firm, are supposed to trust to the ability or property of the firm. Those who trust the individual member, rely upon his sufficiency alone."

"But the case before us is that of a dormant partnership, which is necessarily, from its very character, unknown at the time the liability is incurred." In this case the dormant partner was brought to light by ex post facto investigation and the creditors who discovered him claimed a preference upon the firm property. But the court say that the reason for the rule by which they claim a preference does not exist, and that "even if he (the dormant partner) owned the whole of the stock, as between him and the known man of business, still it is in law the property of the latter, for he is allowed to claim and use it as his alone, and thus lead persons to trust him upon the faith of the goods in his possession."

In *Cammack* v. *Johnson*, 2 N. J. Eq. 163, both the above cases are ably reviewed, and the reasons and principles therein declared fully approved and adopted. With respect to *Lord* v. *Baldwin*, the chancellor says, "the true principle is, in my opinion, laid down in that case." Then referring to the reasons in his own language, he says, "In an open firm the credit is given to the firm and to the goods they

are possessed of; and a partnership creditor shall be first paid out of them; but if the partner be unknown the credit is given to the visible partner only, and the goods in his possession are supposed to be his own, and in such case the discovery of such latent partner cannot give any preference to a partnership creditor. As between the partners themselves, I see no reason to make any distinction in their rights, whether they are dormant or not; but as to the public, it is not only highly proper, but necessary to prevent injustice toward creditors, that this difference should be observed." The case of *French* v. *Greenleaf*, he says "is still stronger." He finally concludes by saying, "Upon a careful examination of the cases on this subject, as well as from the reason and propriety, I am clearly of the opinion that the execution creditor has his remedy complete against all the effects of the visible partner, and all the effects which belong to him and his dormant partner as partners, and that it makes no difference whether the debt was contracted by the debtor on partnership account or on his individual account."

These decisions, conceding the plaintiff's own contention as to the facts, are decisive of the case against him. The property sought to be conveyed by Sam Grant was admitted to be in the possession of M. M. the only visible partner, and there is no suggestion that any of the creditors, whom the defendant, as trustee in bankruptcy, represents, had any knowledge of the dormant partner or gave any credit to him. This property then was first subject to the liabilities of M. M. Grant, whether by attachment or in bankruptcy.

The above decisions declare the rule to be that, in a dormant partnership, the funds of the visible partner and those purporting to be his, although actually belonging to the partnership, are, with respect to the rights of innocent third parties, to be regarded as his sole property. In fairness to M. M. Grant, it should be stated that he emphatically denied any partnership whatever with Sam Grant, secret or otherwise.

In accordance with the stipulation in the report the entry must be,

Judgment for the defendant.

HENRY REYNOLDS *vs.* HENRY P. WHITTEMORE.

Franklin. Opinion May 27, 1904.

Bankruptcy, Act of 1898. *Discharge,*—When not a bar. Creditor not scheduled and had no notice until discharge granted.

In a case of voluntary bankruptcy under the U. S. Bankruptcy Act of 1898, if a debt was not scheduled and the creditor had no statutory notice nor actual notice of the bankruptcy proceedings until after a discharge was obtained, such discharge does not bar the debt.

Symonds v. *Barnes,* 59 Maine, 191, and *Hewins* v. *Whitney,* ante, p. 37, distinguished.

Exceptions by plaintiff. Sustained.

Assumpsit on account annexed. Plea, general issue with brief statement of defendant's discharge in bankruptcy dated Sept. 11, 1901, on proceedings begun June 8, 1901. Replication by plaintiff that the debt declared on was not scheduled with the creditor's name by the defendant in time for proof and allowance before the discharge was granted; and that the plaintiff had no notice or actual knowledge of the proceedings in bankruptcy before that time.

The court ruled as matter of law that the action was barred by the defendant's discharge in bankruptcy, and directed judgment to be entered for the defendant. The plaintiff was allowed his exceptions to the ruling of the court.

B. Emery Pratt, for plaintiff.

E. O. Greenleaf, for defendant.

Creditor's name was inadvertently omitted in making the list, and no claim is made that it was wilfully done.

Section 57 of Bankruptcy Act, par. "n" provides that a creditor has one year from adjudication in which to prove his claim. Though while the language puts it negatively, the meaning is clear and the same rule will apply as in probate suits against administrators, that is, the creditor is allowed the limitation of one year.

In this case, the adjudication was June 8, 1901, and the creditor had actual knowledge as early as March, 1902, within the year.

It does not appear whether the creditor was injured by not so proving his claim, nor does it appear what if any dividend the estate paid, or whether it has ever been settled, but it is assumed that there were no assets, and creditor could not have been injured.

Collier on Bankruptcy states it very clearly and succinctly on page 189, third edition, as follows, "The failure of the creditor to prove his debt, if it is provable, does not prevent it from being released by the discharge; not even in those cases where it was omitted from the schedules of debts and where the creditor was not served with a notice of the proceedings, unless the creditor can bring himself within the provisions of exception (3) of this section, which is new." And it is respectfully submitted that this creditor has not so brought himself within the exception.

It appears affirmatively that he did have notice of the bankruptcy proceedings in ample season to prove his claim; but as no assets are shown, it was of no object to prove a claim, and he waited till he thought he had an opportunity for a trustee process, which of course was his privilege unless his debt was released by the bankruptcy proceedings.

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

EMERY, J. The question in this case is whether a debtor's discharge, under the present bankrupt law, is a bar to the provable debt of a creditor, whose name and claim were not included in the bankrupt's schedule of creditors, and who had no notice nor knowledge of the bankruptcy proceedings until about six months after the discharge was granted, but within the year allowed by the statute for proving debts.

We are constrained to the conclusion that the discharge, under these circumstances, is not a bar to an action subsequently brought by such a creditor.

The facts are these:—

The debtor filed his petition and was adjudged a bankrupt June 8th, 1901, and received his discharge September 11th following.

Neither the name of the plaintiff nor the debt due him was scheduled in the defendant's list of creditors, nor did he have notice or actual knowledge of the proceedings until March 7, 1902.

The statute relating to debts not affected by a discharge reads thus: (debts not affected by a discharge) § 17. . . . (3) "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . ."

It is a fundamental principle of the common law that a judgment of the court is not binding and does not affect persons who are not made parties to proceedings. Says WALTON, J., in *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, p. 458: "No court can rightfully render judgment in a cause until it has acquired complete jurisdiction over the parties, the subject matter of the suit, and the process. Such jurisdiction is not acquired until the defendant is in some way notified of the pendency of the suit. If, upon inspection of the record, a judgment appears to have been rendered without such notice, it is absolutely void,—a mere nullity." And this is announced as a maxim of natural justice and universal application by Marshall, C. J., in *The Mary*, 9 Cranch, 126.

Under the Insolvent Law of Maine of 1878, we have accordingly held that the dismissal of a petition in insolvency, after an adjudication and the issuing of a warrant, should take place only after proper notice and opportunity for hearing all parties interested. *McIntire* v. *Robinson*, 81 Maine, 583.

We think that clause (3), above cited, was intended to prevent the injustice which occurred under the former bankrupt law of 1867 and under the peculiar provisions of which the courts found themselves compelled to hold that a creditor who had no notice of the proceedings was barred. *Symonds* v. *Barnes*, 59 Maine, 191, 8 Am. Rep. 418, is one of the earlier decisions of the kind. Congress must have been aware of the hardship thus occasioned to creditors being barred without notice, for in an amendment in 1874 to the bankruptcy act of 1867, known as the composition law, it incorporated a provision similar to that of clause 3.

Although creditors are allowed one year after adjudication by section 57 of the bankrupt law in which they may prove their claims, an examination of this section affords reason for the conclusion to which we have arrived.

The various purposes for which notices are to be given and claims may be proved are that creditors may be present and attend (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of the creditors; (4) the declaration and time of payment of dividends; (5) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (6) the proposed compromise of any controversy; and (7) the proposed dismissal of the proceedings.

It will be seen that these statute provisions are intended to cover the two branches of all proceedings in bankruptcy cases, viz: (1) the question relating to the discharge and (2) the questions relating to the administration of the assets. Creditors may desire, as is their right, to be heard upon both or only one of the questions. They may desire to be heard only upon the question of the bankrupt's examination and discharge. That is an important matter in many cases and the rights of creditors should be well guarded in this respect. It cannot be accomplished or the purpose of the statute fulfilled unless the creditor is duly notified; and it is not a forced presumption that creditors whose names are omitted from the bankrupt's schedules are not, generally speaking, likely to get knowledge of the proceedings in season to be heard before the discharge is granted.

With this view of the statute we think that, while a creditor may take the entire year to determine whether the assets of the estate will be sufficient to warrant proving his claim, and thereby assenting to the discharge, Congress intended to protect creditors who desire to be heard upon the matter of the bankrupt's examination and discharge, by requiring his name and the amount of his claim to be scheduled; otherwise the creditor, not having notice or knowledge of the proceedings prior to the discharge, shall not be barred.

In this case the plaintiff's debt was not scheduled at all, and the plaintiff had no notice nor actual knowledge of the proceedings in

bankruptcy until after the discharge was obtained. We think the statute excepts his debt from the operation of the discharge. This was the decision in *Columbia Bank* v. *Birkett*, 174 N. Y. 112, where precisely the same question was presented and considered. We have found no decision to the contrary.

It should be noted that our decision here, like that in the case cited, is based entirely on the peculiar language of the present U. S. bankruptcy statute. It does not at all conflict with our decision in *Hewins* v. *Whitney*, ante, p. 37, which is based entirely on the very different language of our State insolvency statute.

The presiding justice having ruled that the debt was barred by the discharge, the entry must be,

Exceptions sustained.

JOHN E. BEAL *vs.* EDWARD BRYANT, and another.

Knox. Opinion June 7, 1904.

Negligence. Master and Servant. Duty of master to furnish safe appliances. When this duty may not be delegated. *Fellow-Servant.*

The plaintiff was injured by the fall of a platform upon which he was at work for the defendants. The defendants knew that certain materials were required with which to secure the platform in place. They themselves had no materials, furnished none, and attempted to furnish none, but expected and intended that the fellow-servants of the plaintiff would use the identical fore throat-halyards of a certain vessel which they did use for that purpose. An examination of the halyards would have revealed the fact that they were old and rotten, unsafe and unsuitable, but no examination was made.

Held; that if the workmen in furnishing these halyards for the use to which they were put acted by the authority of the defendants, they stood in place of the defendants in discharging a duty owed by them to their servants.

Also; this duty, to furnish their servants with safe and suitable materials and appliances with which to perform their work, could not be delegated so as to relieve the defendants from responsibility for negligence in its peform-

ance to the plaintiff, who had nothing to do with securing the platform and first came to work upon it after it was in place.

In such case, while the men who secured the platform were the fellow-servants of the plaintiff in the use which they made of the halyards after they were furnished, they did not sustain that relation to him in furnishing the halyards.

Exceptions by plaintiff. Sustained.

Action by plaintiff for personal injuries suffered by him, in the defendant's employ at the defendant's plant in Rockport, Knox County, May 28, 1902, by the giving way of rope supporting one corner of a coal stage, and his falling into the hold of the vessel then being unloaded.

The case was opened to a jury, and upon the evidence being taken out, on motion of the defendants, the presiding justice instructed the jury to render a verdict for the defendants. The plaintiff took exceptions to this instruction of the court, contending that the case should have been submitted to the jury.

The case appears in the opinion.

Declaration. In a plea of the case, for that heretofore, to wit:—on the 28th day of May, 1902, at said Rockport, to wit:—at said Rockland, the said defendants were, and for a long time prior thereto had been, and still are engaged in the business of burning lime from limerock, and carrying on other business connected therewith.

That in the prosecution and conduct of said business and burning said lime, the said defendants use and have a large amount of coal, which said coal is brought to the premises operated and controlled by said defendants and upon which said business is conducted by means of vessels, and is unloaded from said vessels onto the wharf on said premises, and the said defendants in order to so unload said coal, had on or before said day erected and had under their control, maintenance and management upon said wharf, and projecting over the vessel from which coal was then and there being unloaded by said defendants, a run or stage, elevated at a great height above the deck of said vessel, to wit:—at a height of 20 feet.

That the plaintiff was upon said day employed by said defendants for hire, to work upon said stage and assist in unloading said coal from said vessel; in which said work it was the duty of the plaintiff

to wheel a barrow to the end of said stage projecting over the hatch of said vessel there to assist in dumping coal into said barrow when it should be hoisted from said vessel, and to wheel the same and dump it upon said wharf occupied by said defendants.

And the plaintiff avers that it was then and there the duty of said defendants for the protection and safety of their servants at work thereon to exercise reasonable care in the construction and erection of said stage and the supports thereof, and in selecting the material therefor, and to exercise like care to have, keep and maintain the same in a safe and suitable condition for unloading said coal.

That said defendants had constructed said stage and sent the plaintiff to work thereon, and in constructing the same had supported the outer or projecting end of said stage by the halyards of said vessel, which said halyards were defective, decayed, unsafe and unsuitable for said purpose; all of which was well known to the said defendants, or by the exercise of reasonable care might have been known to them.

And the plaintiff avers that upon said day, while he was in the exercise of reasonable care and in performing his duties aforesaid was standing upon the outer edge of said projecting stage, without any knowledge or means of knowledge, of the defective, decayed, unsuitable and unsafe condition of the ropes by which said stage was supported, the rope, or halyard which supported one of the outer corners of said stage suddenly broke because of its insufficiency for the purpose for which the defendants had made use of it, and the plaintiff was thereby projected and thrown into the hold of the vessel, falling a long distance, to wit:—a distance of thirty feet, and striking in the bottom of the hold of said vessel, and upon the beams therein, whereby he was greatly bruised, injured and shaken up, and his back and side were greatly strained and his spine injured, and he suffered and will continue to suffer great pain, both of body and mind; has expended and will be obliged hereafter to expend large sums of money in medical attendance and nursing; since said injury has been and will continue to be wholly disabled from performing bodily labor and earning a livelihood for himself and his family; and is permanently disabled by the injuries so by him suffered by the

fault of said defendants, and which were not contributed to in any degree by fault on his part.

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

Counsel argued: (1) That whether the master undertook to furnish a completed structure, and therefore in putting up the stage the employees were doing the duty of the master in the case at bar, is a question of fact to be passed upon by the jury. (2) The master delegated to the servant not simply the duty of selecting from material furnished by him, but his duty to furnish material, and is therefore responsible for the material negligently furnished, and (3) If we assume that the master furnished all the materials on board of the the vessel for supporting the stage, there is still evidence that the material furnished was unsuitable for the purpose and the master is therefore liable as not having furnished suitable material. Incidentally, we say that the plaintiff being sent to work on the stage after it was a completed structure is entitled to recover against the defendant, because as to him at least the defendants furnished the stage as a completed structure and are responsible for the sufficiency of it.

D. N. Mortland, for defendants.

The plaintiff was a fellow-workman with all others of that crew of men. The rule is stated in *Kelley* v. *Norcross,* 121 Mass. 508, and cited in case of *Donnelly* v. *Booth Bros. & Hurricane Isle Granite Co.,* 90 Maine, 110, that when the master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility if suitable materials are furnished and suitable workmen are employed.

Whatever machinery or appliances used, were selected by plaintiff's co-workmen or employees, under no orders or directions from the masters or their agent directly or indirectly. Whatever these co-workmen selected and used, belonging to the defendants, was good and suitable for the purpose. The fall or halyards that broke or parted, which was the cause of the accident, was not furnished or used by this crew by any order or direction of the defendants or their agent, but was selected and used without any instructions what-

ever by plaintiff's co-laborers or workmen, who were competent to determine what materials were or were not suitable.

The evidence shows that Mr. Arey, the agent of Bryant & Kent, intrusted the work of discharging the cargo to his employees or workmen, leaving it to them, they being competent and experienced men, to provide the structure and appliances required for its prosecution. If this be so, we contend he was responsible only for care in the selection of the men to do such work and for the safety of materials furnished to them by him. As stated in the opinion in case of *Arkerson* v. *Dennison*, 117 Mass. 412, "If the employer directs his workmen to do certain work, leaving it to them to provide the structures and appliances required for its prosecution, he may be responsible only for care in the selection of the men and materials assigned for it." In *Adasken* v. *Gilbert*, 165 Mass. 443, the court say in the opinion, "As there was no evidence that the defendant undertook to furnish the staging as a completed structure, but intrusted the making of it to the intestate and his fellow-servants, the defendant is not liable, if there was no defect in the rope." In *Colton* v. *Richards*, 123 Mass. 484, the court held that if the defendant employed competent men to take charge of the erection of that building and of the necessary staging out of which material a fellow-workman, not under the superintendence of the defendant or his agent, selected a defective put-log which broke after the staging was erected by which the plaintiff was injured, that the defendant was not liable if he used ordinary care and prudence in the selection of competent workmen and materials from which the staging was made. In the case at bar, the defendant did not in fact by any order or direction furnish any structure or any portion of it, but permitted the use of whatever the workmen selected and saw fit to use, they being competent men to do that work and to select suitable materials for such purpose. "It is a familiar rule (as the Massachusetts court says) that one who enters the service of another takes upon himself the risks incident to the employment, including the risk of the negligence of fellow-servants employed in the same service." *Killea* v. *Faxon*, 125 Mass. 486. These men so employed to erect the staging and select the apparatus

for the purpose, were all fellow-servants with the plaintiff, as held in *Rounds* v. *Carter*, 94 Maine, 535; *Kennedy* v. *Spring*, 160 Mass. 203; *Hoppin* v. *Worcester*, 140 Mass. 222; *Nelson* v. *Du Bois*, 11 Daly, (N. Y.) 127. There is no evidence in this case that the defendants undertook, directly or indirectly, to furnish the staging or materials as a completed structure. The breaking or parting of the halyards of the vessel caused the accident. These halyards were selected and used for the purpose by the plaintiff's co-laborers, men too, competent and experienced in the construction of stagings of that kind and in knowledge as to the strain to which the rigging was or would be subjected. Instead of asking for other or more suitable rope or rigging, they voluntarily used the halyard of the vessel without orders or directions to do so. There is nothing in plaintiff's declaration or in the evidence that shows incompetency on the part of the co-workmen so employed. As remarked by this court in the opinion in case of *Pellerin* v. *International Paper Co.*, 96 Maine, 391: "There is no evidence that the defendant undertook to furnish the staging in question for the workmen as a completed structure. The company did not assume the responsibility of adapting specific hooks or planks to the construction of a particular staging. On the contrary, it satisfactorily appears that, that duty was intrusted to the workmen engaged in painting the ceiling, and assumed by them as within the scope of their employment. The plaintiff's fellow-workmen obtained the hooks and the planks from the company's storehouse and erected the staging themselves. There is no suggestion that they were not competent workmen. Under such circumstances, if the plaintiff's fellow-workmen failed to exercise due care in the adjustment of the planks to the hooks, and the accident resulted from that cause, the defendant company is not responsible," and cites case of *Kelley* v. *Norcross*, supra, approvingly and like authorities on the same point. The mere fact, that the plaintiff may have sustained an injury while in the employment of the defendants or upon their premises, raises no presumption of wrong on their part and is not of itself sufficient upon which to found a verdict. *Nason* v. *West*, 78 Maine, 255.

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

POWERS, J. Exceptions to the ruling of the presiding justice directing a verdict for the defendant.

There was evidence tending to show the following facts:—

The defendants operated a quarry at Rockport. They were unloading coal from the schooner "Perry" lying at the wharf. The mode of unloading coal was over a platform belonging to the defendants, consisting of a movable stage and a permanent run, one end resting upon the wharf and the other was attached to and supported by the vessel's throat-halyards. This end extended over the hatch between the foremast and mainmast, and was elevated above the deck. The coal was hoisted from the hold, dumped into the wheelbarrows on the end of the stage and wheeled thence over the stage and run to a pile upon the wharf. The plaintiff was in the employ of the defendants as a common laborer, doing such kind of work as he was directed to do. On May 28, 1902, he was injured by the fall of this stage on which he was engaged in the wheeling of the coal from the schooner. The fall was caused by the breaking of the fore throat-halyards which supported the right-hand corner of the front end of the platform above the hatch. The platform and the load upon it weighed from one to two tons. It had been put in position in the morning at the beginning of the work of unloading the coal and fell about two o'clock of the same day. While in position, a considerable amount of coal had passed over the platform. George E. Arey had charge of the defendants' business at Rockport, and hired and discharged the men. The platform was put up on this occasion by his direction. The night before he telephoned to one Bracey to get shovelers, come over in the morning, put up the gear and discharge the vessel. The platform was put up by two of the men whom Bracey brought with him to work for the defendants in discharging the schooner. These men used the halyards for supporting the stage. The defendants furnished no other materials for that purpose, and Mr. Arey expected the men to use the vessel's halyards for holding up the stage, and the defendants had no materials for that purpose. The plaintiff had nothing to do with putting up the stage. His general

employment was jobbing, and when he worked wheeling he was paid extra compensation. He had been employed the day before in discharging another cargo of coal, the only prior instance of his doing that work for the defendants. When he got through, nothing was said to him about working on any other coal vessel, and he went to work that afternoon planking over the run and was engaged in doing that work the following morning while the platform was suspended by the other workmen. The first orders he had to have anything to do with discharging the "Perry," was after the run was repaired and the other workmen had started in to discharge the coal, after the platform was erected and in place. He had no knowledge of the condition of the ropes which supported the platform. There is no claim that any want of care on the part of the plaintiff contributed to the accident. The superintendent, Mr. Arey, was present for a longer or a shorter time at the wharf during the placing in position of the platform, but at no time gave any direction in regard to it other than what was contained in his telephone message to Bracey. An examination of the halyards would have shown that they were old and rotten. No examination of them for the purpose of ascertaining if they were suitable was made by any one. Arey did not put anybody in charge of putting up the stage, but the gang were to put up what was necessary without any further instructions from him.

The adjusting and securing the platform in place was incidental to and a part of its contemplated use, one of the ordinary duties of the workmen and a part of the work which they were engaged to do. In doing this, they acted as fellow-servants of the plaintiff and the defendants would not be liable for their negligence in the manner of doing it. They simply adapted the platform to use by means incidental to its use, work which may properly be intrusted to servants. It matters not that the stage was already secured in position before the plaintiff was set to work discharging the coal. "An employer under such circumstances owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which may ordinarily be intrusted to them without liability to his fellow-servants." *O'Connor* v. *Rich*, 164 Mass. 560, 49 Am. St. Rep. 483; *Butler* v. *Townsend*, 126 N. Y. 105.

It is familiar law, however, that the risks arising from the negligence of fellow-servants, which a servant assumes in entering the employment of a master, are those only which occur after the due performance by the master of those duties which the law imposes upon him. One of these duties is the furnishing of safe and suitable materials and appliances with which to do the work in which the servant is employed. He is chargeable with the knowledge of the means necessary to be employed and is liable for negligence in providing them. If this undertaking is to provide a completed appliance, he must use ordinary care to furnish one that is safe and suitable; if its construction is such as may be properly left to the workmen, then he is bound to employ competent workmen and furnish suitable materials. He is not liable for the negligence of a fellow-servant in the selection of unsuitable materials from proper materials furnished, but he is liable for his own negligence in furnishing unsuitable materials. *Kelley* v. *Norcross*, 121 Mass. 508; *Donnelly* v. *Booth Bros. & Hurricane Isle Granite Co.*, 90 Maine, 110.

It cannot be doubted that in the case at bar, it was the duty of the defendants to furnish safe and suitable materials with which the workmen might secure and support the end of the platform. They knew that such materials were required, yet they had none for that purpose. Mr. Arey, their superintendent, testified that he expected the workmen to use the vessel's fore throat-halyards to secure the platform. Knowing that something must be used for that purpose, knowing that nothing was furnished and making no attempt to furnish anything to meet that requirement, and expecting as he did, that the workmen would use the fore throat-halyards, he must have intended that they should use them. This is not a case where the workmen selected the materials to be used from proper materials furnished by the master. Selection implies a choice, and here the workmen had no materials of the master from which to choose. Neither is it a case in which workmen being without materials for their work, instead of applying to the master, volunteer to supply themselves without his knowledge or consent. Here the workmen used the identical materials which the master expected and intended they should use. A jury would have been authorized to find that in

furnishing the halyards for the use to which they were put, the workmen acted by the authority of the defendants. If so, they stood in the place of the defendants in discharging a duty owed by them to their servants, which could not be delegated so as to relieve them from responsibility for negligence in its performance to the plaintiff, who had nothing to do with securing the platform and first came to work upon it after it was in place. In such case while the men who secured the platform were the fellow-servants of the plaintiff in the use which they made of the halyards after they were furnished, they did not sustain that relation to him in furnishing the halyards for that purpose. In doing that, if they acted by the authority of the defendants, discharging their duty to furnish safe and suitable materials, and if there was negligence in this respect, the defendants must answer for it. We think the case should have been submitted to the jury.

Exceptions sustained.

CHARLES J. COLEMAN, In Equity,

vs.

ANGIE M. DUNTON, and others.

Sagadahoc. Opinion June 15, 1904.

Equity. Vendor and Purchaser. Specific Performance, contract not enforceable. *Notice,* as affecting purchaser.

Specific performance will be refused where a vendor after making the contract and before suit, conveyed the land to a bona fide purchaser for value and without notice.

In a bill in equity for specific performance of an oral agreement for the conveyance of real estate, it appeared that prior to the commencement of the plaintiff's bill, a deed of the property in question had been given by the defendants Dunton to the defendant Thompson, who claimed to be a bona fide purchaser thereof for a valuable consideration without notice of any prior right on the part of the plaintiff.

It was contended on the other hand that the transfer was made for the sole purpose of depriving the plaintiff of his equitable interest in the property, and that the defendant Thompson knowingly participated in that purpose; or, if not, that he took the conveyance with a knowledge of such facts as would have induced a man of ordinary prudence and caution to make further inquiries in relation to the nature and extent of the plaintiff's interest in the premises, and hence was chargeable with notice of those facts which by the exercise of reasonable diligence he might have ascertained.

Held; that although the plaintiff by force of the oral contract and the acts of part performance shown by the evidence might have been entitled to relief in equity by a decree of specific performance against the defendants Dunton, if the legal title to the property had remained in them, equity will stay its hand and refuse to disturb the title of an innocent grantee who purchased the recorded legal estate for a valuable consideration without notice of an outstanding equitable interest.

Held; that notwithstanding the grounds of suspicion suggested by the evidence in regard to the bona fides of the transfer to Thompson, the evidence reported does not possess sufficient probative force to warrant a judicial finding of fact that at the time he took the conveyance and paid the consideration for it, the grantee had actual notice, even in its enlarged legal sense, that the land conveyed to him was impressed with any trust in favor of the plaintiff.

Specific performance. Bill dismissed.

Bill in equity praying for specific performance of an oral agreement for the conveyance of a lot of land and buildings in the City of Bath.

The case is stated in the opinion.

Frank E. Southard, for plaintiff.

Counsel cited: *Pulsifer* v. *Waterman,* 73 Maine, p. 244; *Green* v. *Jones,* 76 Maine, 563; *Rowell* v. *Jewett,* 69 Maine, 301; *Knapp* v. *Bailey,* 79 Maine, 195, 1 Am. St. Rep. 295.

Jos. M. Trott and Arthur J. Dunton, for defendants.

Counsel cited: 20 Am. Eng. Enc. of Pl. & Prac. 435, 439; 2 Story on Equity, 69; Beach on Contracts, §§ 72, 891, 892, 894; *Gates* v. *Gamble,* 53 Mich. 181; *Vantassel* v. *Hathaway,* 53 Maine, 18; *Snell* v. *Mitchell,* 65 Maine, 48; *Rutland Marble Co.* v. *Ripley,* 10 Wall. 339 at 359; Pomeroy on Contracts, 166; 22 Am. Eng. Enc. of Law, 1st ed. 963; *Buck* v. *Smith,* 29 Mich. 166, 18 Am. Rep. 84; *Cooper* v. *Pena,* 21 Cal. 404; Bispham on Equity, § 376; 22 Am. Eng. Enc. of Law, 1st ed. 1042; *Phillips* v. *Thompson,* 1

Johns. Ch. 131 at 148; *Woodbury* v. *Gardner*, 77 Maine, 68, p. 71; *Bennett* v. *Dyer*, 89 Maine, 17, p. 22; *Waymire* v. *Waymire*, 141 Ind. 164, 40 N. E. Rep. 523; *Purcell* v. *Coleman*, 4 Wall. 513; Beach on Contracts, § 894 and cases cited; *Buck* v. *Dowley*, 16 Gray, 555 p. 558; *Taylor* v. *Merrill*, 55 Ill. 52; *Little* v. *Thurston*, 58 Maine, 86; *Ockington* v. *Law*, 66 Maine, 556; *Smith* v. *Kelley*, 56 Maine, 64; *Kennedy* v. *Hazelton*, 128 U. S. 667; *Kempshall* v. *Stone*, 5 Johns. Ch. 193.

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

WHITEHOUSE, J. The purpose of this bill in equity is to compel the specific performance of an oral agreement for the conveyance of real estate.

It is alleged in the plaintiff's bill that in September, 1895, James N. Dunton entered into an oral contract with the plaintiff to sell and convey to him a lot of land with the buildings thereon situated on Court Street in Bath, in consideration of $350 payable "in work of the plaintiff, and such sums of money as he might from time to time be able to pay; that thereupon the plaintiff entered into possession of the premises, erected a small stable or barn and two hen-houses, dug a well, and made other valuable improvements thereon; that after the death of James N. Dunton, the legal title to the property became vested in the defendants, Arthur J. Dunton, Angie M. Dunton, and Arthur J. Dunton trustee of Doris Purrington; that in pursuance of his agreement the plaintiff performed labor and made cash payments to the amount of $325, and before the commencement of this bill offered to pay the balance due under the terms of his contract, and demanded a conveyance of the property, which was refused."

The plaintiff admits that prior to the commencement of his bill a conveyance of the property was made to the defendant Samuel D. Thompson, but alleges that this "pretended sale is a part of a conspiracy between said Arthur J. Dunton and Samuel D. Thompson to defraud the plaintiff of his rights in said premises and as to him is absolutely void."

The defendants Dunton while denying in their answer that any such agreement as that set up by the plaintiff was ever made by James N. Dunton, and contending that if any such contract was made there have been no acts of part performance sufficient to defeat the operation of the statute of frauds, strenuously insist that the deed to the defendant Thompson, executed and recorded five days before the date of the plaintiff's bill, was made in good faith on their part in the belief "that any rights which the plaintiff might have had were long since lost, and that they had a perfect legal and moral right to make such a conveyance."

The defendant Thompson pleads in bar to the plaintiff's bill that he purchased the property in good faith and paid therefor the sum of $280 "without any knowledge or notice whatsoever of the plaintiff's claim that he had a prior right to a conveyance of said premises from said defendants, by virtue of any contract as alleged in said bill," and without any intent to defraud the plaintiff of his rights in the premises; and avers that he is a bona fide purchaser thereof for a valuable consideration without notice.

The case comes to this court on bill, demurrers, pleas, answer and replication, with a report of all the evidence in the case.

It may be assumed that by force of the oral contract and the acts of part performance disclosed by the evidence, the plaintiff would have been entitled to relief in equity by a decree of specific performance against the defendants Dunton if the legal title to the property had remained in them. *Green* v. *Jones*, 76 Maine, 563; *Woodbury* v. *Gardner*, 77 Maine, 68; *Bennett* v. *Dyer*, 89 Maine, 17. But it is a familiar and well established rule that in such a case equity will stay its hand and refuse to disturb the title of an innocent grantee who purchased the recorded legal estate for a valuable consideration without notice of the outstanding equitable interest. *Whitman* v. *Weston*, 30 Maine, 285; *Knight* v. *Dyer*, 57 Maine, 174; *Cross* v. *Bean*, 83 Maine, 61; 1 Pom. Eq. 368; 2 Pom. Eq. 770.

The defendants interpose this principle of obvious justice as an insuperable objection to the maintenance of the plaintiff's bill, and exhibit in evidence a conveyance of the property to Samuel D. Thompson by deed of warranty signed by the defendants Dunton

and duly recorded five days prior to the date of the plaintiff's bill. The grantee, Samuel D. Thompson, testifies that his business is that of a carpenter; and that he has "had more or less to do with real estate in the last ten years;" that he purchased the property in question and paid $280 for it, and that at the time of the purchase he had no knowledge of any facts which led him to suppose that the grantors did not have a legal and equitable title such as would enable them to make a good conveyance to him. In answer to an inquiry whether there was a reservation of the right of the plaintiff to remove any of the buildings on the premises, he testifies that he didn't think there was anything said about that, but on reflection he thought there was something said about moving a barn, but he "couldn't say for certain." The defendants Dunton admit in their answer that when they made the sale to Thompson they reserved to the plaintiff the right to remove the barn and hen-houses.

It appears in evidence that Thompson lived within forty rods of the premises, and during the period of the plaintiff's occupancy he had twice called there and frequently passed the premises and had an opportunity to observe the improvements that had been made. He knew that the plaintiff was in the occupancy of the premises at the time of the conveyance in question, and two days after the date of his deed gave the plaintiff notice to "vacate the house as soon as possible," as he "contemplated making some changes in it."

Upon this state of the evidence the plaintiff sharply assails the good faith of the conveyance to Thompson, and insists that it is not only manifest that the defendants Dunton made the transfer for the sole purpose of depriving the plaintiff of his equitable interest in the property, but that the testimony in the case viewed in the light of the circumstances and conduct of the parties warrants the conclusion of fact that the defendant Thompson knowingly participated in that purpose, or, if not, that he took the conveyance with a knowledge of such facts as would have induced a man of ordinary prudence and caution to make further inquiries in relation to the nature and extent of the plaintiff's interest in the premises, and hence was chargeable with notice of the facts which by the exercise of reasonable diligence

he might have ascertained. (See *Knapp* v. *Bailey*, 79 Maine, 195, 1 Am. St. Rep. 295; 2 Pom. Eq. 595, 596.)

If Thompson purchased the property as an ordinary business transaction and paid a consideration of $280 as the full value of the property, as he states, he might reasonably have been expected to have a more definite recollection in regard to the reserved right of the plaintiff to remove the barn. On the other hand it is said that the barn was erected on posts, apparently for the temporary accommodation of the plaintiff, and if so, the right of removal would be entirely consistent with his occupancy of the premises as a tenant at will. Thus some of the extraordinary features of the transaction might be explainable upon the assumption that Thompson accepted the assurance of his grantors that the plaintiff was occupying only as a tenant at will.

After a careful scrutiny of all the evidence in the case it is the opinion of the court that, notwithstanding the grounds of suspicion above suggested in regard to the bona fides of the transfer to Thompson, the evidence reported does not possess sufficient probative force to warrant a judicial finding of fact that at the time he took the conveyance and paid the consideration for it, the grantee had actual notice, even in its enlarged legal sense, that the land conveyed to him was impressed with any trust in favor of the plaintiff. For this reason the entry must be,

Bill dismissed.

EDWARD C. MORAN, Admr.,

vs.

ROCKLAND, THOMASTON & CAMDEN STREET RAILWAY.

Knox. Opinion June 22, 1904.

Negligence. Master and Servant, Rules for employees in dangerous occupations. When not liable to volunteers. *Railroads. Fellow-Servants.*

It is the duty of persons and corporations engaged in a dangerous and complex business to adopt, promulgate and enforce such rules and regulations, for the conduct of its business and the government of its employees in and about the discharge of their duties, as will afford reasonable protection to its servants and agents in the discharge of those duties.

The master is not bound to make or promulgate rules as to how his servants shall conduct themselves outside the scope of their employment, or as to how business shall be carried on or any act done which is not carried on or done by his knowledge and permission or consent either express or implied.

When acting without his employer's authority and beyond the scope of his employment, the servant is as much a stranger to his master as is a third person, for whose act the master is not responsible, and for whose government and guidance he is under no obligation to make rules and regulations.

Held; that the injury which resulted in the death of the plaintiff's intestate was caused by the negligence of the defendant's servant, while acting as a mere volunteer outside the scope of his employment, contrary to the rules and without the authority of the defendant.

Exceptions by plaintiff. Overruled.

Action on the case for alleged negligence on the part of the defendant corporation, causing injuries to Raymond E. Moran while in its service, and from which injuries he subsequently died.

The plaintiff claimed that the accident was due to the failure of the defendant corporation to make and enforce suitable rules and regulations, for the protection of those in its employ, regarding the running of the cars over its tracks. He averred that the defendant negligently and carelessly permitted its servants employed in the construction and repair of its machinery, apparatus, poles and wires to run cars at will over its track without ordinary direction and control.

The defendant offered no evidence, and at the close of the plain-

tiff's evidence, the presiding justice instructed the jury to return a verdict for the defendant. The plaintiff took exceptions to this ruling.

D. N. Mortland and E. K. Gould, for plaintiff.

It is those risks alone which cannot be avoided by the master that the servant assumes. *City of Lasalle* v. *Kostka,* 190 Ill. 135; *Pantzar* v. *Tilly Foster Iron Mining Co.,* 73 N. Y. 376; *Frye* v. *Bath, Gas & Electric Co.,* 94 Maine, 17; *Noyes* v. *Smith,* 28 Vt. 64; *Whittaker* v. *Del. & Hudson Canal Co.,* 126 N. Y. 544.

Duty to establish and enforce definite regulations for the protection of employees. 3 Wood on Railroads, 2nd ed. 382; 14 Am. & Eng. Enc. of Law, 1st ed. 907; Am. & Eng. R. R. Cases, 497; Wood on Railroads, Minor's ed. 1757; *Abel* v. *Del. & Hudson Canal Co.,* 128 N. Y. 664.

Whether the rules are adequate for the safety of others and the management of trains is a question of fact for the jury. *Chicago, B. & Q. R. R. Co.* v. *McLallen, Admr.,* 84 Ill. 109. It is the duty of a railroad corporation operating a railroad, not only to adopt and promulgate rules, but after doing so to exercise such a supervision over its servants in the prosecution of its business as to have reason to believe that it is being conducted in pursuance of such rules. *Wabash R. R. Co.* v. *McDaniels,* 107 U. S. 454; *Laning* v. *N. Y. Central R. R.* 49 N. Y. 521, 10 Am. Rep. 417; *Dowd* v. *N. Y. Ontario & Western Ry.* 107 N. Y. 459.

Other facts should have been left to the jury. *Lasky* v. *Canadian Pacific Railway Co.,* 83 Maine, 461; *Nugent* v. *B. C. & M. R. R.* 80 Maine, 62; Sherman on Negligence, 19; Cooley on Torts, 669; Thompson on Torts, 38; 2 Wood on Railroads, 2nd. ed. 1433; *Gaynor* v. *Old Colony & Newport R. R. Co.,* 100 Mass. 212; *Mayo* v. *Boston & Maine R. R.,* 104 Mass. 143; *Hankinson* v. *Lynn Gas & Electric Co.,* 175 Mass. 271; *Olsen* v. *Andrews,* 168 Mass. 261.

Plaintiff's intestate not a fellow-servant. *Shanny* v. *Androscoggin Mills,* 66 Maine, 420; *Smith* v. *Erie R. R. Co.,* 67 N. J. 636.

Statute 1893, c. 268, § 17, applies to cases of this kind, as well to employees as other persons, because the statute makes no exceptions.

Orville D. Baker and Arthur S. Littlefield, for defendant.

Condon, in setting the construction car in motion over the defendant's road, was wholly outside his contract of service, and his acts no longer bind the defendant. *Lima Railway Co.* v. *Little,* (1902), 67 Ohio St. 91, 13 Am. Neg. Reports, 431; *Demers* v. *Deering,* 93 Maine, at page 280.

The injury to the plaintiff's intestate was brought about not by lack of rules, but by neglect or disobedience of rules on the part of Condon. These rules are three in number: (1) Forbidding any car to be taken out by any department without express order or permission from Mr. Chisholm. (2) Related especially to the particular stretch of single track on which Condon placed his construction-car, and on which the accident happened. (3) If any car about to follow another car in the same direction, it was the duty of the conductor of the following car to notify the conductor of the car ahead, that he was about to follow; and then it was the duty of the conductor of the leading car to notify in turn the conductor of the car approaching in the opposite direction, as soon as he might pass that car at any turn-out; the approaching car, being thus notified that another car was to follow behind the one just crossed, was under the duty to wait upon that turn-out till the following car also had safely passed.

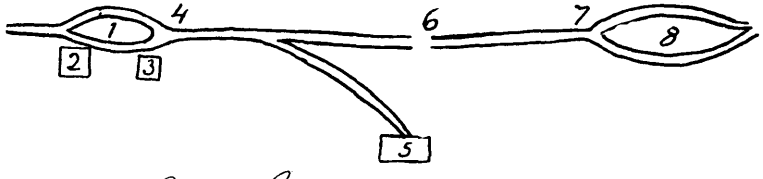
Counsel also cited: *Fluhrer* v. *Lake Shore Ry.,* 124 Mich. 482, 484; *O'Donnell* v. *Alleghany Valley Railroad Co.,* 59 Pa. St. 239; *Pa., etc., Railroad Co.* v. *Langdon,* 92 Pa. St. 21; *Waterbury* v. *N. Y. Central Railroad Co.,* 17 Fed. Rep. 671; *Galveston H. & S. A. Ry. Co.* v. *Slinkard,* 2 Am. Neg. Rep. 654, 44 S. W. Rep. 35.

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

POWERS, J. Action on the case for negligence. The plaintiff excepts to the ruling of the presiding justice directing a verdict for the defendant.

Moran, the plaintiff's intestate, was an employee of the defendant at the time of the injury. He was employed as a motorman and was just being taught his duties. At the time of the accident he was taking charge as a motorman of a passenger car running from Camden towards Rockland, another and experienced motorman being also upon the platform with him to oversee and instruct him in his new duties.

The accident was in the daytime and occurred by reason of a motor construction-car with a tower car attached being taken out of the upper car-barn, placed upon the main track, and run in the opposite direction to the intestate's car by one Condon assisted by one Ripley. Condon and Ripley were employed as linemen by the defendant. The duties of a lineman were to make such repairs as were called for and directed upon the over-head work of the system, that is, its poles and wires. On the day of the accident, Condon assisted by Ripley ran the motor car out of the upper car-barn and down a spur track to a junction with the main line, and then started it towards Camden, upon the main line which at that point consisted of a single track situated between two turn-outs, one turn-out at the lower car-barn and power-house, a few hundred feet towards Rockland from the junction with the spur track; the other turn-out, Oakland Siding, being some distance away towards Camden on the farther side of a hill which rose between the junction and Oakland Siding. Owing to this hill and a heavy fog which prevailed at the time, the two cars did not discover each other until too late to avoid collision. In the collision the plaintiff was injured and subsequently died of the injuries received. The situation may be better understood perhaps from the following rough sketch:



1 Car Barn Siding
2 Lower Car Barn
3 Power House
4 Signal Light
5 Upper Car Barn
6 Place of Collision
7 Signal Light
8 Oakland Siding

The plaintiff claims that the accident was due to the failure of the defendant corporation to make and enforce suitable rules and regulations, for the protection of those in its employ, regarding the running of the cars over its tracks. He avers that the defendant negligently and carelessly permitted its servants employed in the construction and repair of its machinery, apparatus, poles and wires to run cars at will over its track without ordinary direction and control.

Undoubtedly it is the duty of persons and corporations engaged in a dangerous and complex business to adopt, promulgate and enforce such rules and regulations, for the conduct of its business and the government of its employees in and about the discharge of their duties, as will afford reasonable protection to its servants and agents in the discharge of those duties. A failure to do so is negligence, and for an injury resulting from such failure the employer is liable. It is not necessary that such rules shall be printed. They may be simply oral; but whether oral or printed it is the duty of the employer to so promulgate them as to afford the employees a reasonable opportunity of ascertaining their terms. Knowledge of the rule however is sufficient. If the servant has such knowledge, it matters not how the rule was promulgated or the knowledge obtained. Moreover, the master in making rules is only held to the exercise of ordinary care. He is not bound to anticipate and guard against accidents which cannot be foreseen by the use of ordinary prudence. He is not called upon to make or promulgate rules as to how his servants shall conduct themselves outside of the scope of their employment, or as to how business shall be carried on or any act done which is not carried on or done by his knowledge and permission or consent either express or implied. It is for the conduct of his business and the government of his employees in and about the discharge of the duties of their employment that he is bound to make rules and regulations. When acting without his employer's authority and beyond the scope of his own employment the servant is as much a stranger to his master as is a third person, in regard to whose conduct as he has no power so he is under no obligation to make rules.

Applying these principles to the present case we find that the defendant had printed rules, the adequacy and sufficiency of which

are not questioned, for running passenger cars, but it had only oral regulations for the running of its construction-cars. Before any question can arise as to the sufficiency of such rules or the manner of their promulgation it is incumbent upon the plaintiff to prove, as he has alleged, that the act of Condon in taking out the motor construction-car and running it over the line on the day of the accident was done by the authority, permission and consent of the defendant.

It was not within the scope of his employment. He was a lineman or helper to the linemen. His duties were as stated by himself "repairing wire and trolley and one thing and another" to keep the line fixed up and in running order. He had nothing to do with the running of cars. The movement of cars upon the entire system was under the control of Mr. Chisholm the defendant's assistant superintendent, from whom also the linemen at this time took their orders as to their work. When it was necessary to transport the tower car from place to place in the repair work of the linemen, it was done by attaching it to a regular passenger car, which did not and could not interfere with the running of the other cars. If for any reason this was impractical or inconvenient, the motor car might be used, but only by the special direction of Mr. Chisholm. There is no evidence in the case that the linemen had any authority to take out the motor car upon their own judgment and inject it at will into the transportation system of the defendant. The only other time Condon ever took the motor car out upon the line, he obtained permission from Mr. Chisholm and followed his specific directions. Libby, who was with him and whose employment covered a similar period of time, never had taken the motor car out himself and stated that he had no authority so to do, and had nothing to do with that branch of the business. Without stating the testimony further it is sufficient to say, that a most careful examination of it fails to show any authority on the part of Condon or any other lineman, resulting from their employment, to run the motor car over the defendant's track except by special order from Mr. Chisholm.

It is not claimed that any such order was expressly given on the day of the accident, but it is contended that authority may be implied from the attendant circumstances. The accident occurred on Monday

afternoon. On the Saturday previous while Condon and Libby were out with the tower car attached to a regular passenger car, Mr. Chisholm told Condon to go and fix some wires up to the Highlands. He did not have time to do it Saturday and on Monday afternoon without any further conversation or notice to Mr. Chisholm, took the motor out upon the main line and was proceeding on his way to make these repairs when the collision took place. It is self-evident that notice to Chisholm of the movements of all cars was necessary to the safety of the defendant's passengers and servants. The instruction given by Chisholm on Saturday to Condon, who was then out making repairs with the tower car alone attached to a regular passenger car, can afford no basis for any inference of authority for Condon at some future time to run the motor car over the line without any notice to Chisholm who had charge of the running of all the cars upon the road. No such authority could have been intended to be conferred by Chisholm and none such could have been understood to have been received by Condon, who says that he supposed Chisholm had charge of letting out cars and directing whether any cars should be put upon the line outside of the regular passenger cars.

Condon at the time of the accident was acting outside the scope of his employment without the express or implied authority of the defendant, a mere volunteer for whose act it was not responsible and for whose government while so acting it was under no obligation to make rules or regulations. It may be observed, however, that the entire evidence conclusively shows that the accident was not due to any failure on the part of the defendant to adopt and promulgate suitable rules, but to the failure of Condon and Libby to observe and practice the rules, either as to giving notice to the preceding passenger car that the motor was about to follow it, or as to turning on or observing the signal lights which protected this section of the defendant's track, both of which rules they perfectly knew and understood and the observance of either one of which would have prevented the collision.

Exceptions overruled.

INHABITANTS OF PALMYRA *vs.* WAVERLY WOOLEN COMPANY.

Somerset. Opinion July 9, 1904.

Waters. Mills. Dams. Bridge, floated off by extraordinary freshet. *R. S., c. 94, §§ 1-2; 37-42.*

1. Under the Mill Act, R. S., c. 94, the limitation, if any, imposed upon the height of a dam by a prior highway bridge above on the same stream is only that the dam shall not be so high as to injure the bridge at the usual and ordinary stages of the water throughout the year including the usual recurring and to-be-expected freshets at different seasons as they occur in a series of years.
2. If a bridge is unfavorably affected by a dam below only in extraordinary and unusual freshets which occur but seldom in a long series of years, the dam is not of unlawful height as to the bridge.
3. It is not necessary that a freshet be unprecedented, or higher than any preceding freshet within memory, to constitute it an extraordinary and unusual freshet within the above rule.
4. In this case the prior bridge had stood uninjured by the dam below in all the freshets occurring for a decade, and was injured at last only in an extraordinary and unusual though not unprecedented freshet. The loss, therefore, must remain where it fell. The law does not shift it from the town upon the owner of the dam.
5. The case does not seem to be within the "Mill Act" §§ 37-42, providing for cases of flowage of a highway by a dam. The road was not regularly or periodically overflowed.

Motion and exceptions by defendant. Motion sustained. Exceptions not considered.

Action on the case for negligence of defendant in building a dam at its mill in Pittsfield, across the Sebasticook River, so high that in the freshet of April, 1901, it raised the water and carried away a bridge in Palmyra on the same stream, to the damage of plaintiff. The verdict was for plaintiff for $1,751.51.

The case is stated in the opinion.

Forrest Goodwin, for plaintiff.

"One who builds a dam in a stream is bound to build and maintain it as reasonable men can foresee shall be necessary to meet the

ordinary contingencies and demands of nature, and cannot be held liable for those extraordinary visitations, whose comings could not have been anticipated or guarded, by the exercise of ordinary foresight." 13 Am. & Eng. Enc. of Law, 2nd ed. 696.

"Whether the flood was of such an extraordinary character as to relieve the defendants from liability, is a question of fact, to be determined by the jury, after proper instructions from the court." 13 Am. & Eng. Enc. of Law, 2nd ed. 696.

In *State* v. *Ousatonic Water Co.*, 51 Conn. 137, the court say, "When the defendants built their dam they were bound to know the habits and peculiarities of this river — what effects had been produced along its banks by its ordinary freshets in the spring of the year, when the ice breaks up; they were bound to notice the configuration of the shore, the contracted space at places for the waters of the river to pass, the formation of ice dams, and so far as science could reasonably discover, what would be the effect of a pond created by raising the water twenty-two feet above the natural flow of the stream at the place where the dam was erected, and they were bound to act in view of all these facts. The defendants were bound to provide against all the natural result of ordinary freshets in the river, whenever they might occur, and with whatever ordinary combination of circumstances they might be attended."

In *Gulf Ry. Co.* v. *Pomeroy*, 67 Texas, 501, where it appeared that a flood occurred in 1852, similar to the one occurring in 1885 and no flood intervened in the meanwhile, an action was founded on the injury caused by the flood in 1885. It was held that there was sufficient evidence to warrant the jury in finding that the 1885 flood might have reasonably been anticipated.

The jury found that reasonable, prudent men, in the exercise of ordinary prudence and common sense, would not have built a dam which raised the water so much at the bridge, and left it in that condition; and that, if they did do that, that they were not exercising reasonable prudence, such as the law requires; and they found that the sole cause of the destruction of the bridge was the dam built by the defendants.

J. W. Manson and Geo. H. Morse, for defendant.

The freshet was so much higher than any freshet that ever occurred on this river, that we are not bound to have anticipated it. *Lawler* v. *Baring Boom Co.*, 56 Maine, 443; *Topsham* v. *Lisbon*, 65 Maine, 449; *Smith* v. *Agawam Canal Co.*, 2 Allen, 355. Other dam owners above by their acts, after our dam had been built, changed the flow and condition of the stream so that it actually caused this bridge to go out, and we were not bound to have anticipated and guarded against these changes. Our dam was built with overflow and escape capacity enough to take care of all the water that could come to it in freshet times and was doing so. The water did not choke at the dam and retard the stream so as to cause this loss.

The injury was caused by a piece of ice formed where we had a right to flow, which was taken by the wind into the stream against this bridge and destroyed it. The defendant cannot be held liable for merely retarding the current without making every dam owner an insurer against all possible damage from high water.

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

EMERY, J. From the evidence for the plaintiff and from the uncontradicted evidence for the defendant we find the following to be established as the material facts:—

In pursuance of its statutory duty the plaintiff town, Palmyra, about the year 1880 built a highway bridge in that town across the Sebasticook River, a stream not navigable. Afterward in 1891, at a point on the river three and one-eighth miles below this bridge, the defendant erected and has since maintained on its own land a dam across the river as authorized by the "Mill Act," R. S., chapter 94. This dam was about ten feet high above the bed of the river. With the water even with the top of the dam the level of the water ran out about a mile above the dam. With two and a half feet of water running over the dam the level ran out about two miles above the dam and one mile below the bridge. At this latter stage of the water the surface of the water at the bridge was ten inches higher

than at one mile below. At a normal pitch of the water its surface under the bridge was some four feet below the lowest part of the bridge. The flowage caused by the dam extended up the river for some distance above the bridge.

Through all the periodical freshets, spring, fall and winter for the ten years after the dam was built, from 1891 to 1901, no harm came to the bridge from freshets, the water not troubling it. In April, 1901, however, there occurred on this river as on many other rivers in the State a very unusual freshet. The like had not been known on that river since 1887 and had seldom occurred during the century, though the freshet of 1887 and perhaps one or two previous ones had been as high or even higher. Though very unusual it was not unprecedented. In this freshet of 1901 the water of the river rose suddenly and so high that at the bridge it reached the bottom of the structure, and the cakes of ice floating down struck the bridge and threw it down into the river. There was no evidence that the defendant company did not exercise all due diligence to give the freshet free vent through the gates and waste ways of the dam. The only complaint was that the dam was too high.

Under these circumstances does the law shift the loss from the town to the owner of the dam, or does it leave the loss where it fell? The answer is to be found in a consideration of the limitations upon the right given by statute, R. S., ch. 94, to riparian owners upon streams not navigable to erect and maintain dams for the purpose of operating mills. The right is given in the broadest terms with no limitation as to the height of the dam, except that it shall not be so high as to injure prior mills on the same stream. *National Fibre Board Company* v. *Lewiston & Auburn Electric Light Company*, 95 Maine, 318, 321. There is no such express prohibition in the statute against maintaining the dam so high as to injure prior bridges, and the question has been mooted whether such a prohibition is implied; whether, on the contrary, the town is not obliged to raise its bridges as water power is developed under the statute.

But, ignoring this question and conceding arguendo without deciding that the statutory right of the riparian owner to erect dams on his land for manufacturing purposes is limited to some extent by the

height of a prior bridge above on the same stream, we think the limitation as to height is only that the dam shall not be so high as to injure the bridge at the usual and ordinary stages of the water throughout the year, including the usual recurring and to-be-expected freshets at the different seasons as they occur in a series of years. *China* v. *Southwick*, 12 Maine, 238; *Smith* v. *Agawam Canal Co.*, 2 Allen, 355. If the production of water power must be so limited that low bridges will not be affected by extraordinary and unusual freshets which occur but seldom, a few in a century, the development of industries dependent upon, or facilitated by, water power will be often greatly hampered, if not absolutely prevented, to the great loss of the public.

Applying even this rule to the case at bar, the defendant company's dam was not an unlawful structure nor of unlawful height. The bridge was not injured by the highest water of any freshet for a decade. The freshet, in which it was carried away by the ice brought down by the current, was a very extraordinary one, caused by unusually heavy rains at the season of melting snows. This was to human ken a fortuitous and very infrequent combination of powerful natural causes, unusual and unexpected. The resulting loss must, therefore, remain where it fell.

It may be observed that this is not a case of regular flowage of a road by a dam. Nothing was regularly or periodically overflowed. Hence the case is not within the purview of those decisions maintaining actions by towns for flowing out the roads they were by statute obliged to maintain. Again, it is not a case where the dam must be lowered, or the road raised, in order to use and keep the latter open for travel. This is a case of a bridge only, and not only was the bridge not regularly or periodically overflowed by the dam, but it was not overflowed even at this unusual and unexpected juncture. The water simply rose so high under the bridge that cakes of floating ice struck the bridge and pushed it from its piers. The case, therefore, does not seem to be within sections 37 to 42 inclusive of the Mill Act, (ch. 94, R. S. of 1904) providing for cases of flowage of a highway.

Motion sustained. Verdict set aside.

SAMUEL J. KIDSON *vs.* CITY OF BANGOR.

Penobscot. Opinion July 9, 1904.

Drains and Sewers. Laying out. Maintenance and Repair. Overflow. Deviation in construction from formal laying out. *Evidence. Municipal officers,* judicial action by. *Record,* Evidence dehors not admitted. *Special Assessments,* for sewers. *City of Bangor. R. S. 1903, c. 21, § 18. Stat. 1850, c. 153, § 1. Priv. & Spec. Laws 1887, c. 242, § 3.*

In order to recover against a municipality for violation of R. S., c. 21, § 18, requiring proper maintenance and repair of public drains and sewers, the plaintiff must establish the following propositions:

1st. That the drain in question was a public drain or sewer, one legally established by act of the municipal officers of the city.

2nd. That the plaintiff was a person entitled to drainage through it, not a mere trespasser, but one who had fulfilled the requirements of law which were conditions precedent to the enjoyment of the right of drainage.

3rd. That the defendant had failed to maintain the sewer, or to keep it in repair, so as to afford sufficient and suitable flow for all drainage entitled to pass through it. And on this point, it must be shown that the defect was not in the original system established by the judicial act of the municipal officers, but that there was an actual failure on the part of the city to maintain and keep the drain in repair after its construction.

4th. That the plaintiff suffered injury from this neglect of the city to properly repair and maintain the sewer.

Judicial acts of such boards as county commissioners or municipal officers, which might result in taking private property for public use, must be done with due formality and entered of record.

Presumptively the record of such judicial action by the board of municipal officers shows the full proceedings. Parol evidence cannot supply, extend or modify the record.

The board of municipal officers of the City of Bangor passed an order July 13, 1889, instructing the superintendent of sewers to cause a public sewer to be constructed in Hammond Street to Pier Street westerly to the lot of one Thompson. No record appears showing any petition to, or precedent action by, the municipal officers for any sewer to be constructed on

Wing Street, the location of the drain into which the plaintiff subsequently entered. There was evidence tending to show that in constructing the sewer it was found convenient, owing to a ledge in Hammond Street to deviate from the proposed authorized location and take a more practicable one passing through a portion of Wing Street and past the premises of the plaintiff. There appears no recorded action of the municipal officers authorizing this change. The mayor was allowed to testify that an order was formally passed by the municipal officers directing the construction of the sewer on Wing Street. *Held;* that this testimony should have been excluded.

Since municipal officers in laying out drains and sewers act judicially under authority from the State, they are in no sense the agents of the city.

The city or its agents in charge of the maintenance and repairs of a drain or sewer after its completion are not in a legal sense continuing the same work commenced by the municipal officers in laying it out. They are accountable to different authorities and no privity exists between them.

There can be no subsequent ratification of a deviation from the original laying out of a sewer in cases where the original proceedings for the same must be in pursuance of statutory requirements. Hence, the recorded action of the municipal officers in accepting the report of the superintendent of sewers showing the completion of the sewer and assessing the benefits accruing to the plaintiff from its construction, cannot be received in evidence to prove ratification of acts otherwise unauthorized.

Subsequent ratification or acquiescence by the city, even to the extent of accepting payment of the assessment levied on the plaintiff's premises for sewer purposes, cannot cure a substantial defect or omission in the action of the board of municipal officers in laying out a sewer.

The presentation to the board of municipal officers of a petition signed as required by statute, is a jurisdictional fact which must be made to appear in order to show a proper and legal laying out of a sewer.

Held; that the provisions of Spec. Laws of 1887, c. 242, § 3, relating to the entry of private drains into common sewers in the City of Bangor, have reference to such public drains and sewers as are established and constructed by the direction and in accordance with the formal laying out of the board of municipal officers; and that no subsequent ratification or acquiescence by the city can cure a substantial defect or omission in the action of the board.

Held; *also*, that this special law cannot give the plaintiff any greater or different rights from those accorded by the general laws governing drains and sewers.

Motion and exceptions by defendant. Sustained.

Case to recover damages for alleged violation by defendant of the duty imposed on cities and towns by R. S., c. 21, § 18, to maintain and keep public drains and sewers in repair.

The plaintiff had entered a private drain from his premises at the corner of Wing Street and West Broadway, in the City of Bangor, into what he claimed to be a public drain or common sewer.

It appeared in evidence that the plaintiff paid to the City of Bangor, March 25, 1896, "for assessment for sewerage" on the premises alleged to have been damaged, $31.55. It was also in evidence that the superintendent of sewers of the city directed the plaintiff to enter his private drain with the sewer in question, which was done under his direction and to his satisfaction. It appeared by the records in evidence that the reports of the superintendent of sewers and the sewer board reporting the actual construction of the sewer in question through Wing Street instead of "in Hammond Street from Pier St. westerly to the lot of Fred L. Thompson" as originally and formally laid out, and assessing the property benefited, were considered by the municipal officers and the following records were appended to said reports:—

"In Board of Municipal Officers
Nov. 7, 1894.

Report accepted, assessments established & ordered that hearing be granted all persons assessed at the Aldermens' room Dec. 19, next, at 7.30, P. M.

Victor Brett, City Clerk."

"In Board of M. Officers Dec. 26, 1894.

Finally revised and amended by fixing all assessments at $31.55 each, and by abating assessment on lot No. 13 to J. A. Boardman, & als. amended finally established.

Victor Brett, City Clerk."

The plea was the general issue. The jury found a verdict for plaintiff in the sum of $318.33.

A. L. Blanchard, for plaintiff.

If the court should determine that the jury erred in their finding of the facts on this point, the plaintiff still contends that the city has ratified the acts of its agents, in the construction of the sewer on

Wing Street, by levying a sewer tax upon the property of the abutting owners, and accepting the amount of the assessment against the abutting owners and giving receipts therefor. Subsequent adoption and ratification is equivalent to original authority given. 1 Addison on Contracts, p. 108; *Partridge* v. *White*, 59 Maine, 564; *Combs* v. *Scott*, 12 Allen, 493; *Odiorne* v. *Maxcy*, 13 Mass. 178; *Pratt* v. *Putnam*, 13 Mass. 362; *Tucker* v. *Jerris*, 75 Maine, 188; Vol. 1 Am. & Eng. Ency. of Law, 1196; *Hastings* v. *Bangor House*, 18 Maine, 436; *Bryant* v. *Moore*, 26 Maine, 84, 45 Am. Dec. 96; Mechem on Agency, chap. 5, § 113.

Ratification may frequently be inferred from acquiescence or knowledge of all the material facts, or from acts inconsistent with any other suppositions. The same rule is applied to corporations as to individuals.

Dillon on Municipal Corporations, 4th ed., p. 539; *Lincoln* v. *Stockton*, 75 Maine, 146; *Otis* v. *Stockton*, 76 Maine, 506; *Pierce* v. *Greenfield*, 96 Maine, 350; Mechem on Agency, chap. 5, § 118; *Salem* v. *Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111; *Baker* v. *Cotter*, 45 Maine, 236; *School District* v. *Ætna Ins. Co.*, 62 Maine, 339; *Davis v. School District No. 2, in Bradford*, 24 Maine, 349; Vol. 1, Addison on Contracts, Morgan's ed. p. 109.

If the principal appropriates the proceeds of the trespass, ratification is properly implied. *Exum* v. *Brister*, 35 Miss. 391; *Sceery* v. *Springfield*, 112 Mass. 514.

The statute under which this action is brought was undoubtedly passed for the benefit of the property owners along the line of sewer, as it granted to them a privilege to enter the sewer under conditions which were not conferred upon them by general statute. The abutting owner could insist on a written permit to enter the sewer and the city would be obliged to grant the permit. The abutting owner could waive the written permit on being assured that they could make the entry without it. The city, by allowing the entry to be made without issuing a written permit, would not waive any of its statutory rights as it might properly do. The plaintiff could waive any or all of the formalities and have his rights protected.

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

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

PEABODY, J. The plaintiff commenced an action on the case against the City of Bangor to recover damages alleged to have resulted from the overflowing of a public drain or sewer in his premises. The wrong complained of was, following the language of R. S. 1903, chap. 21, § 18, the failure of the defendant to "constantly maintain said drain and keep it in repair so as to afford sufficient and suitable flow for all drainage entitled to pass through it." The statute provides that "if such town does not so maintain and keep it in repair, any person entitled to drainage through it may have an action against the town for his damages thereby sustained."

Upon trial before a jury a verdict was rendered for the plaintiff and damages assessed at $318.33.

This case is brought before the law court by the defendant on motion for a new trial and on exceptions.

To entitle the plaintiff to a verdict he must have established the following propositions:

1st. That the drain in question was a public drain or sewer, one legally established by act of the municipal officers of the City of Bangor. *Estes* v. *China*, 56 Maine, 407; *Darling* v. *Bangor*, 68 Maine, 108; *Bulger* v. *Eden*, 82 Maine, 352, 9 L. R. A. 205.

2nd. That the plaintiff was a person entitled to drainage through it, not a mere trespasser, but one who had fulfilled the requirements of law which were conditions precedent to the enjoyment of the right of drainage. Spec. Laws 1887, chap. 242, § 3; *Bulger* v. *Eden*, 82 Maine, 352 supra; *Evans* v. *Portland*, 97 Maine, 509.

3rd. That the defendant had failed to maintain the sewer or to keep it in repair so as to afford sufficient and suitable flow for all drainage entitled to pass through it. And on this point, it must be shown that the defect was not in the original system established by the judicial act of the municipal officers, but that there was an actual failure on the part of the city to maintain and keep the drain in repair after its construction.

4th. That the plaintiff suffered injury from this neglect of the city to properly repair and maintain the sewer.

There seems to be sufficient ground for the jury to have determined the 3rd and 4th of these propositions in favor of the plaintiff, although there is conflicting evidence as to whether the overflowing of the drain was the natural result of a system of drainage faulty in conception and construction, or was due to the subsequent addition of a number of catch-basins not contemplated in the original plan which, as it is claimed, did not intend to provide for the drainage of surface water. It being entirely reasonable for the jury to have concluded from the evidence that the injury was caused by the negligence of the city in the maintenance of the sewer after it had been laid out and constructed, they would naturally come to the further conclusion that the plaintiff had sustained damage in consequence of this negligence.

It seems probable that the jury in considering this branch of the case failed to give due weight to the first two propositions. In respect to the plaintiff's right of drainage through this sewer upon which his claim for damages is necessarily founded, the evidence shows no literal compliance with the terms of the statute or the city ordinances. His permit to enter the sewer was admittedly only verbal; but he claims that by virtue of § 3, chap. 242 of the Spec. Laws of 1887 relating to drains and sewers in the City of Bangor, he had a right to enter the sewer, and that the formality of a written permit was waived, or at least the omission of this formality was cured by subsequent ratification by the city in receiving his assessments, and otherwise acquiescing in his connection with the sewer. The special law relied on as giving the plaintiff greater and different rights from those accorded by the general laws provides as follows: "Any person may enter his private drain into any such public drain or common sewer, while the same is under construction and before the same is completed, and before the assessments are made, on obtaining a permit in writing from the municipal officers, or the sewer board having the construction of the same in charge. . . ." Spec. Laws, 1887, chap. 242, § 3.

Whether this statute placed the plaintiff on the footing claimed by him in respect to his entry of the sewer, or whether there could be a waiver of the written permit required by the law or a subsequent

ratification by the city of the informal or unauthorized acts of its agents under the circumstances indicated, are questions of serious importance. They were decided in favor of the plaintiff by the jury, and perhaps correctly under the instructions of the court. This need not however be determined under the motion for a new trial, as the subject may more properly be considered, if found necessary, in discussing the exceptions. But a consideration of the remaining point reveals a lack of competent proof which is conclusive of the case.

The special law just referred to, as well as the general statute, deals explicitly with public drains and sewers. These are such as are established and constructed by the direction and in accordance with the formal action of the board of municipal officers. No subsequent ratification or acquiescence of the city can cure a substantial defect, or omission in the acts of this board. As these officers act judicially under authority given them by the state to lay out public drains and sewers, they are in no sense agents of the city; and the city or its agents subsequently in charge of the maintenance and repair of such drains and sewers are not in a legal sense continuing the same work commenced by the municipal officers. Such officers and such city agents are accountable to different authorities and no privity exists between them. It is clear, therefore, that the plaintiff must establish as one of the elements of his right of action, the formal and legal laying out and construction of the Wing Street sewer by the municipal officers of Bangor as a public drain or sewer. This he has failed to do. On July 13, 1899, an order was passed in the board of municipal officers instructing the superintendent of sewers to cause a public sewer to be constructed in Hammond Street from Pier Street westerly to the lot of one Fred L. Thompson. No record appears of the sewer to be constructed in Wing Street, the location of the drain into which the plaintiff subsequently entered. There is evidence tending to show that in constructing the sewer it was found convenient, owing to the ledge in Hammond Street, to divert it from the proposed and authorized location by a circuitous but more practicable way, passing through a portion of Wing Street and by the premises of the plaintiff. There appears no recorded action of the municipal officers authorizing this change. Mayor Beal was allowed

to testify that an order was formally passed by the municipal officers directing the construction of the sewer on Wing Street, but there was no other evidence of formal action by the board relating to the construction of this sewer. It is apparent, therefore, that the jury either relied upon the testimony of the mayor in the absence of the record of the municipal officers, or attached too little importance to the circumstance that the drain was constructed without the necessary action of the only authority competent to make it a public sewer, and their verdict is wrong unless justified by the testimony of Mayor Beal. They were certainly not authorized to find from his testimony facts which, in connection with other evidence introduced by the plaintiff, it had a tendency to disprove. In reply to a question as to the passing of an order by the board of municipal officers in reference to the laying out of a system of sewers described, he says the one on Hammond Street and Wing Street was ordered; but the order introduced in evidence, in reference to which the answer was apparently made, does not include the construction of a sewer on Wing Street, and shows that the witness was probably mistaken. Nor were they justified in finding the jurisdictional fact of which there is no evidence, that a petition for the construction of this sewer had been presented signed as required by statute. Dillon on Municipal Corporations, § 800; Lewis on Eminent Domain, § § 342—62.

The defendant city in its bill of exceptions presents three grounds of objection to the ruling and charge of the presiding justice.

1. Parol evidence in the testimony of Mayor Beal was admitted to prove that authority was given by the municipal officers for the construction of the sewer on Wing Street of which there is no record on the books of the city.

The charge of the presiding justice in reference to this point was very explicit. It was assumed as not in controversy, that there is no public record on the books of the city of the passage of any formal order by the municipal officers authorizing the construction of a sewer on Wing Street; and the attention of the jury was specially called to the testimony of Mayor Beal, and in connection therewith, they were instructed that if they found that the municipal officers did in fact by any vote or order authorize the construction of this sewer,

as stated by him, although not recorded by the city clerk, they would be justified and warranted in reaching the conclusion that the municipal officers authorized its construction. It is true that parol evidence may be received in some cases to supplement a record. *Inhabitants of West Bath, Petitioners* v. *County Commrs.*, 36 Maine, 74; *Smith et al, Petitioners* v. *County Commrs.*, 42 Maine, 395; and to show to what subject the action of a corporation applies, *Baker* v. *Inhabitants of Windham*, 13 Maine, 74. It is also admissible in special proceedings instituted for the purpose, to correct errors in a record, *Willard* v. *Whitney*, 49 Maine, 235; or if the record is destroyed or lost, to prove its purport, *Gore* v. *Elwell*, 22 Maine, 442. But the authorities fairly establish the rule, that judicial acts of such boards as municipal officers or county commissioners, which might result in taking for public use the property of individuals, as in laying out highways, streets and sewers, must be done with due formality and entered of record; that the record by presumption of law shows the full proceedings; and that parol evidence cannot supply, extend or modify the record, and is inadmissible to prove the action of these boards. *Crommett* v. *Pearson*, 18 Maine, 344; *City of Lowell* v. *Wheelock*, 11 Cush. 391; *City of Covington* v. *Ludlow*, 1 Met. (Ky.) 295; *City of Lexington* v. *Headley*, 5 Bush, (Ky.) 508; *City of Delphi* v. *Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Mayhew* v. *District of Gay Head*, 13 Allen, 129; *Morrison, Admx.* v. *City of Lawrence*, 98 Mass. 219; *Jordan* v. *School District No. 3*, 38 Maine, 164; *Moor* v. *Newfield*, 4 Greenl. 44; *Methodist Chapel Corp.* v. *Herrick*, 25 Maine, 354; *Cabot* v. *Britt*, 36 Vt. 349; *Anderson* v. *Commrs. Hamilton Co.*, 12 Ohio St. 635.

2. The jury were instructed that if a vote or order of the municipal officers authorizing the construction of this sewer on Wing Street, as stated by the mayor, although not recorded by the city clerk, became a matter of record by reason of the report of the superintendent of sewers as to the building of the sewer and the assessment of the cost against abutting owners and the adoption of that report by the municipal officers, they would be justified in reaching the conclusion that the municipal officers authorized the construction of the sewer on Wing Street, because a subsequent ratification is equivalent to original authority.

The recorded action of the municipal officers in accepting the report of the superintendent of sewers cannot by implication or presumption prove a judicial act of the municipal officers, nor indirectly ratify acts otherwise unauthorized. Furthermore, there could be no ratification even by direct vote, where in cases like the one under consideration, the proceedings must be in pursuance of the requirements of a statutory enactment. Dillon on Municipal Corporations, § 463. It must therefore be held that the evidence admitted, which alone tended to show that this sewer was legally built, was inadmissible.

This conclusion renders it unnecessary to decide as to the correctness of the third ground of exception to the ruling of the presiding justice, namely: that the requirement of a written permit could be waived, and that the authority of the plaintiff to enter a public sewer might be given by the municipal officers orally.

Motion sustained. Exception sustained.

MEMORANDUM.

The term of Charles Hamlin as Reporter of Decisions expired July 22, 1904, and the remainder of this volume will be completed by his successor.

HERBERT C. BUTLER

vs.

ROCKLAND, THOMASTON AND CAMDEN STREET RAILWAY.

KNOX. Opinion July 26, 1904.

Street Railway Company. Its rights and duties. Speed of cars. Due care. Contributory and contemporaneous Negligence.

1. A street railway company has the lawful right to operate its railway in the location where it has been placed, and run its cars singly or in trains upon the track; but it is its duty to do so, having due regard to the safety, not only of travelers upon the street, but of those who may have occasion to cross the track in driving out from the yards of houses situated along the railway.
2. The speed at which a car or train may properly be run, the kind of control over it, and the degree of watchfulness imposed upon those in charge, must depend to some extent upon the surrounding conditions, such as the nearness of the track to the side of the street and to the houses, the likelihood of persons driving out from the yards, and whether the driveways are so situated that persons driving out over them can see or learn of the approach of cars in season, with due care, to avoid collision. The railway company and its servants have a right to assume that all such persons will themselves be in the exercise of ordinary care.
3. It is the duty of a street railway company at all times to use due care in view of apparent dangers and those which may reasonably be expected, so to regulate the speed of its cars, so to have them under control and so to be on the lookout for teams about to cross, that those in the teams, if they themselves are in the exercise of due care, shall not be put in jeopardy.
4. The person in charge of the car must exercise due care and judgment, and the movements of the car must be regulated with reference to the apparent situation. If it be apparent that a collision is likely to occur, it is the duty of the servant in control of the car to be ready to use, and to use, if necessary, and when necessary, all practicable means to prevent it.
5. Applying the foregoing rules to the evidence in this case, *Held:* That the jury were warranted in finding that the defendant was negligent.
6. But the evidence also shows that the plaintiff was clearly negligent and that his negligence contributed to the injury. And in such a case, where the plaintiff is guilty of contributory negligence, he must fail unless it

appears further that after the plaintiff's negligence, independent of and distinct from any prior negligence of his own, the defendant was negligent, and that this negligence was the proximate cause of the plaintiff's injury. It must appear that at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes.

7. *Held;* that the defendant's negligence was not subsequent to and independent of the plaintiff's contributory negligence, but that it was contemporaneous with it and operated to produce the result in connection with the plaintiff's negligence, and not independently of it; that the plaintiff's negligence actively continued from a point about twenty feet from the railway track, where he first had opportunity to see the approaching train of the defendant which was not more than two hundred feet away, to the point of collision, and that it was operative to the last moment, and contributed to the injury as a proximate cause.

8. The doctrine of prior and subsequent negligence is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous.

On motion for new trial by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by plaintiff in a collision between defendant's cars and the team in which plaintiff was riding.

Plea, general issue. Verdict for plaintiff for $8,157.50.

The facts, so far as material, are stated in the opinion.

J. E. Moore and D. N. Mortland, for plaintiff.

Arthur S. Littlefield and Orville D. Baker, for defendant.

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

SAVAGE, J. Case for damages for personal injuries sustained in a collision between the defendant's cars and the team in which the plaintiff was riding. The plaintiff obtained a verdict which the defendant, on motion, seeks to have set aside.

It appears that the line of the defendant's railway in Rockport, at the point where the collision occurred, lies on the easterly side of the highway, and the outer rail, towards the sidewalk, is nineteen feet from the south-westerly corner of a house known in the case as the Shepard house. By the driveway leading easterly from the street by the southerly side of the Shepard house to the yard, the

distance from the rail to a point opposite the corner of the house is twenty feet. Standing at the corner of the Shepard house, and looking northerly towards Camden the first object or obstruction to vision is a trolley pole about eighty-four feet from the center of the driveway, and the ordinary distance easterly from the rail. One hundred and thirty-one feet further on in the same direction is another trolley pole, and on each side of the pole a tree a foot and a half in diameter. The trees were each about ten feet from the pole, were in line with it, and trees and pole were about parallel with the railway track. These trees and pole partly obscure a view of the track. One hundred feet further on, or three hundred and fifteen feet from the center of the driveway is a third trolley pole. Between the second and third poles, but easterly, and upon the easterly side of the road, is a house called the Burgess house. There are three slight curves in the railway track, and beyond the Burgess house, near the third pole spoken of, the house obstructs the view and the track passes from the sight of an observer who may be at the corner of the Shepard house. So much for the physical situation about which there seems to be no controversy.

On October 2, 1902, the plaintiff, who was a clerk in a grocery store, was driving a covered delivery wagon. The cover extended so far forward as the front edge of the seat, and rose perpendicularly, and so over to the other side. The effect was that the plaintiff, if sitting on the seat, could not look out at a right angle without leaning forward. He started from Rockport village, which is southerly from the Shepard house, and drove to that house where he called. He testified that on his way he met one of the defendant's passenger cars proceeding from Camden towards Rockport. These cars run half hourly. He drove into the yard on the southerly side of the Shepard house, made a delivery of goods, returned to the wagon, took his seat, turned and drove out westerly towards the street. The plaintiff testified that as he came out of the yard, he looked southerly in the direction of Rockport, having in mind the car which naturally would cross the one he had met, at Eells crossing, further to the south, and would be coming towards the Shepard house; also that when he reached the corner of the Shepard

house he pulled up the reins a little and leaned forward a little and looked northerly on the track towards Camden, that he did not see any cars, nor hear any, nor hear any bell or gong, that he then settled back upon the seat and drove on to the track, and that his horse was walking all the time.

Meanwhile, a train of the defendant's cars loaded with lime rock was being propelled southerly from a quarry, past the Burgess house, and the trees which have been spoken of, towards the driveway at the Shepard house, on its way to the lime kilns in Rockport. The train consisted of three rock cars pushed by a motor car in the rear. Each rock car was thirteen and one half feet in length and the motor car was nineteen feet. The length of the train was in all fifty-nine and one half feet. The weight of the train was approximately thirty-two and one half tons. Just as the plaintiff's wagon was over the rails at the driveway, it was struck by the forward rock car, and the plaintiff was thrown out and seriously injured. The wagon was thrown forward to the left hand, but the horse on the right apparently was not touched. The car itself was derailed. The train pushed it along about twenty-five feet before it stopped.

The plaintiff claims that the train was traveling at the rate of at least sixteen miles an hour, while he himself was going at the rate of not more than two or two and a half miles an hour. The defendant claims that the train was moving only from six to eight miles an hour, and that the plaintiff drove his horse down the driveway at a quick trot, say six miles an hour, slowing somewhat as he approached the track.

Beyond an estimate of the speed at which the train was moving several hundred feet before the driveway was reached, the plaintiff introduced no direct testimony respecting the movements of the train. But the defendant's witnesses, the trainmen, testified in effect, that the train had reached a point fifty or sixty feet from the driveway, when the plaintiff's horse appeared from behind the Shepard house, going towards the track at a trot, that the brakeman on the front end of the front car instantly shouted and signalled to the motorman to stop, and that the motorman at once reversed the action of the motor, the effect of which was to reduce the speed of the train so suddenly

that the front brakeman was thrown from the car, and this, he says, was at almost the same instant that the car struck the wagon. He also testified that the collision occurred before he had time to set his brake, the chain of which was slack at the time. The witnesses also testified that the gong on the motor car was ringing, and had been ringing for several hundred feet back. They estimated the speed of the train at from six to eight miles an hour, and testified, that by reversing the motor, the most efficient process known, the train could be stopped in from seventy-five to one hundred feet.

The burden was upon the plaintiff to show that his injuries were caused by the negligence of the defendant or its servants, and that no want of due care on his part contributed to the injury, or, if he himself was guilty of contributory negligence, that some distinct and later negligence of the defendant was the proximate cause of the injury. *Atwood* v. *Railway*, 91 Maine, 399. The defendant contends that it is so clearly manifest that the plaintiff has not proved any one of these essential propositions that the court is required to set the verdict aside, to prevent a miscarriage of justice.

I. Was the defendant or its servants guilty of negligence? Or to state the question more accurately, were the jury justified in finding them guilty? In finding them so, is their conclusion unmistakably wrong? The court is not required, or even permitted, to set aside a verdict merely because the jury came to a conclusion different from that to which the court would have come. The jury have the right for themselves to determine the credibility of witnesses, to determine how far their stories are true, and from the truth of statement thus ascertained, to make all legitimate inferences, and unless their conclusions are palpably wrong, their verdict cannot be disturbed.

This defendant had a lawful right to operate its railway in the location where it was placed, and to run its cars singly, or in trains, upon its track, but it was its duty to do so, having due regard to the safety, not only of travelers upon the street, but of those who might have occasion to cross the track in driving out from the yards of houses situated along its railway. The speed at which a car or train

may properly be run, the kind of control over it and the degree of watchfulness which is imposed upon those in charge, must depend to some extent upon the surrounding conditions, such as the nearness of the track to the side of the street, and to the houses, the likelihood of persons driving out from the yards, and whether the driveways are so situated that persons driving out over them can see or learn of the approach of cars in season, with due care, to avoid collision. The defendant and its servants had a right to assume that all such persons would themselves be in the exercise of ordinary care. While as was said in *Flewelling* v. *Railway*, 89 Maine, 593, "Electric street cars have in a qualified way at least the right of way as against persons on foot or traveling with carriages and teams in the same manner as ordinary steam railroads have," yet we think it is only "in a qualified way." The movements of their cars and trains are more easily and quickly controlled than are those of steam railroads. The speed at which they may properly travel along the highways is much less than the ordinary speed of steam railroads. Instead of a right of way exclusive except at crossings, they exercise their right of way in a public thoroughfare, to which many people must have access from their houses. And this access to the highway must in many cases, as in this, be had across the railway tracks. "Travelers with teams and proprietors of street cars still have concurrent rights and mutual obligations." *Atwood* v. *Railway*, supra.

In fine it was the duty of the defendant to this plaintiff at the time in question to use due care, in view of apparent dangers, and of those which might reasonably be expected, so to regulate the speed of its cars, so to have them under control, and so to be on the lookout for a team about to cross the track, that the plaintiff, if he was himself in the exercise of due care, should not be put in jeopardy. We do not mean to be understood as saying that a street railway company must stop or slacken the speed of its cars every time a person is seen to approach the track with apparent intent to cross it. It may properly be assumed that the traveler, if far enough away to cross safely, will continue his movements and cross in front of the car, or if not far enough away, and if warned of the approach of the car, that he will stop and let the car pass first. The person in

charge of the car must exercise due care and judgment, and the movements of the car must be regulated with reference to the apparent situation. *Tashjian* v. *Worcester Street Railway*, 177 Mass. 75. If it be apparent that a collision is likely to occur, it is the duty of the servant in control of the car to be ready to use, and to use, if necessary, and when necessary, all practicable means to prevent it. Nothing less is due care.

Now to apply these general propositions of law to such conclusions of fact as we think the jury were warranted in finding in this case. In doing this, we must, as in all cases upon motion for a new trial, take those conclusions most favorable to the verdict, provided the jury were justified in finding them. We think that the jury might have found properly that the train of cars was running much faster than six or eight miles an hour, perhaps as fast as sixteen miles an hour, and that the plaintiff was traveling at no greater speed than two or three miles an hour. If so the plaintiff's horse came within the range of view of the defendant's brakeman when he was more than two hundred feet distant from the driveway. In such case it was the duty of the brakeman to use due care in keeping watch of the movements of the horse. Nevertheless the jury might have found that the brakeman did not in fact discover the horse approaching the track until the train was only fifty or sixty feet from the crossing, when it was too late to stop the train before reaching the crossing. The jury might have found that no steps were taken to reverse the motor until the forward car reached the crossing. They might have found that to run a train of cars as fast as this one was run, with such momentum as this one had, with slack brakes, in such proximity to the Shepard house and driveway, was dangerous, and that in doing so the defendant was negligent. They might have found, as we shall notice later, that while the plaintiff was driving towards the track, apparently ignorant of the approach of the train, the defendant's servant whose duty it was to watch, had a full opportunity to see him more than two hundred feet away, and yet negligently failed to discover him until fifty feet away, when he had not even time to set his brake before the collision. They might have found that the motor was not reversed as quickly as it ought

to have been after the plaintiff was discovered. Surely if these conclusions were warrantable, and we think they were, it cannot be said that the verdict of the jury establishing the negligence of the defendant was so far unmistakably wrong.

2. Was the plaintiff guilty of contributory negligence? We think it is demonstrable that he was. He says that upon passing the corner of the house, he leaned forward, looked to the north but saw no car and heard no bell or gong. From all the testimony in the case, aided by photographs which witnesses on both sides say represent the situation correctly, it is clear that the plaintiff at the corner of the house could have seen the track at least three hundred feet distant, and the body of a car a further distance still. It is argued that his vision was interrupted while the train was passing behind the trees near the second telegraph pole, about two hundred feet north of the driveway, and that this accounts for his not having seen the train. But we think the evidence shows clearly that at no time could the entire train of three cars and motor, all fifty-nine and one-half feet in length, have been hidden by the trees, and that there was no time after the train first came in sight north of the Burgess house that the cars or some of them were not in plain sight to a person looking from the corner of the Shepard house. If we take the estimate of speed, both of himself and of the train, as contended for by the plaintiff, he will not be aided. He says his horse was walking. His counsel urge that the speed should not be estimated as greater than two miles an hour. We cannot see how it could be less, and if more it would only show that the train was still nearer than he contends. His claim is that the train was traveling at the rate of at least sixteen miles an hour. If so, the train was traveling eight times faster than he was. While he was going the twenty feet to the railway, the train would have passed over one hundred and sixty feet. In other words when the plaintiff was at the corner of the house, the head car of the train was one hundred and sixty feet from the crossing. It was in plain view, with nothing to obstruct vision, except one trolley pole. If we assume that the train was going at the rate of twenty miles an hour, it was traveling ten times faster than the plaintiff, and would have been two hundred

feet from the crossing when the plaintiff says he looked. But at two hundred feet the forward cars at least must have been in plain view of the plaintiff. For the train to have been beyond the sight of the plaintiff when he says he looked, it must have been traveling more than thirty miles an hour, in order to reach the crossing when he did. But there is nothing in the case which warrants any such estimate of speed. If the train was traveling at a speed less than sixteen miles an hour it must have been still nearer the crossing when the plaintiff came by the corner of the house.

Coming back to the evidence in the case, and taking the contentions of the plaintiff's counsel as to speed, we are forced to one of two conclusions, — either that the plaintiff, if he looked for cars, saw the train less than two hundred feet away and moving towards the crossing; or that he did not look at all to the north. We do not think it possible under the given conditions that he could have looked, as he says he did, without seeing the train, and it seems incredible, if he looked and saw the train, that he would have proceeded in the manner he did. In our view it is immaterial which horn of the dilemma is the true one. The plaintiff's conduct, his sitting back on the seat of the wagon where he could not see the track, his driving at a walk as he says right in front of the coming train, his apparent indifference to the train, all point to the conclusion that he was not aware of the proximity of the train, as he would necessarily have been if he had looked.

While the rule that a traveler must look and listen before passing over a railroad crossing has been held not applicable to street railroads, *Fairbanks* v. *Railway*, 95 Maine, 78; *Warren* v. *Railway*, 95 Maine, 115, still it is necessary that a traveler approaching a street railroad crossing is bound to exercise some care to avoid danger of collision. He must exercise ordinary care, the care of an ordinarily prudent man, in view of all the existing conditions. He must take into account the probability of cars being near at the time, and the opportunities for observing them. He must have regard to his own speed, and must take some notice of the apparent speed of the approaching car, if seen. It is not necessarily negligence for a traveler to cross a track in front of an approaching car, even if he has

misjudged its distance and speed, *Coleman* v. *Railway*, 181 Mass. 591; *Driscoll* v. *Railway*, 159 Mass. 142. Whether a traveler in such a case is negligent depends upon the facts in that case. But he must exercise due care and judgment about it. He cannot sit under cover and not look, or if he looks, not see a car plainly before his eyes, and have no care whatever, and then say he has fulfilled the measure of the law.

The plaintiff owed it to himself and to the defendant to exercise reasonable care to anticipate and avoid a collision. If the plaintiff saw the train of cars approaching the crossing, less than two hundred feet away, as we think he must have done if he looked, and then settled back into his seat out of sight of the cars, and drove onto the track at a walk, without taking any care to observe the further approach of the cars, it was a reckless proceeding on his part, and we think it impossible to hold that he was not negligent.

On the other hand, if he drove out of the yard without looking, or ascertaining in any way whether cars were near, or without doing any act or employing any sense in an endeavor to ascertain whether crossing the track would be safe or otherwise, we think he was negligent. Upon this hypothesis the case shows that the plaintiff did not see, but that he sat back under the cover of his wagon where he could not see. He was clearly inattentive, for he did not know of the train at all until the moment of collision. He did not even hear the buzz of the electricity which must have been audible at some distance to an attentive ear. It is no answer to say that the plaintiff was justified in his inattention by the fact that no regular car was due there at that time, for it appears that the plaintiff knew that the defendant was running trains of lime-rock cars. These trains were run at irregular times,—sometimes before a passenger, sometimes after,—and sometimes, with a greater interval, between regular cars. And in any event the defendant had the right to run cars when it chose, and it was the duty of the plaintiff to exercise some care to look out for them. He could not be entirely inattentive.

3. It being demonstrably clear in our judgment that the plaintiff was guilty of contributory negligence, the verdict in his favor is

wrong and must be set aside, unless it appears further that after the plaintiff's negligence, and independent of and distinct from any prior negligence of its own, the defendant was negligent, and that this negligence was the proximate cause of the plaintiff's injury. In other words the plaintiff must show that, at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be proximate cause of the injury. If the evidence justifies that conclusion, we must assume that the jury adopted this view, for in no other way can the verdict be reconciled with law.

As already stated, in the consideration of the defendant's negligence, we think the jury were authorized to find that during the whole time the horse and wagon of the plaintiff were passing from the corner of the house to the track, they were in plain sight of the brakeman on the front car of the train; that the plaintiff's horse was walking slowly, while the train was moving rapidly; that the plaintiff himself was out of sight, all of the time, and gave no sign that he was aware of the approach of the train. And, if after the brakeman, whose duty it was to watch as well as to brake, came in sight of the team, he saw the team approaching the track, and saw that the driver was apparently negligent, inattentive or ignorant of the train, neither stopping for the train to pass, nor apparently endeavoring to cross before the train, and if at such a time, and under such conditions there was apparent danger of a collision by reason of the plaintiff's negligence, and if there was then time to stop the train, it was unquestionably the duty of the brakeman, then, by signalling, and by braking, to stop the train.

But even if the brakeman, seeing the situation, failed seasonably to take the necessary steps to prevent a collision which was apparently not only likely to happen, but all the more likely to happen, and which probably would happen, because of the apparent negligence or ignorance of the plaintiff, was his failure the proximate cause of the plaintiff's injury? Was his negligence in that respect subsequent to and independent of the plaintiff's contributory negli-

gence? We are constrained to say that it was not. It was contemporaneous, not subsequent. It operated to produce the result in connection with the plaintiff's negligence, and not independently of it. The plaintiff's negligence actively continued from the corner of the house to the point of collision. It was operative to the last moment and contributed to the injury as a proximate cause. It is not like the case of one who by his own prior negligence has merely put himself in a position of danger, as in *Atwood* v. *Railway Co.*, 91 Maine, 399, and *Ward* v. *Railway Co.*, 96 Maine, 145, in which cases the distinction is well illustrated. The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous. It was so stated, and the distinction was pointed out, in *Ward* v. *Railroad Co.*, supra, where the Court used this language, "It is not enough that the defendant might by the exercise of due care on his part have avoided the consequences of the plaintiff's negligence when that negligence is contemporaneous with the fault of the defendant. But if the plaintiff's negligence is so remote as not to be a proximate cause contributing to the injury, then a defendant's failure to exercise due care to avoid the consequences of the plaintiff's earlier and remote negligence when by the exercise of such care they could have avoided, will render the defendant liable." *Rider* v. *Syracuse R. T. Ry. Co.*, 171 N. Y. 139; *Fritz* v. *Railway Co.*, 105 Mich. 50; *O'Brien* v. *McGlinchy*, 68 Maine, 552.

Motion for new trial sustained.

PETER PLOURD *vs.* HENRY JARVIS.

Penobscot. Opinion August 2, 1904.

Husband and Wife. Evidence. Punitive Damages.

1. Upon an issue whether the defendant "unlawfully persuaded and enticed" the plaintiff's wife to refuse the plaintiff marital intercourse, evidence is admissible of frequent meetings between the wife and the defendant even under circumstances suggesting a probability of adulterous intercourse.
2. If offered evidence tends to prove a material allegation in the pleadings, it is not to be excluded because it also tends to prove other and graver matters not alleged.
3. The defendant can be lawfully found guilty if his unlawful persuasions and enticements were a contributing cause of the plaintiff's wife refusing him marital intercourse. It is not necessary they should have been the sole cause.
4. The conduct of the plaintiff was wilful and shameful, and the jury was authorized to assess heavy punitive damages, and the Court is not sure that the assessment was too large.

On motion and exceptions by defendant. Overruled.

Action on the case for unlawfully persuading and enticing plaintiff's wife to refuse him marital intercourse. Plea, general issue. Verdict for plaintiff for $2,333.33.

The case sufficiently appears in the opinion.

H. H. Patten, for plaintiff.

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

Exceptions. The evidence was proof of adultery which was not alleged or charged. Defendant was not bound to meet a case for adultery, not being charged with it. The evidence should have been excluded. *Perry* v. *Lovejoy,* 49 Mich., 529.

If the action were for adultery, the plaintiff would be bound to prove a legal and formal marriage, but in the action as it is, which does not allege adultery, he need only prove his marriage by common repute; hence to admit evidence of adultery is to give the plaintiff an undue advantage thereby enabling him to escape the application

of the strict rule which obtains in actions where adultery is charged. *Perry* v. *Lovejoy*, supra; 8 Am. & Eng. Enc. of Law, page 268, letter B, note 3.

The evidence being of adultery, tended to swell the damages far beyond what they otherwise would have been.

Motion. The declaration does not state that the defendant enticed the plaintiff's wife to leave him, or that he harbored her after she had left him, or that he was guilty of adultery with her. Allegation and proof of at least one of these acts is necessary for the maintenance of an action for interference with plaintiff's marital relations. *Bigaouette* v. *Paulet*, 134 Mass. 123; *Houghton* v. *Rice*, 174 Mass. 366; *Lellis* v. *Lambert*, 24 Ont. App. 653.

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

EMERY, J. This case is before the law court on the defendant's exceptions to the admissibility of certain evidence, and on his motion to set aside the verdict against him as against the evidence.

I. The exceptions. The pith of the plaintiff's declaration is that the defendant "unlawfully persuaded and enticed" the plaintiff's wife to refuse him marital intercourse. The defendant did not demur but traversed. As tending to prove the above allegation and as a step toward such proof, the plaintiff offered evidence of interviews between the defendant and the plaintiff's wife; of their meetings in a saloon at night; of their meetings in the defendant's barn; of his leaving the plaintiff's house about daylight in the morning; of his being seen in the wife's bedroom on the bed; of his being in her bedroom with the wife; of his admission that he came out of plaintiff's house with his clothes in his arms on hearing somebody knock at the door. To all this evidence the defendant objected, but it was admitted and the defendant excepted.

The offered evidence may not amount to proof that the defendant "unlawfully persuaded and enticed" the wife to refuse her husband marital intercourse, but the circumstances shown by the evidence are clearly admissible as showing the relations, the intimacy, between the defendant and the wife, as showing his influence over her, and as

showing his disposition and his motives for the alleged action. These circumstances are at least steps toward proof, and proper to be considered with other circumstances. The absence of these circumstances would certainly be evidence to be considered. Their presence then must be evidence.

The defendant, however, argues that the evidence directly tended to prove adultery, or at least alienation of the wife's affections, specific wrongs distinct and different from that charged,—and hence tended to prejudice the jury against the defendant as to the wrong that was charged. If this be true it cannot deprive the plaintiff of the evidence, if it tends also to prove his own alleged cause of action as we hold that it does. That evidence, otherwise competent and admissible as tending to prove one cause of action, also tends to prove other and graver wrongs does not make it any the less admissible for the original purpose. The party against whom such evidence is received, must be content with instructions that it is to be considered as evidence only of the wrong charged. *Beaudette* v. *Gagne*, 87 Maine, 534.

II. The motion. We find evidence that the plaintiff's wife did refuse him marital intercourse, and we also find evidence from which a jury might infer, without violence to reason, that this refusal was partially, at least, owing to the unlawful persuasions and enticements of the defendant as alleged. It is not necessary that it should have been wholly owing to them. The defendant's wrong is established if he by unlawful conduct contributed to the result.

As to the damages, the wrong to the plaintiff was wilful and grievous. It necessarily entailed the destruction of marital confidence and hence of domestic happiness. Greater wrong can hardly be done a man. Again, it was a case where a jury might properly assess heavy punitive damages to punish the defendant for his wilful turpitude and to restrain him from future misconduct of the same kind. The question of damages in such a case is peculiarly one for a jury. In this case we are not sure that the jury erred.

Motion and exceptions overruled.

STATE OF MAINE *vs.* FRED L. SMITH, Appellant.

Somerset. Opinion September 7, 1904.

Arrest of Judgment. Criminal Appeal. Defective Record. Amendable after Verdict. True Record Controls. Practice.

Where a motion in arrest of judgment in the appellate court was upon the ground that the original warrant bore no seal, and the presiding justice after verdict permitted the filing of an amended copy of the warrant showing that there was a seal upon it, *Held;* that the motion was properly overruled.

Judgment in a criminal case is arrested for error appearing on the face of the record, but it is the true record and not a false one which controls.

If the record before the court is not a true record, the court may permit its amendment at any time before deciding the question raised by the motion.

On exceptions by defendant. Overruled.

Search and seizure complaint entered in the Supreme Judicial Court, March term, 1904, Somerset county, on appeal from the Municipal Court of Skowhegan. After a verdict of guilty, the presiding justice overruled a motion in arrest of judgment, and allowed exceptions. The case appears in the opinion.

George W. Gower, County Attorney, for State.

George G. Weeks, for respondent.

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

POWERS, J. Complaint originating in the Municipal Court of Skowhegan. The respondent appealed, and in the Supreme Judicial Court after verdict and before judgment moved in arrest of judgment upon the ground that the original warrant bore no seal. The presiding justice, against the respondent's objection, permitted the county attorney to file an amended copy of the warrant, showing that there was a seal upon the original warrant, and thereupon overruled the motion. To these rulings the respondent excepts.

A warrant not under seal is void. If the fact were as alleged in the motion judgment should have been arrested. The copy did not show any seal upon the warrant, and if this were the only evidence the omission would be fatal. But the question raised by the motion was not what the copy originally filed might show, but whether there was in fact a seal upon the original warrant. It was entirely competent for the presiding justice to permit the filing of an amended copy, showing that in truth and in fact the original warrant did have a seal upon it. Judgment in a criminal case is arrested for error appearing on the face of the record, but it is the true record and not a false one which controls. If the record before the court was not a true record, it was proper for the court to permit it to be amended at any time before deciding the question raised by the motion. The court was not obliged to stultify itself by denying an amendment in accordance with the fact, and refusing to receive competent evidence upon the very question which the motion raised. The record as amended shows no error and the motion was properly overruled.

This case is not to be confounded with *State* v. *Libby*, 85 Maine, 169, and similar cases in which the amendment is to the complaint and affects the offence for which the accused is tried. In such cases it is necessary that the amendment be made before the case is given to the jury. Otherwise the respondent might be convicted upon one complaint and judgment rendered upon another. In the case at bar the amended record shows that the original warrant was in due form and that the respondent was tried and convicted upon the complaint as originally made.

In the closely analogous case of *Commonwealth* v. *Carney*, 153 Mass. 444, the court permitted an amended copy of the record below, showing jurisdiction in the lower court, to be filed after verdict and motion in arrest of judgment.

Exceptions overruled.

STATE OF MAINE *vs.* POPE D. MCKINNON.

Penobscot. Opinion September 19, 1904.

Maintaining Liquor Nuisance. Ownership and control of Building. Evidence.

In the trial of an action for maintaining a liquor nuisance, for the purpose of proving the respondent's ownership of the building an office copy of a mortgage of the same was introduced against the respondent's objection. *Held*; that he was not prejudiced thereby as he afterwards testified that he executed the mortgage.

Parol evidence is admissible to prove that a party has made a contract which is in writing, when such contract is not the foundation of the cause but simply a collateral fact, and the contents of the writing are not involved in the case.

On exceptions by respondent. Overruled.

Indictment against the respondent for maintaining a liquor nuisance in the building known as the Globe Hotel in Bangor.

The case is sufficiently stated in the opinion.

Bertram L. Smith, County Attorney, for State.

It is well settled that secondary evidence of the contents of a writing or document may be given when it does not form the foundation of the cause, but merely relates to some collateral fact.

Among other cases, counsel cited *Scullin* v. *Harper*, 78 Fed. Rep., 460, 25 Am. & Eng. Ency. Law, 2d Ed. 173, *Phinney* v. *Holt*, 50 Maine, 570; *Ayer* v. *Hewitt*, 19 Maine, 281.

W. R. Pattangall, for respondent.

The written contract was primary evidence. No excuse for not offering it was suggested. Secondary evidence of its contents was not admissible. The fact that respondent afterwards admitted that such a contract existed has no bearing, as up to the time of the admission of the evidence he was under no obligation to take the stand. The evidence should have been excluded.

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

POWERS, J. Indictment against the respondent for maintaining a liquor nuisance in the building known as the Globe Hotel in Bangor. The exceptions present two points.

The building was personal property, and for the purpose of proving the respondent's ownership of the same and that he had executed mortgages thereof, against his objection the records of the City Clerk were admitted in evidence, in which mortgages purporting to have been executed by the respondent were recorded, no evidence having been offered otherwise than the record of the execution of said mortgages.

The defendant testified that he executed these mortgages, and this point is not relied upon in argument by the respondent's learned counsel. The respondent's acts, the fact that he had mortgaged and dealt with the property as his own, were admissible against him on the question of title. His admission was coextensive with the evidence objected to; and it is self-evident that he could not be prejudiced by a refusal to require more formal proof of the execution of documents which he admitted he had executed.

For the purpose of proving that the respondent had control of the hotel and made contracts connected therewith, a witness for the State was permitted to testify against objection that there was a telephone service at the hotel, and that the contract, which at the time of the trial was in Boston, was in the name of the respondent. The contract itself was undoubtedly the best evidence both of its existence and contents, but in cases where the written agreement is collateral to the question at issue it need not be produced. 1 Green. Ev. § 89. Secondary evidence of the contents of documents is admissible when they do not form the foundation of the case but relate simply to collateral facts. 25 Am. & Eng. Ency. Law, 2d Ed. 173. Parol evidence of the contents of a paper may be given when the paper is not the foundation of the cause of action, but merely relates to some collateral fact. *Gilbert* v. *Duncan*, 29 N. J. L. 133, *Tucker* v. *Welsh*, 17 Mass. 160. Here the issue was whether the respondent main-

tained a liquor nuisance in the hotel. The fact that he had made a contract in regard to its telephone service, while admissible as tending to show his control of the property, was not the foundation of the charge made in the indictment.

These authorities go further than is necessary to support the ruling in the present case. The evidence admitted did not involve proof of the contents of the writing, but simply the fact that the respondent had made a contract irrespective of its terms. It is like the case stated in 1 Green. Ev. 87: "If the fact of the occupation of land is alone in issue without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question." The evidence was not offered to prove the contents of a writing, but simply to prove a collateral fact that the respondent had made a contract which happened to be in writing, the contents of which were not involved in the case.

Exceptions overruled.

SPRAGUE ADAMS, and others, *vs.* ISAAC CLAPP.

Piscataquis. Opinion September 19, 1904.

Real Action.—Survey and Plan. Boundary Lines. Conveyances. Evidence.

1. Where a land surveyor was directed by the State to run out wild lands in the public domain into ranges and townships, to spot the lines and to make a return of his survey with a plan representing the lines of the ranges and townships; and enters upon the work and makes and returns to the State a plan of his survey, showing range and township lines; such plan after the surveyor's death is competent evidence (and sufficient if uncontradicted) that the township lines laid down upon the plan were actually run upon the earth's surface.
2. The fact that after seventy-five years of lumbering operations and forest fires, no spotted trees or other indicia of one such line are found on the surface of wild land is not sufficient to overcome the evidence of the plan that the line was actually run.
3. The fact that some streams and ponds are so delineated on the plan as to indicate they were not then actually surveyed in detail does not overcome the evidence of the plan as to lines. The running of the line was essential to the purposes of the survey. The course and contour of streams and ponds were incidental, not essential.
4. While such a plan is only a picture of the survey and must give way before satisfactory evidence that it does not correctly represent the actual survey, yet if there be no such evidence the plan must be taken as a correct picture. Hence if the plan shows a given line to have been run in a given direction and at a given distance from a given natural object, as a pond, it is evidence (and sufficient if uncontradicted) that such was the direction and position of the line run upon the earth, even though no traces are now found to correspond.
5. In the case of two or more surveys and plans of the same tract, a conveyance of a lot or township, "as the same was surveyed by A," with the date, adopts as boundaries the lines of the lot or township as pictured on the plan of that survey, if the plan be the only existing evidence of the survey, notwithstanding the lines are differently located on the plans of the other surveys. Even if the lines in the survey named in the conveyance were not correctly run, yet having been run and made the boundaries in the deeds of conveyance, they must stand as such despite the irregularities and inequalities thus produced.

6. The question in this case, was the location of the north and south dividing line between township No. 4 on the east and township No. 5 (now Brownville) on the west, in the 8th range north of Waldo Patent. If it was west of Schoodic Lake the demanded land belonged to the plaintiff. In 1794 Samuel Weston was sent by Massachusetts the then owner to run out the tract into ranges and townships. The only evidence of his survey was his plan on which the north and south line between these two townships was laid down as west of Schoodic Lake. The subsequent conveyance of each township adopted the line, surveyed "by Samuel Weston in 1794." *Held;* that the plan was sufficient evidence that Samuel Weston actually ran the line between the townships and ran it west of Schoodic Lake, and hence that the demanded land must be adjudged to the plaintiff. *Held;* further, however, that the judgment in this case being based on the evidence in this case, does not fix the dividing line between the two townships named, for any other case between other parties, towns or individuals.

On report. Judgment for plaintiffs.

Real action brought to recover a parcel of real estate situate on the west shore of Schoodic Lake, Piscataquis County.

Plea, general issue.

This action came on for trial at the September term, 1902, of the Supreme Judicial Court, in Piscataquis County. After all the evidence had been taken out, the case was withdrawn from the jury and reported to the Law Court for decision. It was stipulated "that any exhibits that may have been offered upon either side and excluded may be made a part of the case;" also that "all plans, chalk and chips used at the trial are to be produced at the argument before the Law Court," and that "upon so much of the evidence as is legally admissible the Court is to enter such decision as the legal rights of the parties may require."

The case sufficiently appears in the opinion.

Henry Hudson, for plaintiffs.

J. B. Peaks, for defendant.

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

EMERY, J. This is a real action to recover a small parcel of land on the west shore of Schoodic Lake in Piscataquis County. The demanded parcel is on a cape of land making easterly into the lake

between Howard Cove on the north and Berry Cove on the south, and is on the border between township No. 4 in the eighth Range of townships north of the Waldo Patent and township No. 5, now called Brownville, in the same Range next west and adjoining township No. 4. It is conceded to be wholly within the one township or the other, and if within township No. 4 to belong to the plaintiff, but if within township 5 to belong to the defendant. The main question, therefore, is whether the boundary line between the two townships was run or established by the original owner of both to the east or west of the demanded parcel.

The land in this vicinity was first surveyed and divided into Ranges and townships, at least on paper, by Samuel Weston in 1794 by direction of the Commonwealth of Massachusetts, the then proprietor. Samuel Weston under this commission admittedly ran the Range lines east and west from the Penobscot River to the line of the "Million Acre purchase" on the Kennebec. It is also conceded that on these Range lines he established bounds to mark the corners of the townships. The defendant, however, denies that Weston actually ran the north and south lines between the townships, and claims that the north and south line between townships No. 4 and No. 5 was first run at a later date (1803) by Park Holland, who was directed by the Commonwealth to divide township No. 5 into lots. A preliminary question, therefore, is whether Samuel Weston did actually run the north and south line between these two townships under his commission of 1794.

Upon turning to the instructions given Samuel Weston to "survey three ranges of townships" etc., we find the following: "All lines are to be run and well spotted, and the corners of each township marked, the Ranges to extend from east to west and to be numbered the Seventh, Eighth and Ninth Range, and the townships to be numbered in each Range and to be laid out six miles square excepting those bordering on the Penobscot River." And again: "And you are to make return of the survey with duplicate plans representing the lines of the townships, a border or margin of the adjoining lands, the rivers, streams, lakes, ponds, and the most prominent heights" etc. No field notes or other return of the survey is shown in this

case except the plan. Upon this plan, however, are lines indicating north and south lines between the townships, including Nos. 4 and 5, as well as the east and west, or range, lines. There are also upon the plan, lines indicating streams and the boundaries of ponds and lakes, including the lake now called Schoodic Lake. These lines upon the plan returned by Weston, as part at least of his return of his doings under his instructions, are evidence after his death that he did run upon the surface of the earth the lines laid down on his plan. He was sent to survey "townships" as well as Ranges. He was instructed that "*all* lines are to be run and well spotted." North and south lines were as essential to running out townships as were east and west lines. He was directed to return "plans representing the lines of the townships" etc., meaning, of course, the townships and lines that he surveyed. It is to be presumed, after his death, in the absence of evidence to the contrary, that he did what his return, his plan, shows he did. Had he been a public officer his return would be conclusive. He was at least a public agent employed by the government, and his return is, after his death, to be taken as sufficient evidence of what he did until overthrown by evidence to the contrary.

The defendant, however, points out some parts of the plan representing streams, outlets, etc., which later surveys have shown to be incorrect. He urges that these errors show that Weston could not have surveyed those streams, outlets, etc., and hence his plan thus being shown to be false in these respects cannot be regarded as correct in others. Because he may have laid down the course of some streams or assumed certain streams to be outlets, without surveying them in their full length, we do not think it follows that he did not survey or run the boundary lines of the townships shown on his plan which was the main work he was sent to do. The boundary lines were important, essential to the purpose of his survey. The streams, etc., were incidental, collateral. Again, the force of the defendant's argument as to the correctness of the plan in respect to the line in question is much weakened by the fact that upon the plan the west shore of the lake, in close proximity to the line, is represented with sub-

stantial accuracy as to its contour of coves and capes, showing that it, at least, must have been actually surveyed.

The defendant further contends that no north and south line can now be found on the earth's surface in that neighborhood with marks indicating an existence as far back as 1794. There is evidence to the contrary, but conceding that no such marks can now be found, we do not think their absence, after nearly a century of lumbering operations and forest fires, overcomes or even contradicts the evidence of the plan.

Lastly on this point the defendant calls attention to a letter of Samuel Weston in the case written in 1801 after he had been sent to re-survey a township in Range 7 next south of Range 8 by reason of some mistakes in his former survey of that Range. In this letter he made some statements of what he did in his former survey in 1794. Ignoring the question of the competency of this letter as evidence, we do not find in it any statement that he did not run the north and south township lines, nor any statements from which we think such an inference can be fairly made. Two expressions only are quoted by the defendant. "I surveyed said river (the Penobscot) . . . and found where to make the corners of the townships on the Range lines." "After my brother and I had left (the river) and gone to checking off the towns." Bearing in mind that this letter was not a return of that survey of 1794, and did not purport to give any full account of it, and was not written with the least reference to township lines, we think it cannot be fairly inferred from such casual remarks that he did not do what his official return says he did do.

We, therefore, think it legally proved by the competent evidence of the plan, practically uncontradicted, that the north and south line between these two townships was actually run upon the surface of the earth by Samuel Weston in 1794. The next question is whether that line was run to the east or west of the demanded parcel. Upon this question the parties have introduced much evidence descriptive of two north and south lines now found upon the surface of the earth about half a mile apart and on either side of the demanded parcel. Each party contends that spots on trees, peculiar stones, and other indicia now found on these lines support his contention, the plaintiff

that the western of these two lines is the original line, and the defendant that the eastern line is the original line. Each stoutly controverts the contention of the other as to what these various indicia do show. It is not made absolutely certain that any of them were made or placed there by the original surveyor, Samuel Weston, in 1794, and hence they are not certainly decisive of the question. We think, however, the location of the line run by Weston can be determined sufficiently for this case by other and contemporaneous evidence apart from the indicia on these two lines.

All the actors in the survey are long since dead. On the surface of the earth are no indubitable traces of the line. In the case are no records of what was then done except the plan returned by the surveyor, Weston. We have no other contemporaneous description of the line than that pictured on the plan. While the survey is the thing and the plan is only the picture, yet when the thing itself has become obliterated and the only description left to us by those who were cognizant of it is a picture or plan made in the line of his duty by a contemporary charged with the duty of making a correct picture, we must assume primarily at least that the thing is correctly represented by the picture. In the absence of other evidence, this evidence of the plan must be taken as sufficient and decisive.

Turning to the plan of this survey, it clearly shows the line in question to have been run so far to the west of Schoodic Lake as to include the demanded parcel, though west of the lake yet within the limits of township No. 4 under the grant of which the plaintiff claims. Comparing the line pictured on the plan with the two parallel lines half a mile apart now found upon the earth's surface and above described, it very nearly, if not quite, fits in location the western of the two lines, that claimed by the plaintiff; while the defendant frankly admits it does not fit the eastern line, that claimed by him. As between these two lines, therefore, the western line, that claimed by the plaintiff, must be taken as the true boundary line.

The defendant introduced a survey and plan of Park Holland, who was sent in 1803, before the conveyance of the township, to divide township No. 5 into lots, and who apparently at least laid out a

tier of lots a half mile wide east of the line shown on the Weston plan of 1794, and in doing so ran a north and south line as the east line of the township No. 5. This line is practically in the same location as that now existing on the earth's surface a half mile east of that marked on the plan. When, however, the Commonwealth came in 1805 to convey township No. 5 it fixed the limits of the township conveyed, "as the same was surveyed by Samuel Weston in 1794," and not as the same was surveyed by Park Holland. The grantee, therefore, only took to the Weston line, according to the familiar rules for interpretation of deeds. The eastern tier of lots run out by Park Holland was excluded from the conveyance, being east of and beyond the Weston line.

The defendant also introduced surveys and plans by Moses Greenleaf in 1815, who made a plan of township No. 5 or Brownville. He does not appear to have been employed by the Commonwealth, but by private owners or on his own account. He placed the east line of township No. 5 (Brownville) on the line run by Park Holland in 1803, a half mile east of the Weston line and east of the demanded parcel. But this was after the conveyance of the township in 1805, and hence could not extend its eastern limits beyond the Weston line.

It appears that Moses Greenleaf also in 1816 prepared a map of Maine from various old surveys and plans, upon which map the eastern line of township No. 5 was laid down as east of the demanded parcel. The legislature of the Commonwealth in 1816 authorized the Secretary of State to contract for 1,000 copies of this map for the use of its towns and public offices, and in the resolve recited that the map was "on the whole as correct a map as could be made or was necessary." On this map also the east line of township No. 5 is shown to be so far east as to include in that township all the land, including the demanded parcel, lying West of Schoodic Lake. The defendant urges that the Commonwealth, then owning township No. 4, thereby adopted as its west line and the east line of township No. 5, the line shown upon the Greenleaf map, and thereby acknowledged the title of its grantees of No. 5 to extend east to that line. He cites in support of this proposition *Commonwealth* v. *Pejepscot Proprs.* 10 Mass. 155, and *Blaney* v. *Rice*, 20 Pick. 62.

Had the east line of township No. 5 as described in the conveyance never been run or fixed upon the earth's surface before the making of the Greenleaf Map, perhaps the doctrine of those cases would have been applicable. In this case, however, the evidence heretofore cited shows that the line named in the conveyance had been run and fixed. The conveyance of township 5 was thereby limited to that line, and the approval of the Greenleaf Map did not extend the conveyance beyond that line. The subsequent conveyance of township No. 4 in 1834 to the plaintiff's predecessors bounded the land conveyed "westerly by township No. 5 of the 8th Range." This description extended the conveyance west to the Weston line run in 1794.

The defendant also introduced evidence that the grantees of township No. 5 and their grantees repeatedly conveyed lots in the eastern tier run by Park Holland to the east of the Weston line. While these conveyances indicate the belief of such persons as to the location of the line, they do not change the fact. On the other hand the defendant concedes that most of the maps made after that of Greenleaf in 1816, including the Holman and Rose plan, Chace's Map of the State, and the Piscataquis County Atlas, show the line to be substantially as upon the Weston plan, and to cut off the eastern tier of lots run by Holland.

The defendant further claims that township No. 5 is made by the Weston line to be only five and a half miles wide instead of six, as it should have been. This may show that the Weston line was run in the wrong place, but being run and made the boundary, it must stand as such.

It being established by the evidence that the survey of Samuel Weston in 1794 included the actual running of the north and south line between the two townships, and that that running was to the west of the demanded parcel, cutting it off from township No. 5, and including it in township No. 4, the judgment in this case must be for the plaintiff. In other cases involving this same line, the evidence may of course be different, and lead to a different result.

Judgment for the plaintiffs. Damages assessed at one dollar.

WILLIAM J. MAINS *vs.* INHABITANTS OF FORT FAIRFIELD.

Aroostook. Opinion September 23, 1904.

Liability of Towns in Tort. Municipal Officers. Constable. Nuisance.

1. In this state towns are incorporated for two distinct purposes, one for the particular welfare of their own inhabitants, the other for the general welfare. In pursuing the one they may be liable in contract or tort at common law for the acts or omissions of officers appointed by them. In pursuing the other purpose they are not so liable.
2. So officers appointed by a town may be agents for whom the town is liable at common law, or may be simply public officers for whom the town is not liable (unless made so by statute), according as their duties are merely municipal or are public duties.
3. In maintaing a police "lockup" a town is pursuing not a municipal purpose but a public purpose, viz: the maintenance of the justice and peace of the state, and hence in the absence of any statute imposing liability the town is not liable for the neglect of its selectmen in the care of it.
4. A constable committing a prisoner to the town "lockup", as a place of detention, acts for the state and under its authority, if any. He does not act for the town nor under its authority, though he may have received his appointment from the town.
5. So long as a building owned and maintained by a town for a police "lockup" is not injurious nor offensive nor dangerous to any property or person except to such as enter within, whether willingly or unwillingly (not being compelled nor invited by the town), it is not a nuisance, nor is the town liable therefor in an action of nuisance.
6. The fact that a prisoner committed by a constable to a town "lockup" suffered damage from its neglected condition does not make the town liable to an action therefor.

On report. Plaintiff nonsuit.

Action on the case to recover damages for injuries to the health of the plaintiff alleged to have been caused by the foul, offensive and unhealthy condition of the "lockup" of the defendant town, and in which the plaintiff was confined for several hours, for safe keeping, by a constable of the defendant town, pending plaintiff's arraignment on a charge of intoxication. Plea, general issue.

This action came on for trial at the December term, 1903, of the Supreme Judicial Court, in Aroostook County, and after the plaintiff's evidence had been taken out, the case was withdrawn from the jury and reported to the Law Court under the stipulation that "if the Law Court is of the opinion that the action is maintainable against the town upon this evidence, the action will stand for trial; but if it is of the opinion that the town is not liable, then the plaintiff is to be nonsuit."

The case is sufficiently stated in the opinion.

Ira G. Hersey, Louis C. Stearns, J. E. Magill, for plaintiff.

Herbert W. Trafton, Powers & Archibald, for defendant.

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

EMERY J. The town of Fort Fairfield in pursuance of an appropriate article in the warrant for the town meeting voted to raise money "for the purpose of building a lock up," or town jail. In pursuance of this vote the selectmen erected a building of two stories, the lower for use as a "lock up" or town jail, the upper for use as a court room by trial justices. No part of the building was designed or used for any other purposes. Little or no care was taken of the lower story after the erection of the building and it had become very foul, offensive and unhealthy to persons who might be confined therein. The plaintiff was arrested one evening by a constable of Fort Fairfield for intoxication, and confined in this lock up for the night for safe-keeping until he could be arraigned the next morning. From the foul condition of the lock up the plaintiff suffered injury by his confinement therein for the night, and to recover compensation for this injury he has brought this action against the town of Fort Fairfield.

No statute is cited imposing on towns the duty of erecting town jails or of keeping them in clean, healthy condition when voluntarily erected; nor is any statute cited granting any right of action against towns for injuries received from the unhealthy condition of such town jails. The plaintiff, however, contends that the town is liable

by the common law for the malfeasance or misfeasance of its officers in permitting this lock up to become so unhealthy. He cites authorities from other states in support of his contention.

This contention seems to make it necessary to again iterate, what has been so often iterated as to become trite, that in this state an incorporated town has two distinct functions, one as a corporation for the particular benefit of its inhabitants, the other as a governmental agency for the general benefit of the public. So the officers appointed by the town may be acting as mere agents of the town in some work for the particular good of its inhabitants, or they may be acting as public officers in the performance of some public duty for the general good. The mere fact that a town has the power or duty to appoint an officer does not make the town pecuniarily liable for his misfeasance or malfeasance in his office, any more than a similar power and duty of the governor makes him pecuniarily liable for the misconduct of his appointees in office. The criterion is in the nature of the duty and power imposed by law on the officer, by whomsoever he is appointed.

In this case the building was not erected nor used for any strictly municipal purpose, but only for the public purpose of aiding in maintaining the public peace and dispensing public justice. Court-rooms and jails are public instrumentalities. The care of them is a public function or duty. Whoever is charged by law with that care is a public officer whether appointed by the town or by the governor. He is not the agent of the appointing power, and that power is not pecuniarily liable for his neglect or misdeeds. Granting it to be the legal duty of the selectmen of Fort Fairfield to care for this lock up and keep it clean and healthy, it is a public duty to be performed for the public, the state, and not for the town. The duty is of the same kind as the duty to care for the public roads, or the public health, or the public order, in which cases it has been held, too often to require citation, that the town is not liable for the neglect or misconduct of its appointees. Everything relating to public order or peace, including police officers, court-rooms and jails, is of state concern, and the duties of towns, and of officers appointed by towns, in

relation to these matters are public duties. The town is not liable in a civil action in either case unless made so by express statute.

By parity of reasoning the town is not liable for the action of the constable in confining the plaintiff in such an unhealthy place. The constable though appointed by the town was not its agent. He was a public officer, as much so as a sheriff. In the arrest and confinement of the plaintiff he assumed to exercise an authority conferred upon him by the state and not by the town. He acted in behalf of the state and not in behalf of the town.

The plaintiff suggests another ground for the maintenance of his action, viz: that the town erected and owns the building and has suffered it to become a common nuisance, injurious to persons and property in its neighborhood, and hence the town is liable for maintaining a nuisance the same as an individual who allows his property to become a nuisance. The plaintiff's action, however, is not based on that ground. He does not sue for injuries to his property, or to his comfort or health as a resident of the neighborhood, or as a sojourner, or passer by even. The evidence fails to show that any person or property anywhere outside of the "lock up" itself was in the least harmed, or discommoded, or threatened by its foul condition. It was not harmful until one went into it. But for the action of the constable the plaintiff would not have suffered anything from it. The cause of his injury was his confinement by the constable in an unhealthy place. The foul condition of the lock up was inoperative upon him until then. The constable was under no compulsion and had no direction from the town to confine the plaintiff there. He acted upon his own judgment in the execution of a duty imposed upon him, not by the town, but by the state, viz: the safe-keeping of the plaintiff. The proximate cause of the plaintiff's injury was the action of the constable, a public officer. The town is not responsible for the consequences of that action.

Plaintiff nonsuit.

WILLIAM A. ANNIS, In Equity,

vs.

HARRY BUTTERFIELD, and others.

Penobscot. Opinion September 30, 1904.

Fraudulent Conveyances. Assignment. Action. Equity. Demurrer. Bankruptcy. Bankrupt Act 1898, §§ 67 and 70. Public Laws, 1877, c. 158, R. S., c. 79, § 6, Clause IX.

The grantor in a conveyance fraudulent as to creditors was afterwards adjudged a bankrupt. His trustee in bankruptcy sold and assigned to the plaintiff all the right, title and interest which vested in him as trustee to the premises fraudulently conveyed "together with any right to bring action, at law or in equity, to enforce any claim against said premises which was vested in said trustee in the interest" of the bankrupt's creditors. The plaintiff was one of the creditors of the bankrupt, and as such, might have maintained proceedings to have the fraudulent conveyance set aside.

In a bill to set aside the fraudulent conveyance brought by the plaintiff as purchaser from the trustee in bankruptcy, there was no allegation that the trustee had ever made entry upon the premises, or had possession thereof, or had ever made any election to avoid the fraudulent conveyance, unless the sale and assignment was such an election, or had taken any steps to contest the title of the fraudulent grantee. Nor was there any allegation that the plaintiff was in possession when the bill was brought.

Held; 1. That a mere naked right to set aside a fraudulent conveyance is not assignable, and an attempted assignment thereof cannot be enforced.

2. By force of the U. S. Bankruptcy Act, the title to the lands in question become vested in the trustee.

3. Whether the conveyance by the trustee under the circumstances recited was a sufficient manifestation of his option to avoid the fraudulent conveyance, *quaere.*

4. Whether a trustee in bankruptcy can sell estate which had previously been conveyed by the bankrupt in fraud of his creditors, until he has obtained an adjudication of the fraud and reduced the estate to possession, *quaere.*

5. If the trustee could not give, and the plaintiff did not obtain, title to the premises by the deed, then the deed conveyed only a mere naked right of action to attack the fraudulent conveyance, and that is not enforceable.

6. But if the plaintiff obtained title, he cannot maintain proceedings in equity to have the cloud of the fraudulent conveyance removed, without alleging and proving that he is in possession. If not in possession, he must resort to his remedy at law.

7. The remedy given by R. S., c. 79, § 6, clause IX, by which the court has general jurisdiction in equity to reach and apply in payment of a debt any property or interest conveyed in fraud of creditors, is not applicable in this case; that remedy is limited to creditors. In this bill the plaintiff stands as a purchaser, not as a creditor.

In equity. On appeal by plaintiff. Bill dismissed.

Bill in Equity to set aside a certain conveyance of real estate as fraudulent to creditors.

On demurrer the bill was dismissed by the Presiding Justice below, and the complainant appealed.

The case is stated in the opinion.

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

We claim that the title to real estate fraudulently conveyed by the debtors vests in the trustee so that he can transfer the title thus vested and the right to have the fraudulent conveyance set aside by proceeding under the Bankruptcy Act.

In the case at bar under the Bankruptcy Act admittedly the Trustee was subrogated to the rights of all the creditors of the bankrupt and furthermore he was vested with the title of all the property of the bankrupt, — vested with that which he had conveyed in fraud of creditors as well as that which they retained in their own name until the time of the bankruptcy, — the Trustee conveyed his right thus vested in him not under and by an assignment, but by a good and sufficient deed describing the property which was fraudulently conveyed; he sold it in the interest of all the creditors of the bankrupt's estate; he gave to the purchaser his title and the title of the creditors as well, whom he represented.

The case of *Gibbs* v. *Thayer*, opinion by Chief Justice Shaw, holding that the purchaser from an assignee can maintain an action in his own name to obtain possession of property sold in fraud of creditors by a bankrupt is distinctly affirmed by our own court in the case of *Dwinel* v. *Perley*, 32 Maine, 197, and that case clearly sets forth the position which the plaintiff in this case takes.

E. C. Ryder and Louis C. Stearns, for defendants.

The defendants claim that the demurrer should be sustained: (1) Because if the interest which the plaintiff acquired is an interest in real estate, he can only acquire such interest by virtue of a deed, and there is no allegation in the bill that there was such a deed. (2) Because if the plaintiff is trying to enforce in his own name as purchaser, rights acquired by virtue of a sale and an sssignment by a trustee in bankruptcy of the naked right to set aside a fraudulent conveyance, he cannot do so. (3) Because the plaintiff is not seeking to recover as a creditor, but as a purchaser. (4) Because if he has a remedy, it is at law, the title to the premises having been in the husband; and lastly because the plaintiff acquired no interest which can be enforced in a court of equity.

The rights to property pass to the trustee from the bankrupt under the statute. His title to property is the title of the bankrupt. In addition to any title passing to him from the bankrupt, the statute gives him the same right to have fraudulent conveyances of the bankrupt set aside that creditors had before the adjudication. This is simply a right to bring a bill in equity after he has reduced the debt to a judgment, and either levied upon the real estate and thus acquired a legal seizin, or caused the execution issued upon such judgment to be returned in no part satisfied. He acquires under the statute the mere, naked right, to have a fraudulent conveyance set aside. Such a right is not the subject of sale. Such a right cannot be assigned. Story Eq. § 104, and note. *Prosser* v. *Edmunds,* 1 Younge & Coll. 481, 496 to 499; *DeHoyton* v. *Money,* L. R. 2 Ch. App. 164; *Hill* v. *Boyle,* L. R. 4 Eq. Cons. 260; *Brush* v. *Sweet,* 38 Mich. 574–8; *Voorhees* v. *Fresbie,* 25 Mich. 476.

The right to set aside a deed obtained by fraud, under which a grantee is in possession is but a right of action or entry, and is not assignable. *Bailor* v. *Daly,* 7 Makey, 175; *Marshall* v. *Maeins,* 12 Ga. 61, 56 Am. Dec. 444; *Norton* v. *Tuttle,* 60 Ill. 130; *Illinois Land & L. Co.* v. *Speyer,* 138 Ill. 137; *Jones* v. *Babcock,* 15 Mo. App. 149; *Morrison* v. *Deaderick,* 29 Tenn. (Humph.) 342; *Broughton* v. *Smith,* 26 Barb. 635.

The right to reduce to possession property fraudulently conveyed by the bankrupt passes to the trustee alone. *Glenney* v. *Langdon*, 98 U. S. 20; *Trimble* v. *Woodhead*, 102 U. S. 647; *Moyer* v. *Dewey*, 103 U. S. 301–3; *Re Pitts*, 9 Fed. Rep. 544; *Olney* v. *Tanner*, 10 Fed. Rep. 107; *Olney* v. *Tanner*, 18 Fed. Rep. 637; *Re Lowe*, 19 Fed. Rep. 591.

The object of the bankruptcy law is to secure the equal distribution of the property of the bankrupt. This can be done only through the rights vested in the assignee. If a creditor, for a small consideration, or by collusion with the trustee, can purchase rights to bring suits from the trustee, and then recover in such suits, as this creditor is seeking to do, he thus secures to himself a preference not shared by other creditors, and may not only collect his full debt, but even recover more than his debt, thus profiting by the transaction.

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

SAVAGE, J. Bill in equity to set aside a conveyance fraudulent as to creditors. The case comes up on demurrer. The bill alleges that in 1891, Butterfield & Gates, copartners, owned in fee the real estate described in the bill, and in that year conveyed it to Eliza J. Gates, wife of the partner Gates, without any consideration moving from her; that in 1893 Butterfield & Gates became indebted to the plaintiff in the sum of two thousand dollars; that in the summer of 1896 Mrs. Gates erected buildings on this real estate, of the value of four thousand dollars, wholly out of money, labor and materials furnished by the firm of Butterfield & Gates; that prior to and at the time of the conveyance to Mrs. Gates, the firm was in debt to various creditors, and that the conveyance was made in fraud of said creditors; that at the time of the erection of the buildings, as before stated, the firm was also indebted to the plaintiff and others, and put the labor, material and money into the buildings in fraud of their creditors; that Mrs. Gates was conusant of the fraud of the firm; that on March 11, 1899, Butterfield & Gates were individually and as copartners adjudged bankrupts in the U. S. District

Court, and a trustee was duly appointed; that on March 3, 1902, the trustee, for a valuable consideration, "sold and assigned to the complainant all the right, title and interest which vested in him as trustee" to said premises, "together with any right to bring action, at law or in equity, to enforce any claim against said premises which was vested in said trustee in the interest of the creditors of said Butterfield & Gates." There is no allegation in the bill that the trustee ever made any entry upon the real estate in question, or had possession thereof, or took any steps to obtain possession, or to contest the title of Mrs. Gates, or that he ever made any election to avoid the fraudulent conveyance, unless the sale and assignment to the complainant was such an election. Nor does the bill allege that the plaintiff is in possession. The defendants filed a general demurrer which was sustained, and the plaintiff appealed. For the purposes of the present case, the allegations of the bill must be taken as true.

In support of their demurrer, the defendants claim, first, that the plaintiff alleges no title to the real estate in himself. The allegation that the trustee in bankruptcy sold and assigned the property to the plaintiff, it is contended, is not sufficient. But this defect, if it be one, is easily amendable, and we proceed to the consideration of more important questions. The defendants further contend that by the sale and assignment, even though it be in the form of a deed, no right passed to the grantee which he can now enforce. They urge that it was the assignment of a mere naked right to bring an action to set aside the conveyance to Mrs. Gates on the ground of fraud, and that such a right of action is not assignable, and the assignment cannot be enforced, either at law or in equity. This proposition of law is not controverted by the plaintiff. It is conceded that if all that passed to the plaintiff was a mere right of action, the bill cannot be maintained. And such is the law. 2 Story's Equity (15th ed.) 359; *Prosser* v. *Edmunds*, 1 Younge & Coll. 481; *De Hogton* v. *Money*, L. R. 2 Chan. App. 164; *Brush* v. *Sweet*, 38 Mich. 574.

But the plaintiff says that by its terms, the assignment and conveyance was of more than the mere right of action,—namely, that

it was a conveyance of "all the right, title and interest which vested in him as trustee of the estate of Butterfield & Gates" to the premises, and that this conveyance vested the title to the premises in the plaintiff, and gave him the right to maintain an action or bring a bill, whichever might be appropriate, to attack the previous conveyance to Mrs. Gates on the ground of fraud. If the trustee had a title that he could convey, and did convey, to the plaintiff, so that the estate vested in him, we think there is no doubt that the latter would have had the right to maintain proper proceedings to vindicate his title and contest the fraudulent conveyance, whether the right had been expressly granted in the conveyance or not. And the plaintiff's position in brief is this, that this property was conveyed in fraud of creditors; that by the provisions of the United States Bankruptcy Act of 1898, the title to all property conveyed by Butterfield & Gates in fraud of their creditors, vested in the trustee by operation of law; that the trustee had authority by law to sell it; that he did sell it to the plaintiff for a valuable consideration for the benefit of the estate; and therefore that the title to the real estate has come to the plaintiff, and that he is entitled to bring this bill to have the fraudulent conveyance set aside and the cloud upon his title removed.

The United States statute, referred to, in section 70, provides,—

(a) The trustee of the estate of a bankrupt shall be vested by operation of law with the title of the bankrupt to . . . . property transferred by him in fraud of his creditors.

(b) Real and personal property shall, when practicable be sold subject to the approval of the court.

(c) The title to property of a bankrupt estate which has been sold as herein provided, shall be conveyed to the purchaser by the trustee.

(e) The trustee may avoid any transfer by a bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value, prior to the date of the adjudication. Such property may

be recovered, or its value collected, from whoever may have received it, except a bona fide holder for value.

The defendants, however, contend that under these provisions of the bankruptcy act, the trustee acquired no title which was capable of being sold and assigned, until after the trustee had by appropriate legal steps, procured an adjudication setting aside the transfer, or at least until he had reduced it to possession. They claim that under the bankruptcy act, property previously conveyed in fraud of creditors does not vest in the trustee so as to be capable of sale by him until there has been an adjudication setting aside the transfer. They claim that the trustee, and only the trustee, can maintain a bill to procure such an adjudication. They claim further that even if the trustee might convey the estate before an adjudication, he could not do so until after he had, by some act, manifested his option to treat the conveyance as void. Upon this latter point the plaintiff claims that no previous act was necessary, but that the conveyance by the trustee to him was of itself a sufficient declaration of his election to regard the conveyance as void.

It should be noticed that the conveyance sought to be set aside in this case was fraudulent at common law, and not under the provisions of section 67 of the bankruptcy act. It should also be noted that the plaintiff now is seeking to maintain this bill as a purchaser of the property, and not as a creditor. Although he had been a creditor, and before the bankruptcy proceedings were instituted might have maintained proceedings to have the conveyance set aside, yet when the bankruptcy proceedings were instituted, all his rights passed to the trustee, and the power was expressly given by the statute to the trustee to avoid any such transfer. After that the plaintiff as creditor had no rights which he could enforce. All the rights which he now has were obtained by the conveyance, and they are no other or greater rights than any other purchaser would have had. *Glenney* v. *Langdon*. 98 U. S. 20.

The important question, which has been elaborately argued by counsel, is whether a trustee in bankruptcy can sell estate which had previously been conveyed by the bankrupt in fraud of his creditors, until he has obtained an adjudication of the fraud and reduced the

estate to possession. The defendants strenuously urge that under section 70 of the bankrupt act, clause (e), the powers of the trustee are specified,— that is, that he may avoid the transfer, and recover the property so transferred, or its value, from the person to whom it was transferred. And that until he does so, he gets no title which he can convey, and cites authorities to that effect. On the other hand the plaintiff cites authorities to the contrary effect. This question, however, we do not find it necessary at present to decide, nor do we decide whether the conveyance was of itself a sufficient manifestation of his option to avoid the fraudulent conveyance; for there is another point which must be decisive of this case, whatever may be the law in regard to the powers of trustees. It stands in this way. Either the plaintiff obtained title to the premises from the trustee, or he did not. If he did not, then all that the deed conveyed was a naked right to attack the prior conveyance on the ground of fraud, and that, as we have already said, is neither assignable nor enforceable by the assignee. If he did obtain title as he claims he is now the owner, and the fraudulent conveyance to Mrs. Gates constitutes only a cloud upon his title. But he is not in possession, and as we have many times held cannot for this reason maintain the bill. *Robinson* v. *Robinson*, 73 Maine, 170; *Gamage* v. *Harris*, 79 Maine, 531; *Frost* v. *Walls*, 93 Maine, 405.

Nor can the plaintiff be aided by the law, declared in a long line of cases in this state, which gives a creditor the right to attack a fraudulent conveyance, either by judgment and levy and bill, or by bill without judgment and levy. They are not applicable. He is not a creditor. It has, indeed, long been held in this State, that if a debtor at any time has had the legal title to the estate, and after the debt was contracted conveyed it for the purpose of defrauding his creditors, such deed is void. A creditor may levy his execution upon it and then establish the fraud by proceedings in equity. And where the debtor has never had the legal title, but has paid the purchase money and caused the property to be conveyed by the grantor to a third person, whether the deed be regarded as valid or invalid, he has never had any title that could be seized on execution, and a levy is in such case therefore unnecessary, and a bill lies to set aside

the fraudulent conveyance without levy. But this remedy is limited to creditors. The equitable jurisdiction of the court in this respect was enlarged by chapter 158 of the Public Laws of 1877, Revised Statutes, Ch. 79, section 6, clause IX, which gave the court general jurisdiction in bills by creditors to reach and apply in payment of a debt any property or interest conveyed in fraud of creditors. Under that statute it has been held that an equitable proceeding lies generally to reach property conveyed in fraud of creditors, without prior judgment and levy at law. *Brown* v. *Kimball Company*, 84 Maine, 492. But this statutory equitable remedy is limited to creditors, and therefore cannot be invoked in this case. This is the case of a purchaser, not a creditor. The plaintiff claims to be an owner striving to maintain a title which he obtained by purchase, and not a creditor seeking to obtain a title by legal proceedings. It has always been held that an owner cannot maintain a bill to remove a cloud from his title, unless he both alleges and proves that he is in possession. The rule is settled. It is not the province of equity to try titles to real estate, and put one party out of possession and another in. *Robinson* v. *Robinson*, supra. The plaintiff has mistaken his remedy, if he has one, The entry must be—

Bill dismissed, with one additional bill of costs.

EMMA F. ORR *vs.* CITY OF OLDTOWN.

Penobscot. Opinion October 10, 1904.

Ways. Liability of Municipality for Ways. Contributory Negligence. Nonsuit. Exceptions.

Towns have fully performed their duty to the traveling public, when they have constructed and maintained wrought ways of reasonable width and smoothness. If a driver choose, without reasonable cause, to drive outside such a way, he does it at his own risk, and at the risk of his passenger, and not at the risk of the town.

A town is not liable for injury caused by a defect in a way, unless the defect was the sole cause of the injury.

In an action to recover for injuries caused by a defective way, it is incumbent upon the plaintiff to prove affirmatively not only that no want of due care on his own part contributed to the injury, but likewise that there was none on the part of the driver, if any.

Exceptions will not be sustained in any event if the excepting party must ultimately fail upon the undisputed facts.

Exceptions by plaintiff. Exceptions overruled.

Action on the case to recover damages for injuries received by plaintiff by reason of an alleged defect in the highway in defendant town. At the conclusion of the plaintiff's testimony, on motion of the defendant's counsel, the presiding justice ordered a nonsuit on the ground that the foregoing evidence on the question of due care of Gertrude E. Perry, the person who was driving the team in which the plaintiff rode, was insufficient to warrant sending the case to the jury.

W. H. Powell, for plaintiff.

The term "due care" is a relative one. It would have added no probative force to the plaintiff's case if Gertrude E. Perry and a dozen witnesses had testified at the hearing that she was in the exercise of due care. Whether or not she was in the exercise of due care must be inferred by the jury from all the facts and circumstances in the case. *French* v. *Brunswick*, 21 Maine, 29; *Garmon* v. *Bangor*, 38 Maine, 443. The question of due care is for the

jury, 64 Maine, 541. Where evidence had been introduced tending to prove all the points required by law to be proved, in order to maintain the action, although circumstantial in character, and by way of inference from facts proved, a nonsuit ought not to be ordered, but the case should be submitted to the determination of the jury. *Foster* v. *Dixfield*, 18 Maine, 380. The question of negligence either of plaintiff or of defendant is one of fact for the jury, when the facts are in controversy, and even when they are not, if fair minded and unprejudiced persons may differ in the conclusions to be drawn from the facts. It is a question of law for the court when the facts are undisputed, and but one inference can properly be drawn therefrom. *Blumenthal* v. *B. & M. R. R.*, 97 Maine, 260.

F. W. Knowlton, for defendant.

In an action against a town for personal injuries from a defective highway, it is necessary for the plaintiff to show due care on her part, and also due care on the part of the driver, before the defendant will be required to introduce any evidence, and if all the evidence, as a whole does not show said due care, the presiding justice should order a nonsuit. *Merrill* v. *Hampden*, 26 Maine, 234; *Dickey* v. *Maine Tel. Co.*, 43 Maine, 492; *Benson* v. *Titcomb*, 72 Maine, 31; *Whitman* v. *Fisher*, 98 Maine, 575.

If the plaintiff knew that the hole was there and that the highway was dangerous at that point, she would be required to exercise greater care, and the lack of same would be contributory negligence. *Wormwell* v. *M. C. R. R. Co.*, 79 Maine, 397 *Walker* v. *Redington Lumber Co.*, 86 Maine, 191.

A person driving into a place of known peril and doing nothing to safeguard himself, does not exercise the measure of care which the law requires. *Whitman* v. *Fisher*, 98 Maine, 575.

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

SAVAGE, J. Action to recover damages for injuries sustained by reason of an alleged defect in highway in defendant town. The case

comes up on exceptions to an order of nonsuit for want of evidence of due care on the part of the driver. We think the order was right. The presiding justice would have been warranted in finding that the evidence, such as it was, showed affirmatively and unmistakably a want of due care by the driver. The alleged defect consisted in what is called in the case a "hole" beside the road, not more than thirty feet from the plaintiff's house. A drain pipe had been laid alongside the road on the same side and in front of the plaintiff's house, terminating about thirty feet distant therefrom. The ditch in which the pipe lay was filled about to the level of the road, nearly as far as the end of the pipe. From this point, the ditch, unfilled, three feet deep and four feet wide, extended still further. The embankment where the fill ended was nearly perpendicular. The plaintiff claimed and testified that tall grass on the side of the road had "grown right out straight" over the ditch, so that the precise edge of the hole, or end of the ditch, was somewhat obscured or "blind." Between the ditch and the traveled portion of the way was a strip of grass ground, two feet wide, at the end of the ditch. Then widening it extended from the end of the ditch past the front door of plaintiff's house, between the sidewalk and traveled way. At the end of the ditch the traveled way was twenty-one and a half feet wide, between the grass strip and the shoulder of the electric railway bed on the other side of the road. Some time previously, a water pipe had been laid in the street at a distance varying from seven to nine feet from the edge of the ditch containing the drain pipe, it being the longer distance at the end of the drain pipe. When the ditch for the water pipe was refilled, earth was left somewhat above the level of the road. At the time of the accident it had not completely settled, and there still remained a ridge or "mound," as the plaintiff calls it, two or three feet wide at the bottom, rounding over, and three inches high in the middle. This ridge extended to a point in front of the plaintiff's house. Otherwise the traveled way was level and smooth.

On the day in question, the plaintiff and her sister-in-law, Mrs. Perry, with two small children of the latter, had driven out with a team to make some calls. Mrs. Perry drove, and the plaintiff sat

upon the left side of the wagon, holding one child in her lap, with her arm around the other. On their return, they stopped a moment in front of the plaintiff's house, the off wheel standing on the grass strip between the sidewalk and traveled way. They then started to make another call. They drove along in the direction of the ditch or "hole," thirty feet distant. Mrs. Perry drove so far to the right that the off wheel all the time kept on the grass, and the measured distances show that the horse, if not on the grass, must have traveled close to the line between the grass and the traveled way. As Mrs. Perry was sitting on the right hand side of the wagon, the ditch was directly in front of her and even if it was "blind" at the "hole" by reason of the grass, it was clearly in sight a few feet further on, as the photographs in the case show. Nevertheless she drove "right straight on," turning neither to the right nor left, and when the off wheel reached the hole it dropped in and the plaintiff was thrown out and somewhat injured. It was clearly a case of "thoughtless inattention" on the part of the driver. *Tasker* v. *Farmingdale*, 85 Maine, 523. Had she used her eyes and her mind, she could not have failed to see that they were approaching a ditch, a dangerous place. She must have known she was in the line of the ditch, and must turn to the road in order to avoid getting into the ditch. Common prudence would have suggested that course. No other inference is admissible. If she did not know exactly where the ditch began,—and as to this there is no evidence,—there was all the more need of her giving careful attention to where she was driving, if she chose to drive towards a place of apparent danger.

Besides she was driving out of the traveled part of the way. Towns have fully performed their duties to the traveling public when they have constructed and maintained wrought ways of reasonable width and smoothness. If the driver chose, without reasonable cause, to drive outside such a way, she did it at her own risk and the risk of the plaintiff, and not at the risk of the town. No reason appears in this case to justify the driver in guiding, if she did guide, her horse so far to the right of the road. The little ridge of earth, three inches high, left when the water pipe was laid, was not an obstruction. It was hardly an inconvenience. It could be easily

crossed and recrossed. It presented no difficulty. But had it been otherwise, there was sufficient room to drive between the ridge of earth and the grass. And on the other side of the road was a clear space eleven or twelve feet wide, between the ridge and the electric railway. There was no apparent justification for driving outside the wrought portion of the road.

In *Mosher* v. *Smithfield*, 84 Maine, 344, plaintiff failed to hold a verdict merely because there was no evidence, one way or the other, as to the care of the driver. The circumstances were as consistent with one theory as with the other. For it is the law in this state that a town is not liable in a case like this unless its fault was the sole cause of the injury. And it is incumbent upon a plaintiff to prove affirmatively, not only that no want of due care on his own part contributed to the injury, but likewise that there was none on the part of the driver, if any. *Gleason* v. *Bremen*, 50 Maine, 222, *Mosher* v. *Smithfield*, supra. This is a stronger case for the defendant than *Mosher* v. *Smithfield*, for, as we have already said, the circumstances here show affirmatively that want of due care on the part of the driver, did contribute to the injury. And they show it so clearly and unmistakably, that no other inference or conclusion is warrantable. The ruling of the court was therefore right.

But had it been otherwise, the case presents another insuperable obstacle to recovery by the plaintiff, and that is the plaintiff's own want of ordinary care. Though this ground was not made a basis for the ruling below, it is proper to consider it here, for it is a wise rule of the law that exceptions will not be sustained in any event, if the excepting party must ultimately fail upon the undisputed facts. *Matthews* v. *Fisk*, 64 Maine, 101; *Farnsworth Co.* v. *Rand*, 65 Maine, 19.

The entire evidence offered by the plaintiff is made a part of the bill of exceptions. It shows that plaintiff had known of the existence of the hole and its general location for at least six years, though she says she did not know precisely where the edge of it was, on account of the long grass. She could see the mouth of the drain from her windows. She testified that she knew the hole was "a dangerous place." Two months previous she had notified the mayor

that it was a dangerous place, and watched him while he examined it. And yet, with all this knowledge, she permitted Mrs. Perry at the time of the accident to "drive right straight along" into the hole, without a word of suggestion or expostulation, without a hint to the driver of the danger known to the plaintiff, without any effort to save herself or prevent the injury. She was clearly lacking in that care and thoughtfulness which was due to the occasion. Had she used her knowledge as she ought to have done, no injury would have occurred. Her own want of due care contributed to the injury.

Exceptions overruled.

THOMAS DYER *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion August 27, 1904.

Railroads. Fire Set by Engine. Negligence. Action. Evidence. Insurance. Subrogation. R. S. 1883, c. 51, § 64. Stat. 1895, c. 79.

That part of R. S. 1883, c. 51, § 64, as amended by c. 79 P. L. 1895, giving to the railroad company the benefit of any insurance effected by the owner on property injured by fire communicated by a locomotive engine, is limited in its application to those cases in which the liability of the railroad corporation is created by that section and not by its own negligent act.

When the fire is caused by the negligence of the railroad corporation, an insurance company which has paid a policy of insurance upon the property injured, may maintain an action in the name of the owner against the railroad to recover from it the amount so paid, not exceeding the difference between the value of the property and any sum already paid by the railroad company to the owner.

The fact that fire is communicated to property along the line of a railroad by sparks from a locomotive engine raises an inference of negligence, in its construction, equipment or management, sufficient to make out a prima facie case, in the absence of all other evidence as to the manner in which the engine is constructed, equipped or operated.

On report. Judgment for plaintiff.

Action of assumpsit at common law brought by the plaintiff for the benefit of the London, Liverpool & Globe Insurance Co., to recover the sum of two thousand dollars paid by said Company to the plaintiff under a policy of insurance on certain buildings of the plaintiff which were destroyed, as alleged, by fire set by an engine of the defendant negligently constructed, managed and operated by the defendant on its road.

The case was reported to the law court by agreement of the parties, the court to render judgment according to law on so much of the evidence in the case as was admissible.

The case is stated in the opinion.

Clifford, Verrill & Clifford, for plaintiff.

It has been held in various cases that, in the absence of any testimony tending to show that a fire caught in any other way, a jury is justified in finding that a fire was started by a spark from a locomotive. *Hagan* v. *R. R. Co.,* 86 Mich. 618; *Union Pacific R. R.* v. *DeBusk,* 3 L. R. A. 350.

The fact that a fire starts soon after a locomotive passes and there is no other evidence of a fire, despite the fact that the engine was equipped with a spark arrester and was not known as a spark thrower, warrants the finding that the fire was set by a locomotive. *Wild* v. *B. & M. R. R.* 171 Mass. 245.

The discovery of a fire on or near a railroad company's right of way shortly after a locomotive has passed warrants the inference that it was set by sparks thrown from the engine, it being a matter of common knowledge that locomotives do emit sparks. 2 Thompson on Negligence, § 2291; *Smith* v. *London and Southwestern R. R.,* L. R. 6, C. P. 14.

It is not necessary to prove by direct evidence in an action for damages for the destruction of property by fire escaping from defendant's railroad that the fire started in its right of way. *Pittsburg, etc., R. R.* v. *Ind. Horseshoe Co.,* 154 Ind. 322.

It must be borne in mind that the defendants in this case have put in no evidence, the only evidence in the case being that adduced by the plaintiff. Not one statement made in behalf of the plaintiff in this cause has been denied. The plaintiff contends that he has made

out a prima facie case of negligence, and that in the absence of any rebutting testimony said prima facie case of presumption of negligence becomes conclusive, for where damage is caused by fire which is proven to have escaped from the engines of a railroad company, a presumption of negligence on the part of the company arises, which casts the burden of proof upon them to show affirmatively the absence of negligence. *Karsen* v. *Milwaukee & St. Paul R. R.*, 29 Minn. 12.

The fact that fire or sparks in unusual quantities escaped from an engine will of itself warrant the presumption that the appliances for preventing the escape of fire were inadequate and ineffective. *C. & N. W. R. R.* v. *McCahill*, 56 Ill. 28; *Field* v. *N. Y. Central R. R.*, 32 New York, 339.

Payment by the insured before suit brought does not effect the right of action. *Webber* v. *Morris & Essex R. R.*, 35 N. J. L., 410.

The insurer's position is practically that of surety, and as such, if he pays the loss of a part thereof, he is entitled to be subrogated to the extent of the amount paid. 4 Joyce on Insurance, § 3574.

By payment of loss insurers become subrogated to rights of insured against wrong doers whose negligence causes the destruction of the property on which the insurers paid the loss. *Pratt* v. *Radford*, 52 Wis. 114.

As to the bringing of the action in the name of Dyer, it is contended that by common law procedure action by insurance companies must necessarily be brought in the name of the insured. *Pratt* v. *Radford*, 52 Wis., 114.

Nathan & Henry B. Cleaves and Stephen C. Perry, for defendant.

The testimony in the case does not sustain the allegation of defendant's negligence as set out in the plaintiff's writ. It is true that the testimony of Thomas Dyer shows that his buildings were destroyed by fire, and that he received from the Liverpool, London and Globe Insurance Company as insurance on his buildings, the sum of $1,980 on account of the destruction of said buildings. There is no direct positive testimony, however, that the fire was caused by the defendant company.

There is no testimony whatever in the case that the fire was set by

a locomotive of the defendant company or that the defendant in any way caused the fire. It may be argued in behalf of the plaintiff that the defendant company felt that it was responsible for the fire and the loss of the buildings, and as evidence thereof the payment made by the defendant company to Thomas Dyer of $1,120 will probably be cited to substantiate that theory. Should it be so argued, then the answer thereto is that this payment is not proof positive that the company was responsible for or caused the fire, but that the payment was made to save controversy and the expense of a lawsuit.

Even if the testimony was full and convincing that these buildings were in fact destroyed by fire communicated by a locomotive engine of the defendant company, this plaintiff could not recover in this action. If this plaintiff has any cause of action it is by reason of the provisions of the statutes of this State, and under the provisions of these statutes, and under the decisions of this court, the plaintiff cannot prevail in this action.

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

POWERS, J. This is an action at common law, brought for the benefit of the Liverpool, London and Globe Insurance Company, to recover the amount of insurance paid by it to the plaintiff upon his buildings in Freeport, alleged to have been destroyed by fire communicated by sparks escaping from the locomotive engine of the defendant through its negligence in the construction, equipment, management, and operation of the same. The defendant has already paid to the plaintiff the full amount for which it is liable under R. S. 1883, c. 51, § 64, as amended by c. 79 of the laws of 1895, and insists that it is under no further liability. That statute is as follows: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof

less the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had."

Independently of any statute and prior to the enactment of c. 9, § 5, of the laws of 1842, the owner of property had the right at common law to recover damages sustained by fire communicated from a locomotive engine through the negligence of the railroad company using it. The act of 1842, which continued unchanged until 1895, broadened the liability of a railroad company so that it was made to embrace all cases of fire communicated from its locomotive engine. It was no longer necessary to allege and prove negligence in the use of the engine, and the statute in effect made the railroad company an insurer. If the property damaged was insured, the insurance company was entitled to subrogation. In such case, the owner might collect of either party that he saw fit. If from the insurance company first, then that fact constituted no defence for the railroad company, and any sum collected by him, in excess of what was necessary with the insurance to compensate him for his full loss, he held in trust for the insurance company. If, on the other hand, he collected from the railroad first, he thereby diminished to the same extent his claim against the insurance company. Both were insurers, the insurance company by virtue of its voluntary contract, and the railroad company by force of the statute which imposed the liability upon it. The liability of the railroad company was however primary and that of the insurance company secondary, not in point of time, but in point of ultimate liability. *Hart et al.* v. *Western R. R.*, 13 Metcalf, 99.

In this state of the law the statute was amended by c. 79, of the laws of 1895, giving to the railroad the benefit of any insurance upon the property, and providing that the insurance should be deducted from the damages if recovered before they were assessed, or if not, that the policy should be assigned to the railroad corporation which might then maintain an action thereon with all the rights of the

insured. This amendment had special and particular reference to the adjustment of the liability of the two insurers, the insurance company and the railroad company, in those cases falling under the section which was amended, and in which it was necessary for the owner to invoke the statutory liability of the defendant corporation in order to recover against it. The legislature might well deem it just that, as between the voluntary insurer by contract and the one who without fault on its part is made such by law, the latter should have the preference. To go further and say that in a case where the railroad company is liable because of its own fault and negligence, and not as an insurer, it should have the benefit of any insurance effected by the owner upon such property, would be a manifest injustice. The consequence of the defendant's negligence would then fall not upon itself but upon the insurance company, not upon the guilty but upon the innocent. We can not believe that a result so repugnant to justice could have been within the legislative intention. This action, therefore, may be maintained notwithstanding the amendment of 1895. That act is limited in its application to those cases in which the section amended makes the railroad company an insurer, in other words, to those cases in which the liability of the defendant is created by that section and not by its own negligent act.

The result here reached, is not in conflict with *Leavitt* v. *C. P. Ry. Company*, 90 Maine, 153. In that case it was admitted that fire was communicated without fault or negligence on the part of the defendant, thus clearly presenting a state of facts under which the railroad was chargeable, not at common law, but solely because of its statutory liability. We are aware also that the right of subrogation was denied to the insurance company under a similar statute in *Lyons* v. *Boston & Lowell R. R.*, 181 Mass. 551; but that, like *Leavitt* v. *C. P. Ry.*, supra, appears to have been an action based upon the statutory liability of the defendant and the questions here decided were not raised or considered.

This case comes before the court upon report and the defendant contends it is not liable upon the facts. The undisputed facts are that on the date in question the defendant's locomotive engine, sending out an unusual amount of smoke and cinders, passed over its

road through the plaintiff's farm and about three hundred feet from his buildings. There was no fire seen before the train passed but it was discovered shortly after in the grass near the railroad track, extending from the banks of the railroad to the plaintiff's buildings which it consumed. No attempt is made to account for the fire at this time or place upon any other hypothesis, and we think it is a fair inference that the fire was communicated by sparks from the defendant's locomotive. *Gibbons* v. *Wis. Valley R. Co.*, 66 Wis. 161; *C. & A. R. R. Co.* v. *Esters*, 178 Ill. 192; *Smith* v. *London & S. W. Ry. Co.*, 5 C. P. 98, 13 Am. & Eng. Ency. Law, 2 ed. 513.

The plaintiff must still prove that the defendant's negligence was the cause of the fire, and there is no evidence of any negligence on the defendant's part unless negligence in the construction, equipment or management of its locomotive engine can be inferred from the fact that the fire was communicated by sparks from it. On the question whether that fact alone is sufficient to make out a prima facie case of such negligence there appears to be an irreconcilable conflict of authority. The most respectable courts after careful consideration have arrived at directly contrary conclusions. On the one hand it has been held that no such presumption arises, because first, the defendant is carrying on a lawful business in a lawful manner, and second, that sparks and coals may escape notwithstanding all the safeguards have been adopted which modern science can suggest, and the greatest skill and care are employed in the operation of the engine. On the other hand we may well presume that the defendant is not running locomotives over its road the natural and probable effect of which would be to communicate fire to the property along its route if the locomotives were properly equipped and carefully managed, and when fire is so communicated the natural presumption is that it is due to negligence. More than that, such a presumption has its foundation in the necessities of the case. The locomotives of railroad companies by night and day rush with great velocity through the land. They are here today and tomorrow may be hundreds of miles away. They are within the control of the defendant. The method of their equipment and manner of their operation are known

to its employees who are always present with the engine, and evidence touching this subject is easy of production on its part. The owner of the property destroyed has no such opportunities of knowledge. It may be often exceedingly difficult if not impossible for him to even identify the engine which has caused the injury, or to obtain the names of those who know about its equipment or its use. He is frequently absent, and if present at the time and place of the fire he can obtain but a momentary view of the locomotive. He has no opportunity for inspection and knows nothing of its equipment and management. He can judge only by the result, and can often obtain no other proof as to whether the injury which he suffers has been caused by negligence. It is similar to those cases in which the burden of proof is cast upon him who best knows the facts. In this state the question is a new one. We are at liberty to adopt that rule which seems to us most consonant with reason and justice, and we think that negligence in the construction, equipment or management of the defendant's locomotive engine may fairly be inferred from the fact that the fire was communicated by sparks from it, and that there being no evidence or circumstances to rebut that inference, it is sufficient to enable the plaintiff to make out a prima facie case of negligence and maintain this action. This view is amply supported by the following among many authorities: *Chicago B. & Q. R. R.* v. *Beal*, 94 N. W. 956, 14 Am. Neg. R. 133; *Illinois Central R. R. Co.* v. *Mills*, 42 Ill. 407; *Spaulding* v. *Chicago & Northwestern R. Co.*, 30 Wis. 110, 11 Am. Rep. 550; *Idem* v. *Idem*, 33 Wis. 83; *Gulf Ry. Co.* v. *Benson*, 69 Tex. 497, 5 Am. St. Rep. 74; *Clemens* v. *Hannibal & St. Jo. R. R. Co.*, 53 Mo. 366, 14 Am. Rep. 460; *Barker* v. *Louisville & Nashville R. R.*, 7 Heisk. 451, 19 Am. Rep. 618; *Hull* v. *Sacramento Valley R. R. Co.*, 14 Cal. 387; *Louisville & C. R. R. Co.* v. *Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917; *Idem* v. *Reese*, 85 Ala. 497, 7 Am. St. Rep. 66. "In the case of railroad engines it has been repeatedly decided that the fact that the fire had been communicated by them to the premises is sufficient to raise a presumption that the railroad was not employing the best known contrivances to retain the fire and to make out a prima facie case of negligence." Cooley on Torts, 2 ed. 702. In

the closely analogous case of *Dunning* v. *M. C. R. R. Co.*, 91 Maine, 87, this court felt the necessity of applying to locomotives a somewhat more liberal rule of evidence than is applied in other cases.

Lowney v. *N. B. R. R. Co.*, 78 Maine, 479, is not an authority to the contrary. That the case differed from the present in two all important particulars; first, there does not appear to have been any sufficient proof that the fire was in fact communicated by the defendant's locomotive engine, and second, the defendant introduced evidence tending to show that there was no negligence in either the equipment or operation of the locomotive. After stating that it might be doubted whether there was sufficient proof that the fire was communicated by the locomotive the court say: "The negligence must be proved. Its relation as the efficient cause of the fire must also be proved. In this case we find no evidence of such negligence, nor of its casual relation. It is urged in the argument for the plaintiff that the dampers were probably open, or warped, or that ignited coals may have been blown out of the ash pan, or that the smoke stack might not have had proper appliances to arrest sparks. We do not find the evidence of them however. Indeed what evidence there was upon these points seems to negative the plaintiff's suggestions." If there was no sufficient proof that the fire was communicated by the defendant's locomotive, the question of negligence could not arise. If there was such proof then the evidence negatived the claim of the defendant's negligence. The question whether when the fire is in fact communicated by the locomotive and there is no evidence as to its manner of construction, equipment and operation, negligence in one of those particulars may fairly be inferred from the escape of the sparks in such quantity and manner as to cause the fire, was not before the court in that case.

The value of the property destroyed was $2800 and the defendant has paid to the plaintiff $1120.

Judgment for plaintiff for $1680 and interest from the date of writ.

DISSENTING OPINION.

EMERY, J. While a steam locomotive of the defendant railroad company was in lawful operation, drawing a train of cars, sparks escaped from it setting fire to the plaintiff's property. Despite the able reasoning of the majority opinion and the citations in support of it, I am unable to assent to the proposition that this escape of sparks, nothing further appearing, is sufficient evidence to establish negligence in the equipment or operation of the locomotive. I think there is danger in the proposition justifying me in attempting to show reasons against it.

I. Apart from authority, the proposition seems to be based on the assumption that locomotives are ordinarily so equipped and managed as not to set fire to property along the route. The argument seems to be that the setting of fires by sparks from a passing locomotive is exceptional, and therefore indicates some fault in equipment or operation. I deem the argument faulty in that it deals with the setting of fires instead of the escape of sparks; confounds the consequences, which may or may not ensue, with the act which is the subject under consideration. While the setting of fires by them may be very exceptional, the escape of sparks may nevertheless be of daily and hourly occurrence. Sparks may or may not set fires after their escape according to events and conditions entirely outside of the railroad company's sphere of action or duty, as high winds, severe droughts, etc. Whether a given act or omission is negligent is not determined by its consequences. So whether a primary result is evidence of negligence is not determined by a secondary result. The negligence of the defendant, if any, was in the act or omission through which the sparks escaped, not in the escape itself. Hence while the setting of fires may be evidence of the escape of sparks, it is not evidence of the cause of that escape, whether from accident or negligence.

It would seem to follow that the assumption, however indisputable, that locomotives are ordinarily so equipped and operated as not to set fires does not sustain the proposition that the escape of sparks from a passing locomotive indicates fault in equipment or operation.

I think to sustain the proposition the assumption must be as broad as this, viz: that locomotives can be so equipped with known appliances and so operated in known modes that sparks will not ordinarily, or often, escape from them while in operation. There being no evidence whatever in the case upon this point, the assumption must be from common knowledge so common and undisputed that the court can act upon it without evidence. If the assumption has not this foundation it must fall, and the argument with it.

Is it common knowledge, and undisputed, that such appliances exist and that such modes of operation are known? I must confess my own ignorance of them. I do not understand it is claimed to be knowledge so common and undisputed; and whoever will observe the amount of cinders strewing the sides of railroad tracks and will observe the smoke stacks of locomotives running at night will find, I think, much evidence to the contrary.

II. As to authorities; it is frankly admitted in the opinion that no case in this state has gone so far. It is also frankly admitted that eminent courts hold adversely to its view, while claiming support in the decisions of many other courts. Cases are cited in such support from Illinois, Wisconsin, Texas, Missouri, Tennessee, Alabama and California. I will not stop to inquire how far these decisions have been influenced by the statutes of those states or by other circumstances, nor will I burden the reader with citations of cases the other way, for I think the proposition is in conflict with the declarations and even decisions of our own court. In *Sturgis* v. *Robbins*, 62 Maine, 289, a case of fire escaping and causing injury, the court said on page 290, "It is not to be presumed that an act lawful in itself was not done at a suitable time and in a careful and prudent manner." In *Nason* v. *West*, 78 Maine, 253, the court said on page 256, "Presumption of negligence from the fact alone that an accident happened, will not do, for if there is any presumption in such a case it is that the defendants have complied with the obligations resting upon them equally with other men." In *Pellerin* v. *Paper Co.*, 96 Maine, 388, the court on page 391 quoted the above expression from *Nason* v. *West*, and added, "No presumption of negligence arises from the

mere fact that an accident has happened." In *Leach* v. *French*, 69 Maine, 389, the court said on page 393, "negligence and mis-doing are not to be presumed; there must be positive evidence of them." In *Lowney* v. *Railway Co.*, 78 Maine, 479, a case of fire communicated by a locomotive, the court said on page 480, "The burden upon the plaintiff therefore was, to prove, not only that the fire was communicated by the engine, but also that the defendants were guilty of negligence and that their negligence was the cause of the communication of the fire. The communication of the fire alone does not import negligence." This seems quite an explicit declaration and intentionally made. It is sought to distinguish the two cases, but I think the reader of both opinions will be convinced that the court in the Lowney case was pressed with the same proposition, and considered it and intentionally pronounced against it. It will hardly be suggested that the concurring justices would have permitted such an explicit declaration to pass them unchallenged if they did not fully agree with it.

But, further, I think the court has also expressly and necessarily adjudicated upon the principle involved. *Batchelder* v. *Heagan*, 18 Maine, 32, was, like this, a case of escaping fire, where fire lawfully upon the land of the defendant, but which he was by law bound to carefully guard and manage to prevent its escape to the lands of others, did escape to land of the plaintiff and set fire there. It was stoutly contended in that case, as in this, that the escape of the fire alone, if unexplained, was evidence of the defendant's negligence in the premises. The court squarely held that it was not. *Sturgis* v. *Robbins*, 62 Maine, 289, was a similar case. The fire set by the defendant on his own land had escaped therefrom and set fire to property of the plaintiff. The plaintiff's counsel in effect advanced the same proposition, to wit:—that the mere escape of the fire indicated that the defendant was in fault either in the time or manner of building his fire, which he must disprove or be held liable. The court held directly the contrary.

I do not find that either of these cases has since been questioned though the escape of fire from lands and locomotives has been of frequent occurrence. They seem to me not distinguishable in principle

from the case at bar. The defendant company had the right (as good as that of the farmer) to build and maintain fires in its locomotives as they lawfully passed by and near the plaintiff's buildings. In this particular case it was not bound as an insurer but only bound to use due care to prevent the escape of the fire. If the escape of fire from the land of the farmer does not indicate fault in him which he must disprove, I do not see how the escape of sparks from the running locomotive of a railroad company indicates fault on its part which it must disprove.

III. But the majority opinion seems also to be based on the difficulty of the plaintiff in such cases as this, in finding any other sufficient evidence of the defendant's negligence. It seems to be urged that it is so much easier for the defendant to prove that it was careful than for the plaintiff to prove that it was careless, it should be required to do so. Is not this in effect equivalent to saying that whenever the plaintiff cannot prove the defendant's fault in a matter, the fault should be assumed and the burden be put upon the defendant to prove his innocence? How can this doctrine be limited, without obnoxious discrimination, to actions against railroad companies? Why is it not equally applicable to every case where the court thinks it easier for the defendant to prove his innocence, than for the plaintiff to prove the fault or wrong? Is it not destructive of the presumption of innocence which has hitherto protected persons accused of negligence or any other tort or crime?

I think this court has never before intimated any approval of such a doctrine as applicable to a case where fault is necessary to be shown. In the case, *Dunning* v. *M. C. R. R. Co.*, 91 Maine, 87, cited in the opinion, no fault was to be proved. The company was an insurer. It was only necessary to prove the communication of fire from the locomotive. Here it was necessary to prove that, and also the defendant's fault in the matter. On the other hand, the court seems to have been pressed at times with the argument that when circumstances render affirmative proof of some essential element in the plaintiff's case difficult or impossible, the court should assume it to exist unless disproved; yet the court, while sometimes recognizing the hardships, has never dispensed with the proof. *McLane* v. *Perkins*, 92 Maine, 39, and cases already cited.

The legislature, upon whom such arguments should be urged rather than upon the court, can meet the difficulty by imposing liability as insurer instead of mere liability as wrong doer. It has done so in the case of fires communicated by locomotives, and has thus relieved persons injured by such fires from the burden of proving the fault of the owner or operator. It is competent and I think expedient for the legislature to do so; but it seems to have left this plaintiff under the circumstances of this case to prove the fault of the company as a prerequisite to recovery of damages from it. I think, therefore, the court should continue to hold in this case as it held in *Bachelder* v. *Heagan*, and *Sturgis* v. *Robbins*, supra, and as it at least declared in *Lourney* v. *Railway Co.*, supra, that the mere escape of fire, lawfully upon the defendant's property serving him in a lawful business, is not evidence of his fault; that the difficulty of proving his fault does not cast upon him the burden of disproving it.

HERBERT BOWDEN *vs.* SAMUEL DERBY.

Knox. Opinion October 26th, 1904.

Negligence. Proximate Cause. Road Commissioner.

When a road commissioner, in that capacity, has charge of the erection of a wall, and employs laborers who are paid by the city, he acts as a public officer, and is responsible only for reasonable care in the selection of men and materials for the service. Beyond this he is under no liability, except for his own acts.

When a road commissioner, who is under no obligation as a road commissioner to furnish a derrick to be used in the repair of roads, but having done so, he assumes the obligation towards those who use it, of seeing that it is reasonably safe and suitable, and so maintained.

The principle is clearly established that negligence may be regarded as the proximate cause of an injury, of which it may not be the sole and immediate cause. If the defendant's negligent, inconsiderate and wanton, 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, wrongful 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.

It is a question of fact and not of law, as to what was the proximate cause of an accident.

See *Same* v. *Same*, 97 Maine, 536.

Motion for new trial by defendant. Overruled.

Case for personal injuries sustained by the plaintiff August 6th, 1900, while at work in an excavation in a certain street in the city of Rockland.

The jury returned a verdict of $600.00 for the plaintiff.

The facts appear in the opinion.

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

The only question involved was whether given a derrick situated upon the top of a bank thirty or forty feet above the place where the men were at work, with the lower end of the boom of that derrick in no way secured to its place in the socket, and one of the hazards and things which was likely to happen being that the topping lift which held the outer boom was likely to get loose and run down, the inevitable result that when that run down the boom would come out of its socket, and in all probability fall into the quarry, reasonable care had been exercised in providing for that place a derrick of that construction?

While a derrick of this construction might be reasonably safe and a proper derrick to be used where all the work was to be done on the same level on which the derrick was set, and where if the boom should come out of the socket it would only drop three or four feet to the ground at the base of the derrick, it would be an entirely improper and unsafe appliance to use at the place where the lower end of the boom, becoming separate from the mast it would drop a distance of thirty to forty feet and put in jeopardy not only the limbs but the lives of those who were at work with it.

On all branches of the question the jury were certainly warranted

in arriving, on the undisputed facts to a conclusion in favor of the plaintiff. They were to pass, as a matter of fact, upon the question whether it was reasonable care to provide such a derrick for that place.

The conclusion was for them, and the facts certainly justify the conclusions drawn. We submit it would be impossible for them to come to any other proper conclusion.

D. N. Mortland, for defendant.

If it should be thought that as a matter of precaution the end of the boom should have been fastened to the mast, still if such want of fastening was not the direct cause of the accident or injury, the plaintiff could not recover because the undisputed evidence shows that an intervening cause and the real cause of the boom coming out of that chock and falling into the quarry was the loosening or casting off of the topping lift. It is well stated in 16 Am. & Eng. Ency. of Law, 1 Ed., page 433, "Where there can be found an independent, efficient, probable cause, the law will ascribe the injury to this probable cause rather than to the negligence which was not its likely and probable cause, but only to be held so in the absence of any other."

If the jury could, by any process of reasoning find that the derrick was defective because the boom was not lashed or fastened to the mast and into its chock, and that that was the proximate cause of the accident, whose duty was it to so fasten it? Was it the defendant's? Was that not a part of the selection of a competent person to set it up? The evidence shows that he selected a suitable derrick, with no imperfections in it. He then employed a proper and experienced man to set it up. If it were the proper thing, or necessary to fasten the boom to the mast, wasn't it this man's duty to do so, and see to it that it was lashed or fastened to the mast?

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

STROUT, J. The city of Rockland in repairing and protecting Maverick street, was erecting a retaining wall on the side of the

street near a deep excavation. The plaintiff was at work upon the wall at the bottom of the excavation. Upon the adjoining bank a derrick was erected, to be used for the handling of stone for the wall. The boom of the derrick fell into the excavation and upon the plaintiff and injured him. For that injury this suit was brought, and plaintiff recovered a verdict for six hundred dollars, which the defendant asks to have set aside as against law and the evidence and for excessive damages.

The defendant was the street commissioner of the city of Rockland, and in that capacity had charge of the erection of the wall. He employed the laborers, who were paid by the city. In all this he acted as a public officer, and was responsible only for reasonable care in the selection of men and materials which he supplied. Beyond this he was under no liability, except for his own acts. The relation of master and servant did not exist between the defendant and the laborers employed on the work.

The defendant furnished the derrick as a complete appliance to be used in doing the work. It was set up on the ground by Mr. Sweetland, employed by the defendant, who, so far as appears, was a competent person for that purpose.

The plaintiff had nothing to do with the selection or putting up of the derrick. When this case was previously before us, 97 Maine, 536, it was then said by Powers, J., speaking for the Court, that "the defendant supplied it (the derrick) to him as a complete appliance to be used in doing the work in which he was engaged. He had a right to rely that it was all right,—that it was not subject to such defects as could be discovered by the exercise of reasonable care on the part of the defendant. The defendant may have been under no obligation as road commissioner, to furnish the derrick, but, having done so, he assumed the obligation towards those who were to use it, of seeing that it was reasonably safe and suitable, and so maintained." The plaintiff was at work in the place selected for him by the defendant. The duty was thus imposed upon the defendant to see that that place was reasonably safe.

To apply these principles to this case:

The heel of the boom to the derrick rested against the mast upon

a chock of wood attached to the mast for its support. This chock was about eight inches wide. Upon the sides were cleats nailed to the mast to prevent lateral slipping, but it was not otherwise attached or fastened to the mast and it had no appliance for such attachment. The outer end of the boom was raised five or six feet higher than its heel, by a guy or top lift, running from it to the top of the mast. While in this position there was little or no probability that the heel of the boom would fall off from the chock and the cleats. From some unexplained reason, while operating the derrick, the top lift either slipped or became detached from its fastenings, allowing the outer end of the boom rapidly to fall to a point lower than the heel, and the heel came out of its resting place against the mast and fell upon the plaintiff in the excavation below and caused his injury.

The plaintiff claimed that the boom should have been made fast to the mast, to prevent this result, and that the derrick was defective and unsafe for that cause. Its actual condition was apparent to the most casual observation. The jury found the derrick to be defective in this particular, and we are not prepared to say that such finding was incorrect.

The defendant insists that the proximate cause of the injury was not the want of attachment of the boom to the mast, but the failure of the top lift to remain in place and hold the outer end of the boom at a proper elevation, and that this failure was the result of the negligence of Mr. Sweetland, who set up the derrick, for which the defendant is not reponsible, as he did not in fact do this work. In a sense, this may have been the causa causans, but it is nevertheless true that the accident would not have happened if the heel of the boom had been securely fastened to the mast. If two causes operate at the same time to produce a result, which might be produced by either, they are concurrent causes, and in such case each is a proximate cause. *Herr* v. *City of Lebanon*, 149 Pa. 226; *Milwaukee Railway* v. *Kellogg*, 94 U. S. 474. As said by the court in *Ricker* v. *Freeman*, 50 N. H. 420, "the principle is clearly established that negligence may be regarded as the proximate cause of an injury, of which it may not be the sole and immediate cause. If the defendant's negligent, inconsiderate and wanton, 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, wrongful 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." This language was quoted with approval by this Court in *Lake* v. *Milliken*, 62 Maine, 242. So it is said in *Binford* v. *Johnston*, 82 Ind. 428, that "the intervention of a third person, or of other and new direct causes, does not preclude a recovery if the injury was the natural or probable result of the original wrong."

"If, it appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues." *McDonald* v. *Snelling*, 14 Allen, 296.

In this case, if the derrick was defective and unsafe as constructed, and that condition was apparent to the defendant upon a slight inspection, the fact that the top lift got adrift by insecure fastening, from the negligence of Mr. Sweetland who set it up, or otherwise, that result was one likely to happen and to be apprehended as probable, and does not excuse the defendant, although the injury would not have occurred if the boom had remained in place. It must have been foreseen that if from any cause, the outer end of the boom fell below the end at the mast, the boom would not only be likely to slip off from the chock, but would almost inevitably do so, to the danger of those working in the excavation. It was the heel of the boom that fell out and struck the plaintiff. It fell out because insufficiently secured. This fall, therefore, of an unsafe derrick, as a constructed appliance, must be regarded as the proximate cause of the injury,— although the insecure fastening of the top lift concurred to the result as an intervening impetus. *Lane* v. *Atlantic Works*, 107 Mass. 104; *Insurance Co.* v. *Boon*, 95 U. S. 130; *Lund* v. *Tyngsboro*, 11 Cush. 563.

It is a question of fact and not of law, as to what was the proximate cause of an accident. 95 U. S. supra. The jury has found

the fault in the derrick to be the proximate cause, and we do not feel authorized to disturb that finding.

The damages awarded by the jury cannot be regarded as excessive for the injury received.

Motion overruled.

INHABITANTS OF GREENVILLE

vs.

PAUL BEAUTO and WILLARD H. GALUSHA, Trustee.

Piscataquis. Opinion October 27th, 1904.

Board of Health. Towns. Action. Words and Phrases. R. S. 1903, c. 18, § 51.

Revised Statutes, Ch. 18, § 51, provides in substance that when any person is infected with any disease or sickness, dangerous to the public health, the local board of health may remove him to a separate house, and there care for him at his charge, "if able." *Held:*

1. That such a person is not chargeable with any part of the expense incurred, if he is not able to pay the full amount.
2. Such a person is not chargeable with the expense incurred, if he is not financially able at the time of his discharge, although he was able to labor, and did labor, and afterwards accumulated sufficient money to pay the expense.
3. The phrase, "if able," relates to the pecuniary ability of the party at the time the expenses were incurred.

On report. Judgment for defendant.

Action under section 51 of chapter 18 of the Revised Statutes by the town of Greenville, to recover for board, nursing and medical attendance furnished the defendant while sick with small pox in said town.

The defendant, a common laborer about thirty years of age, was taken sick with small pox in the town of Greenville and removed by

the local board of health to a separate house, and provided with nurses and other assistants and necessaries from September 10th, nineteen hundred three, to October 12th, nineteen hundred three, in compliance with the provision of the statute under which the action was brought. The defendant was a single man, capable of earning thirty dollars a month and board during the lumbering season and at other seasons of the year, amounts varying with the nature of employment; having no one dependent on him for support except an aged and infirm father, whom he assisted to some extent. At the time the defendant was taken sick with the small-pox, and at the time of his discharge from quarantine, he had about two dollars in money and there was due him ten dollars which he collected on October 13th, nineteen hundred and three; he had no other property of any kind at the time of his discharge. He commenced work on the 13th day of October, nineteen hundred and three, and from that date to the date of the service of the writ, in this action on the trustee, he earned ninety-five dollars and seventy-six cents, ($95.76) and received in part payments therefor clothing and other goods from the camp store amounting to nineteen dollars and twenty-six cents ($19.26) leaving a balance due him from the trustee at the time of the service on said trustee of seventy-six dollars and fifty cents ($76.50).

If the plaintiffs are entitled to recover in this action they are to have judgment for forty-nine dollars and ten cents ($49.10).

This case was reported for the consideration and decision of the law court, upon the foregoing agreed statement of facts. Upon so much of the evidence as is legally admissible, the court to render such judgment as the law and facts require.

A. L. Fletcher and C. W. Brown, for plaintiff.

The theory contended for by the plaintiff is that the meaning of the statute is not necessarily that the sick person must have the present, subsisting ability to pay in cash, at the time the necessaries are provided nor at the time he is discharged from quarantine, but that if as in this case, it is shown that the person who has had the contagion can pay the expense of his sickness within a reasonable time, he is "able," and further that a man alone in the world, with no one depending on him for support, and possessing health, strength and

ability to work—a capacity for earning money—young in years and strong in body is able to pay a reasonable amount if given a reasonable time.

In Wisconsin under a statute providing a penalty for abandonment of the wife, where the husband has sufficient ability to support her, it was held that the words, "being of sufficient ability, referred as well to the husband's capacity or skill to earn or acquire money as to property actually owned by him." *State* v. *Witham*, 70 Wis. 473. Note to Am. & Eng. Enc. of Law, Vol. 1. Title, "Ability." *Davis* v. *Davis*, 37 N. H. 191.

Butler & Butler, for defendant.

The defendant in this case had no money with which to pay at the time the necessaries were furnished him nor at the time of his discharge from quarantine. *Orono* v. *Peavey*, 66 Maine, Page 60.

There was no liability on his part to pay until he was able to pay. The test of liability is the ability to pay at the time the expense is incurred.

According to the rule laid down in *Bangor* v. *Wiscasset*, 71 Maine, 535, the defendant is not liable unless he was able to pay at the time the necessaries, etc., were furnished. The money which he has earned since his discharge from quarantine cannot be taken to pay the expense incurred in providing him with necessaries, etc. If not able to pay at the time he is not liable to pay, he does not become a debtor to the town of Greenville unless able to pay at the time the necessaries, etc., were furnished; as he was not able to pay at the time, no debt was created and he is not bound at this time to pay for the necessaries so furnished.

It may be argued that the defendant was able to labor and earn money. We do not apprehend that such ability, if it existed, is what is meant by the term ability as used in the statute. We believe the term ability as used in the statute has reference to the financial ability, that is, it depends upon whether the person supplied has sufficient means with which to pay. This seems to be the only question which the court has ever considered in cases of this character. But should such argument be presented then we submit that under the rule laid down in *Bangor* v. *Wiscasset*, the ability to

pay must be determined by the condition of the person at the time the necessaries, etc., were actually furnished. In this case, at that time, the defendant certainly was entirely incapacitated to earn money. He was not only sick but he was quarantined, and if he would otherwise have had ability to earn money with which to pay the expense incurred in providing for him necessaries, etc., this ability was taken away from him on account of his sickness and by virtue of the quarantine; he, therefore, at the time, had no ability to pay the expense incurred, and if he had no ability at the time there was no liability to pay and no debt was created against him.

The question of ability to earn money does not determine the ability of a person to pay debts. The ability of men to use money wisely varies so much that knowing the amount a man may be able to earn can in no way determine the amount he may be able to pay. It is common knowledge that one man will accumulate a comfortable property on the same income which proves insufficient to support another man under like circumstances. The ability to use money wisely is quite as important a factor in determining a man's ability to pay debts as is his ability to earn money. In the case of the defendant it is admitted that he is a common laborer thirty years of age, who had, at the time he was taken sick, not more than twelve dollars worth of property. If the defendant at thirty years of age had not accumulated more than twelve dollars worth of property it is a strong circumstance to prove his inability to pay the debt contracted in this case. If the defendant had never been able to earn more than was necessary to pay his ordinary living expenses, except such amounts as he contributed toward his father's support, it seems fair to argue that he had not sufficient ability to pay an expense incurred, as this was, on account of an unusual sickness.

It does not seem to us that the legislature could ever have intended the term ability to refer to a person's capacity to earn and use money. This would lead in every case to an examination so extended and so complicated and depending so much upon the mental quality of each individual that it would be quite impossible to determine with any degree of fairness, the ability of an individual to pay an expense incurred under this statute.

We believe, therefore, that the term ability as used in the statute under which this action is brought, has reference only to a person's financial ability and if such is the case we believe that the court has fully settled this question in the cases cited and the cases therein referred to.

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

SAVAGE, J. Action under R. S., c. 18, § 51, to recover for board, nursing and medical attendance furnished the defendant while sick with small pox in the plaintiff town. The statute in question provides that when any person is "infected with any disease or sickness dangerous to the public health, the local board of health of the town where he is, shall provide for the safety of the inhabitants, as they think best, by removing him to a separate house, if it can be done without great danger to his health, and by providing nurses and other assistants and necessaries, at his charge, or that of his parent or master, if able, otherwise at that of the town to which he belongs."

The defendant was sick with small pox in Greenville, was removed to a separate house, and nurses and other assistants and necessaries were provided for him at an expense of forty-nine dollars and ten cents. And he became liable to reimburse the town, "if able." Upon the proper construction of this last phrase, "if able," the case turns. It is admitted that at the time the defendant was taken sick, and at the time of his discharge, he had about two dollars in money, and that there was due him ten dollars which he afterwards collected, and that he then had no other property of any kind. It is evident that so far as existing financial ability at that time is concerned, he was not "able" within the meaning of the statute, for, as was held in *Orono* v. *Peavey*, 66 Maine, 60, if a person is not able to pay the full amount of the expense incurred, he is not chargeable with any part of it.

But the case shows that the defendant was a single man, a common laborer, capable of earning about thirty dollars a month, and that

from the time of his discharge from quarantine to the date of the service of the writ, he had earned ninety five dollars and seventy six cents, of which seventy six dollars and fifty cents was then due him. And the plaintiff contends that if not financially "able" at the time of his discharge, he was able to labor, and did labor, and had accumulated sufficient money or credit to pay this bill, and that therefore he is now "able" within the meaning of the statute. Is this contention sustainable? We think not. The liability contemplated by the statute is, we think, fixed and definite, and not contingent and uncertain. And if this be so, it must have reference to the time when the expenses were incurred. He is not chargeable until he is "able," and it follows that if he is not "able" then, he is not chargeable at any time afterwards, unless the statute intends to make him liable upon a future and unknown contingency. If he should become able to labor or accumulate money, would it be reasonable to say that a liability which did not exist at the time of his discharge was afterwards created by the happening of a contingency? If so, within what limit of time? A month, or a year, or ten years? And as the statute of limitation does not run until the cause of action accrues, shall a person in such case be liable to become liable for a lifetime, unless sooner he becomes able to labor, or has accumulated property? That would be unreasonable, and it is not, we think, contemplated by the statute.

But even if he were able to labor at the moment of discharge, there is no necessary connection between ability to labor and ability to pay debts. Whether a laborer can find employment, for what periods in the year, and at how much wages, are all uncertain and contingent, and so are the expenses of living to which he may be subjected. In any event there can be no reason in saying that he is "able" unless he earns more than it reasonably costs to live,— unless he creates a surplus. One is not able to pay debts whose daily wage is eaten up by his daily charges, and in the general run this is, unhappily, too often the case with common laborers, such as this defendant is stated to be. We cannot think the legislature intended the question of liability to depend upon the narrow and often inperceptible balance between the earnings and expenses of a

laboring man. Such a test would be both uncertain and unsatisfactory, not to say unfruitful. The only reasonable test is the existing financial ability to pay at the time the expenses were incurred. See *Bangor* v. *Wiscasset*, 71 Maine, 535. Applying this test to the case at bar, we hold the plaintiff has failed to show the defendant's ability and consequent liability.

Judgment for defendant.

VENA T. WHITNEY, In Equity, *vs.* KATHERINE J. JOHNSTON.

Knox. Opinion October 31, 1904.

Set-off of costs. Decree in Equity. Exceptions. R. S. 1903, c. 79, § 22.

1. After a mandate in an equity proceeding of "Bill dismissed with costs" has been received from the law court, a single justice has no power to stay judgment and execution. He cannot enlarge, limit or modify the scope of the mandate.
2. Nothing remains after such a mandate is received except to enforce it according to its terms.

Exceptions by plaintiff. Overruled.

This was a suit in equity to remove a cloud upon title to real estate in Knox County. The law court being of the opinion that the plaintiff's remedy was at law, sent to that county the rescript, "Bill dismissed with costs." The rescript was received, entered and filed March 17, 1904, but no costs have been taxed or execution issued.

On April 19, 1904, the plaintiff began a real action against the defendant, to recover the same land as in the equity suit, and filed in the equity suit a motion to stay judgment and execution in that suit until the real action should be determined, in order that such sums as she might recover in that action for damages and costs might be set off against the costs in the equity suit.

This motion came on to be heard before the presiding justice who ruled that he had no power to grant the motion at that stage of the cases, and accordingly denied the same.

To this ruling the plaintiff excepted.

D. N. Mortland and R. I. Thompson, for plaintiff.

The power to set off one judgment against another does not rest upon any statute, but upon the general jurisdiction of courts over their suitors, and the general superintendence of proceedings before them.

True the defendant has not asked for a formal order or decree that execution issue, but we were not obliged to wait for such decree or order. We contend that the case was still in the hands of the court to make such order or decree as justice or equity required and it was in the discretion of the justice to either grant or deny the motion or petition. I do not claim that the question as to whether or not such a stay or set-off should be granted, is before this court. The question here is, as to whether or not a justice of this court under the circumstances has the power, in his discretion, to grant the motion. It is a power incident to courts of equity and was for a long time exercised exclusively by them. But it is now established that the power to set-off one judgment against another is incident to courts of law as well as to courts of equity, and that judgment for one party may be withheld until the other, by using due diligence, shall obtain his judgment, so that the other may be set-off against the other, or that one execution may balance the other. *Hutchins* v. *Riddle,* 12 N. H. 464; *Smith* v. *Woodman,* 28 N. H. 520; *Adams* v. *Manning,* 17 Mass. 180; *Ocean Ins. Co.* v. *Brown,* 20 Pick. 259; Parson on Contracts, Vol. 2, 754.

J. E. Moore, for defendant.

The equity suit was ended March 17, 1904, and could not be further heard unless on some petition for a review of the whole case and not of some part of it. The clerk did not bring the action forward on his April term 1904 docket.

We do not think such a decree is necessary to end an equity suit under such circumstances. The judgment of the law court in this case was not an affirmation of any rights or duties to be declared and

enforced by an execution decree. It was a simple negation of the plaintiff's claim. It stopped the suit; dismissed, ended it. The entry on the docket was a decree to be formulated by the clerk in the extended record. It sufficiently effectuated the order of dismissal.

The suit being ended March 17, 1904, judgment was of that date or of the prior January term, 1904. All that remained to be done was for the defendant to tax and attend to the collection of her costs and her attorney had only that duty to perform and could not otherwise bind the defendant, and service could not be made upon him as to any further proceedings.

Even if it were in the power of any justice of the court to alter a decree as to costs, especially as to costs in an equity suit, it is wholly matter of discretion. Costs in an equity suit are not recovered as a matter of course without a special decree, as we have seen, though generally allowed to the prevailing party. Their allowance therefore, must be a matter of discretion and perforce, any change in relation to them in any way must be the same. So if the presiding justice had the power to control their payment it must be only discretionary.

He could not have a right in law to make any order in reference to them. The ordering of them was an exercise of the discretion of the supreme court in chancery and a single justice could not have the legal right to overrule it or do anything about them.

No appeal will be allowed from a decree upon mere matter of discretion, as in the case of granting or refusing costs. Whitehouse, Eq., Par. 619 and N. 9 and 10.

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

SAVAGE, J. This bill in equity to remove a cloud upon the title to real estate, has once before been before the law court. The court being of opinion that plaintiff's remedy, if any, was at law, and not in equity, sent down the following mandate, "Bill dismissed with costs." The bill of exceptions states that no costs have been taxed or execution issued, and we assume that no formal, final decree has

been signed by a single justice, although the bill is silent upon this point. After the mandate was received, the plaintiff began a real action against the defendant to recover the same real estate, and filed in the equity suit a motion to stay judgment and execution in that suit, until the real action should be determined, in order that such sums as she might recover in that action for damages and costs might be set off against the costs in the equity suit. The justice sitting below ruled that he had no power to grant a motion at that stage of the cases, and accordingly denied the same, to which ruling exceptions were taken.

We think the exceptions must be overruled. Revised Statutes, chap. 79, sect. 22, provides that after the mandate is received from the law court a "decree shall be entered therein by a single justice, in accordance with the certificate and opinion of the law court." The decree must follow the mandate. A single justice cannot enlarge or limit or modify the scope of the mandate. He cannot hinder or delay its execution. He must enter the decree in accordance with the mandate, and then he can only cause the decree to be executed. He may, no doubt, issue subsidiary process, if necessary, to enforce the decree, but he cannot issue a restraining order to prevent or delay its enforcement. Nothing remains after the mandate is received except to enforce it according to its terms.

Exceptions overruled.

STATE OF MAINE *vs.* N. J. HANNA.

Knox. Opinion November 14, 1904.

Fish and Fisheries. Extortion. Stat. 1887, c. 285, § 39. 1897, c. 285, §§ 28, 48. 1899, c. 81, §§ 1, 3. R. S., 1883, c. 118, § 23. 1903, c. 41. §§ 2, 17, 61; c. 119, § 23.

The Revised Statutes, ch. 41, § 17, provide that no person shall have in his possession any lobster less than ten and a half inches in length, and fixes a penalty for violation of this provision at one dollar for each lobster. Section 61 of the same chapter provides that all fines and penalties for having "short" lobsters in possession may be recovered by complaint, indictment or action of debt, that the action of debt shall be brought in the name of the commissioner of sea and shore fisheries, and that all offenses under the provisions of the statute, forbidding having short lobsters in possession, may be settled by the commissioner upon such terms and conditions as he deems advisable. *Held:* —

1. The Commissioner of Sea and Shore Fisheries has authority to settle offenses of this character without suit or prosecution.
2. It is not unlawful for him to advise, persuade or urge any offender to settle. He may even go to the extent of pointing out that the alternative will be a criminal prosecution.
3. He may authorize one of his wardens to make demand for payment of the penalty incurred.
4. Such warden has no authority to "settle" with an offender. But this case shows that he did not attempt to "settle," he simply carried out the instructions of his superior, the commissioner.
5. For a fish warden, acting under the instructions of the commissioner, and without malicious, corrupt or oppressive intent, to write to an offender that his lobster case is not yet settled, that he owes the state nine dollars, and that unless he sends that amount to the commissioner before a date named, he (the warden) is ordered to take defendant's case to the grand jury, does not constitute maliciously threatening to accuse another of crime, within the meaning of section 23 of chapter 119, Revised Statutes.

On report. Judgment for defendant.

Indictment under chap. 118, § 23, of the Revised Statutes of 1883, charging the defendant with extortion. By agreement the case was withdrawn from the jury and reported to the Law Court upon so much of the evidence as was legally admissible. If the decision of

the court is that the act of the respondent charged in the indictment, which it was agreed was performed by order of the Fish Commissioner, was a violation of section 23 of chapter 119 of the Revised Statutes of 1883, then judgment is to be entered for the state, otherwise for the respondent.

Philip Howard, County Attorney, for State.

To extort under statutes of this kind means to obtain such money or other advantage by means of the wilful and malicious threatening. *Commonwealth* v. *Coolidge*, 128 Mass. 55.

If the threat was wilfully made, with the intent to extort money, it was a malicious act, and the fact that the charge was true would be immaterial. *Commonwealth* v. *Buckley*, 148 Mass. 27.

The wilful doing of an unlawful act without excuse is ordinarily sufficient to support the allegation that it was done maliciously and with criminal intent. *Commonwealth* v. *Scott*, 122 Mass. 33.

The form of the words alleged to be a threat is unimportant if they sufficiently convey the idea. *State* v. *Patterson*, 68 Maine, 473.

Not the accusation, but the threat to make it, constitutes the crime. Bishop New Crim. Law, Par. 1201.

Immaterial whether person threatened is guilty or not, for in either case there is an attempt to pervert justice. The threat needn't be successful. Bishop as above.

Whether the purpose and intention of the defendant was to extort money is purely a question of fact. *Commonwealth* v. *Coolidge*, supra; *Commonwealth* v. *Buckley*, supra.

Evidence that the person threatened, in fact committed the crime inadmissible on question of intent and malice. *Commonwealth* v. *Coolidge*, supra.

The threat may be of a general character, indicating not the accusation of any particular crime or offense, but the accusation of some offense or other. *Commonwealth* v. *Goodwin*, 122 Mass. 31; *State* v. *Robinson*, 185 Maine, 195.

Merritt A. Johnson, for defendant.

The Statutes of Maine present the authority under which the warden and the commissioner have acted. Have they usurped their

powers? The provision of section 71 seems to be specific wherein it sets out, "And all offenses under, or violations of, the provisions of this statute, may be settled by the commissioner of sea and shore fisheries, upon such terms and conditions as he deems advisable."

I take these words to mean that the commissioner may do just what the letter in this case purports; that is, he may settle all offenses under or violations of the provisions of said chapter, whether such offenses and violations have been brought before the courts or not. In other words, it is left with the commissioner to dispose of all offenses and violations of said chapter as he deems for the best interest of the state so to do. This would allow him to sift the case and to take into consideration the enormity of the offense, the situation of the parties, and in short the best interests of the state and all concerned with the one end in view to stop the handling of short lobsters.

The giving of this power to the commissioner, probably arose from the fact that there are a large number of seizures of small importance for violations of the laws, where it seems best for the commissioner to dispose of them without reference to the courts where he can properly do so, rather than to present them to the courts and by such process the interest of the state be better served. Whether it is a wise policy is not the question raised here, although from the nature of the offenses under said chapter it would seem to be for the interest of the state to grant this power to the commissioner as it has.

The nature of the business makes it obligatory on the commissioner to delegate his authority to his subordinates. It would be an impossibility for the commissioner to cover the entire state in person and to do the entire work of his department. The law does not intend that he shall be so restricted, and provides specifically for the use of subordinates and what the authority of the subordinates shall be.

"No act, carefully performed, from motives which the law recognizes as honest and upright, is punishable as a crime. And it has always been held, that extortion proceeds only from a *corrupt* mind." Bishop on Criminal Law, Vol. 2, § 396.

"In this, as in every other crime, the intent is an essential ingredient. The extortion must be knowingly and with a corrupt motive.

Under the statutes it seems to be generally held there must be

knowledge and corrupt intent whether the statute in terms requires that such should be the case or not.

In morals it is an evil mind which makes the offense; and this, as a general rule, has been at the root of criminal law. The consequence is, that it is not to be intended that this principle is discarded merely on account of the generality of statutory language.

It is highly reasonable to presume that the law-makers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it."

"In an indictment charging the defendant with maliciously threatening to accuse a person named of a crime with the intent to extort money, the evidence offered as to the truth of the accusation might have an important bearing upon the question of the defendant's intent and should be admitted.

If the wrong which he offered to prove had in fact been committed, the demand which the defendant made for payment may have been without the intent to extort money necessary to constitute the crime alleged in the indictment." *Commonwealth* v. *Jones*, 121 Mass. 57; *Commonwealth* v. *Coolidge*, 128 Mass. 59.

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

SAVAGE, J. The respondent stands indicted for a violation of section 23, of chapter 118, R. S. 1883, (R. S., c. 119, § 23) which provides that "whoever verbally, or by written or printed communication, maliciously threatens to accuse another of a crime or offense, or to injure his person or property, with intent thereby to extort money or procure any advantage from him, or to compel him to do any act against his will, shall be punished" etc. The case comes before us on report.

The evidence and admissions show the following facts. In November, 1900, one Allen Simmons at Friendship was found in the possession of nine "short" lobsters in violation of Public Laws of 1897, chap. 285, § 39, as amended by Public Laws of 1899, chap. 81, § 1. (R. S., c. 41, § 17). The penalty fixed by law

was one dollar for each lobster. The respondent, who was a duly appointed fish warden in Lincoln County, reported the fact to the commissioner of sea and shore fisheries. The commissioner, Nov. 6, 1900, wrote to Simmons about the matter, informing him that there was a fine of nine dollars due the state for the nine short lobsters found in his possession, and that he might settle by paying the fine on or before November 15, but received no reply. Afterwards the commissioner turned the case over to the respondent with instructions to write to Simmons, which he did, endeavoring to persuade Simmons to settle the matter. To this Simmons made no reply. In August or September, 1901, the commissioner ordered the respondent to proceed with the case. By this order, the commissioner intended,—and it was so understood by the respondent,—that if the latter could collect the penalty then, by giving the offender another chance, he might do so; otherwise, a prosecution was to be commenced. Thereupon the respondent wrote Simmons the letter which is complained of, which is as follows:—

Office of N. J. Hanna.
New Harbor, Maine. New Harbor, Me. Sept. 22, 1901.
Fish and Game Warden
for Lincoln County.

Mr. Allen Simmons.

Sir.—Your lobster case is not yet settled. You owe the state $9.—and unless you send that amount to the Commissioner at Boothbay Harbor, the Hon. A. R. Nickerson, on or before September 6, I am ordered to take your case to the grand jury in Rockland this term. Let me hear from you immediately.

Very truly,

N. J. Hanna, Warden.

In the stipulations it is agreed that the letter was written by order of the commissioner.

Upon these facts, is the respondent guilty of the offense charged? We think not. The record is entirely barren of anything to show that the respondent acted with malicious, corrupt or oppressive intent, or that there was any intention of any kind to "extort" money

or procure any unlawful advantage from Simmons. On the contrary, malice and intended extortion are negatived. The respondent appears to have been proceeding regularly, and in good faith, under the instructions of his superior officer, the commissioner.

But it is contended on behalf of the state that the commissioner had no authority to collect, or to direct the respondent to collect, the fine in the manner attempted; that the threat, therefore, was for an unauthorized and unlawful purpose, namely, to obtain the money of Simmons or procure an advantage from him in an unlawful way; and that, in law, such a threat wilfully made was malicious. It will not be necessary to carefully criticise the conclusion of the state's argument, for we think the premise is unfounded.

The commissioner assumed to act under the provisions of Public Laws of 1897, ch. 285, § 48, as amended by Public Laws of 1899, ch. 81, § 3, (R. S. ch. 41, § 61,) which provides that "all fines and penalties under this act may be recovered by complaint, indictment or action of debt brought in the county where the offense is committed." The action of debt shall be brought in the name of the commissioner of sea and shore fisheries, and all offenses under, or violations of, the provisions of this statute [which forbids having short lobsters in possession] may be settled by the commissioner of sea and shore fisheries, upon such terms and conditions as he deems advisable. All fines, penalties and collections under this act shall be paid into the treasury of the county where the offense is committed, and by such treasurer to the state treasurer, to be added to and made a part of the appropriation for sea and shore fisheries." By Public Laws of 1897, ch. 285, § 28, (R. S., ch. 41, § 2.) it is provided that "wardens shall enforce all laws and the rules and regulations relating to the sea and shore fisheries, arrest all violators thereof, and prosecute all offenses against the same." Construing these two statutes together, the state contends that legal proceedings of some kind must be instituted by a warden against an alleged offender before the commissioner has authority to demand or receive payment of the penalty. We do not so understand the statute. It says that "offenses" may be settled by the commissioner. It does not say that "prosecutions" may be settled by him. It bestows upon the

commissioner a comprehensive and delicate power. It vests in him a discretion not possessed by the court. The court, upon conviction, must impose the penalty fixed by law, but the commissioner may "settle" offenses as he deems advisable.

It will be noticed that the provision for settling offenses is found in the text of the statute in close connection with the provisions for bringing the action of debt to recover a penalty in the name of the commissioner; and while it is unnecessary in this case to decide whether or not the power of the commissioner to settle extends to criminal prosecutions already commenced, — for here none had been commenced, — it must be clear that the commissioner is authorized to settle a civil action of debt commenced in his name. If he can settle a minute after a writ is made, why may he not do so a minute before? If an offender is caught red handed, and is willing to settle without suit, why should it be necessary to bring suit against him? We think it is not. The statute does not require it. We think it is permissible for the commissioner to settle before suit, or any other process, is instituted. This conclusion is fortified by the use of the word "collections" in the concluding sentence of the section, in which it is provided that "all fines, penalties and *collections* under this act shall be paid into the treasury of the county," etc. Earlier in the section it is provided that all "fines and penalties" may be recovered by complaint, indictment or action of debt." Here it is provided that all "fines, penalties and *collections*" shall be paid into the county treasury. Taken in connection with the other language of the section, the word "collections," if it means anything, seems to refer to moneys *collected*, and not to fines and penalties imposed and paid.

Now if it was lawful for the commissioner to settle with Simmons, it could not be unlawful for him to advise, persuade or urge Simmons to settle, even to go to the extent of pointing out to him that the alternative would be a criminal prosecution. The commissioner was seeking no more than he was authorized to collect, and he was seeking it in a lawful manner.

But at this point the state contends that whatever may have been the authority of the commissioner, it was authority vested in him personally, and could not be delegated to a warden. True. And it

is equally true that the commissioner did not attempt to delegate any authority to the respondent. He did not attempt to clothe the latter with any discretion to settle. The warden could not fix terms and conditions. He could not take less than the amount due. He could simply receive, if Simmons would pay. When the commissioner had exercised his discretion and had determined that Simmons ought to pay the full penalty, we perceive no illegality nor impropriety in his ordering a warden to make the demand.

In accordance with the stipulation the entry must be,

Judgment for the defendant.

THOMAS H. WHALEN *vs.* THE EQUITABLE ACCIDENT COMPANY.

Penobscot. Opinion November 14, 1904.

Health Insurance. Notice. Waiver. Stat. 1895, c. 46. R. S., c. 49, § 95.

Plaintiff was insured against loss resulting from sickness caused by various diseases, among which was dysentery. The policy provided that failure to give written notice as therein provided within ten days of the date of the beginning of any sickness, should invalidate any and all claims under it. The plaintiff fell sick October 17, 1903, and no notice was given to the company or its agents of the sickness, until December 30, 1903. Within thirty days after plaintiff became sick with dysentery, but not within the first ten days of his being sick, he became insane. *Held:—*

1. The condition in the policy was a valid one, and by its terms the failure to give notice within ten days of the date of the beginning of the plaintiff's sickness invalidated all claims under the policy.
2. The provisions of Public Laws 1895, ch. 46, (R. S., ch. 49, § 95) to the effect that notice of accident, injury or death may be given to a foreign or domestic casualty or accident insurance company insuring, at any time within thirty days after the happening of an accident or injury or death, and shall be valid and binding on the company, do not extend to cases of health insurance.
3. Where a health insurance company, after the expiration of ten days from the time a party insured became ill, but before it knew the date when he

did become ill, sent blank forms for proof of claim to him to be filled out, such conduct did not constitute a waiver on its part of the provision requiring the plaintiff to notify it within ten days from the beginning of the sickness.

Exceptions by plaintiff. Overruled.

Action brought in the Bangor Municipal Court and submitted on an agreed statement of facts. The Judge of that Court ordered a nonsuit, and plaintiff filed exceptions.

The facts sufficiently appear in the opinion.

A. L. Blanchard, for plaintiff.

It is contended that in accordance with the agreed statement of facts in the case that the requiring the plaintiff to fill out forms Nos. 1 and 2 constituted a waiver on the part of the company requiring the plaintiff to notify them within 10 days of the beginning of his sickness as required by the conditions of the policy.

As a second proposition the plaintiff sets forth that he is excused from giving the notice within the time prescribed by the condition in his policy, or within the time prescribed by the statutes of this state, which is thirty days from the beginning of the sickness, from the fact that at the time he became sick and was deprived of his reason by insanity; that the time for filing the proof of his claim begins to run from the date of his recovery from his insanity. *Pratt* v. *Woodman Accident Ins. Co.*, L. R. A., 291; *Ins. Co.* v. *Boykin*, 12 Wallis, 433.

Lewis A. Barker, for defendant.

The condition C. in the plaintiff's policy of insurance requires that notice of the beginning of any sickness for which claim is to be made under the policy, shall be given in writing addressed to the secretary of the company in Boston, and that failure to give such written notice within ten days of the date of the beginning of such sickness shall invalidate any and all claims under this policy.

Such conditions have always been held valid and requisite to a recovery in this state. *Leadbetter* v. *The Etna Insurance Company*, 13 Maine, 265; *Davis* v. *Davis and Niagara Insurance Company*, Trustees, 49 Maine, 282; *Heywood* v. *Maine Mutual Accident*

Association, 85 Maine, 289; *Kimball* v. *Mason's Fraternal Accident Association*, 90 Maine, 183.

By section 95, chapter 49, Revised Statutes 1903, this period of notice is extended to thirty days. In the case at bar it is agreed that the plaintiff fell sick on October 17, 1903. No pretension is made that any notice whatsoever was given the company until December 30th, 1903, when the plaintiff's wife notified the company's agent at Bangor, a period of seventy-three days from the date of sickness.

This leaves only the question of whether there was a waiver by the company. *In Peabody* v. *The Fraternal Accident Association of America*, 89 Maine, 96, where it was held that the company's acts constituted a waiver, a preliminary proof having been sent three days late, the company made no objection but forwarded a second and final form. This was held to be a waiver, but is in no way applicable to the case at bar.

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

SAVAGE, J. Action on a health policy issued to the plaintiff July 10, 1903, whereby he was insured for the loss of time resulting from the sickness caused by various diseases, among which was acute dysentery. The policy contained the following provision: —

"This policy is issued by the Company, and signed by the insured subject to the following provisions and conditions:

(C) Notice of the beginning of any sickness for which claim is to be made under this policy, shall be given in writing, addressed to the Secretary of the Company at Boston, stating the full name and address of the insured, with full particulars of the sickness including the date of beginning and an accurate description of the sickness; and failure to give such written notice within ten days of the date of the beginning of any sickness shall invalidate any and all claims under this policy."

The plaintiff fell sick with acute dysentery October 17, 1903, during the life of the policy, and continued sick until April 4, 1904. The parties agree that he was regularly committed to the Eastern

Maine Insane Hospital, Nov. 7, 1903, and it is a reasonable presumption that he was then insane. It does not appear how long he remained so, nor does it appear when he first became insane, nor how long he had been insane at the date of the commitment.

No notice was given to the company or any of its agents concerning the plaintiff's sickness, or his claim for insurance under the policy until Dec. 30, 1903. By the terms of the policy, the failure to give notice within ten days of the date of the beginning of any sickness invalidated all claims under it. This condition was a valid one, *Heywood* v. *Accident Association*, 85 Maine, 289, and the plaintiff must fail to recover unless he shows some legal excuse for the failure to give the notice required by the contract. *Kimball* v. *Accident Association*, 90 Maine, 183. And the burden of proof is upon the plaintiff. He seeks to sustain that burden of proof in this way. He claims that by force of public laws, 1895, ch. 46, the time within which notice might be given was extended from ten days to thirty days, so that a notice given within thirty days after he began to be sick would be sufficient. He claims that he had all of the thirty days in which to give the notice, and that before that period expired he became insane. And his insanity, it is argued, legally excused the giving of the notice.

Whether the insanity of an insured person excuses the performance of the contract as to notice on his part, is a question which we have no occasion to consider, and do not decide, for the plaintiff's case fails before we reach it. Unless the time of giving notice was extended by the statute to thirty days, as is claimed, the effect of the plaintiff's insanity is of no consequence. Unless the statute applies, he must stand by the contract. He became sick October 17. The ten days within which he was required by the policy to give notice, expired October 27. There is no proof that he was insane until November 7. All men are presumed to be sane. That presumption continues until the contrary is proved. *Weston* v. *Higgins*, 40 Maine, 102; *State* v. *Lawrence*, 57 Maine, 574. He who claims that a person previously sane became insane, or was insane, at any particular point of time, must prove it. There is nothing in this case to show that the plaintiff was not sane during the entire period

of ten days from the beginning of his sickness. It follows, even upon the plaintiff's own theory, that his claim became invalidated by failure to give notice within ten days, unless the statute referred to afforded him a longer time, and until after he became insane.

The statute of 1895, ch. 46, provided that "No conditions, stipulations or agreements contained in any application for insurance in any foreign or domestic casualty or accident insurance company, or contained in any policy issued by any such company, or in any way made by any such company, limiting the time within which notice of the accident or injury, or death, shall be given to such company, to a period of less than thirty days after the happening of the accident or injury, or death, shall be valid. Said notice may be given to the company insuring, at any time within thirty days after the happening of the accident or injury, or death and shall be valid and binding on the company."

As this statute to some extent limits the right of contract, and reads into the contract which the parties in terms have made, language which they did not use, and creates stipulations which they in fact did not agree to, we think it should not be strained to include cases which are not clearly within its terms. The statute in terms extends the time only in case of notice of "accident, or injury or death." This is not a case of accident, or injury or death. It is a case of sickness. It does not seem to have been within the contemplation of the legislature. At the time this statute was enacted there was comparatively little or no health insurance in this state. It may be that the reasons why the legislature saw fit to extend the time within which notice might be given would apply equally well to cases of insurance against loss of time for sickness, as to cases of accident, or injury, or death. But that consideration does not empower us to say what the legislature has not said. We think the statute of 1895 does not apply, and that the notice given in December was too late.

But the plaintiff urges still further, that notwithstanding the failure to give notice seasonably, the failure has been waived by the defendant company. It appears that the agent of the company was notified of plaintiff's illness Dec. 30, 1903. On the following day

he notified the company of the fact, and on Jan. 7, 1904, the company mailed to the plaintiff two blanks, one for him to make out, and one for his physician to make out, the one called "Formal Notification," form number one, and the other "Report of Attending Surgeon," form number two. These blanks were duly filled out and returned to the company, which received them on Jan. 15, 1904. These blanks so filled out conveyed to the company the first knowledge it received of the date of the beginning of the plaintiff's illness. On the same day the company wrote to the plaintiff, calling his attention to the fact that he had failed to comply with the condition in question, and informed him that he had no claim which could be recognized.

It is contended by the plaintiff that the acts of the company, after the notice in January, 1904, in sending blank forms to the plaintiff to be filled out, constituted a waiver on the part of the company of the provision requiring the plaintiff to notify them within ten days from beginning of his sickness. The plaintiff relies upon *Peabody* v. *Accident Association*, 89 Maine, 96. But that case differs widely from this, so far as relates to the facts which were evidence of a waiver. There the company furnished blanks to be filled out, knowing all of the facts. The time within which notice of loss was to be given had expired, but the company knew it, and yet led the injured party to go to the trouble and expense of filling out blanks and forwarding them. And as said by the court in that case, "it would have been an inexcusable imposition to invite the plaintiff to make up proofs of loss, when the intention of the company was to wholly disregard the same, whatever might be the result of their investigation." In this case, so far as appears, neither the agent nor the company had any knowledge whatever of the date when the plaintiff's illness began at the time the company forwarded him blanks to be filled out. If its officers or agents did not know that ten days had already elapsed since he began to be ill, the mere fact of sending the blanks would not be proof of waiver. Waiver is a matter of intention. One cannot be said to waive that which he does not know. *Marcoux* v. *Society of St. John Baptist*, 91 Maine, 250. The conduct of the defendant company, taken as a whole, not only shows no

waiver, but shows affirmatively that there was no intention to waive.

Therefore the action is not maintainable. The court below correctly ordered a nonsuit.

Exceptions overruled.

NETTIE L. JOY *vs.* INHABITANTS OF YORK.

York. Opinion November 14, 1904.

Way. Notice of claim. Evidence. R. S. 1903, c. 23, § 76.

1. The statute, R. S., ch. 23, § 76, provides that a party injured by a defect in a way cannot recover of a town unless he shall, within fourteen days thereafter, notify one of the municipal officers of the town by letter or otherwise, in writing, setting forth his claim for damages, and specifying the nature of his injuries.
2. A notice is sufficient which describes the nature of the injury with sufficient particularity to enable the town to inquire into and ascertain the true condition of the sufferer.
3. But the injured party, in his notice, must specify such injuries as he knows of, and for which he claims damages. If he can do no more, he must state the apparent physical condition caused by the injury, and he may do this by comprehensive terms. If he does so, it is notice of such results as actually follow from the injury.
4. In a case where such notice in writing described the injury as "said injury consists of a fracture of both wrists," and the claim for damages was stated in these words,—"I claim five hundred dollars damages against said town for my injuries above specified," *held*:—

That it was error to permit the jury to allow the plaintiff damages for an injury to her shoulder.

Motion and exceptions by defendant. Exceptions sustained.

Action on the case for personal injury arising from an alleged defective highway. Plaintiff in her notice to the selectmen of York, dated July 15, 1902, claimed to be entitled to damages for certain injuries therein described. Nothing was said in her notice about

injury to the right shoulder. Evidence was offered showing that she suffered injury to that shoulder and also that both wrists were broken. Defendant requested the presiding justice to charge the jury "that plaintiff can only recover damages arising from such injuries as are specified in her notice to the town dated July 15, 1902." This instruction was refused.

The jury rendered a verdict for plaintiff for $275.

Further facts appear in the opinion.

William S. Pierce, for plaintiff.

The plaintiff did testify, without objection, that she injured her shoulder in this accident and it has since caused her considerable pain and suffering.

We submit that it is not at all surprising or remarkable, that in view of all her other injuries sustained, their character and extent, the pain accompanying her two fractured wrists, that she should overlook, up to the time of giving her notice, the development of the shoulder trouble which grew into prominence only as the violence of her greater injuries began to subside, and that too late to incorporate into a notice of injury within the time limited by the statute.

We say that she had a right to testify to this injury to her shoulder and of the inconvenience and suffering to her caused thereby and to have it considered by the jury as an element of damage. *Blackington* v. *Rockland*, 66 Maine, 332 at 334a; *Bradbury* v. *Benton*, 69 Maine, 194 at 197; *Rogers* v. *Shirley*, 74 Maine, 144 at 150; *Wadleigh* v. *Mt. Vernon*, 75 Maine, 79 at 81-82; *Low* v. *Windham*, 75 Maine, 113 at 116c.

Though the act of 1877 has materially changed the nature of a statutory notice of injury and claims for damages against a town from that required by the act of 1874, yet the matter of specifying the nature of the injury remains the same, except that now greater latitude should be shown to the plaintiff in that regard for the reason that the time was shortened to fourteen days, thereby frequently rendering it impossible to tell in so short a time all the injuries that are sustained or that may develop from the accident. *Wadleigh* v. *Mt. Vernon*, 75 Maine, 79 at 81.

John C. Stewart, for defendant.

At the trial of the case defendants requested the presiding justice to instruct the jury "that plaintiff can only recover damages arising from such injuries as are specified in her notice to the town dated July 15, 1902." This instruction was refused. It should have been given. If parties are required to give notice "specifying the nature of his injuries" it is for the purpose of notifying the town for what injuries he claims damage. *Wadleigh* v. *Mount Vernon,* 75 Maine, 79.

In this case the notice stated that he had been "violently shaken up and jarred in his fall to the ground"—The court said, "the declaration is comprehensive enough to warrant the introduction of proof of any bodily injury resulting from "such shaking and jarring." Not so here. The injuries alleged are specific. See also *Blackington* v. *Rockland,* 66 Maine, 332; *Goodwin* v. *Gardiner,* 84 Maine, 278; *Lord* v. *Saco,* 87 Maine, 231.

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

SAVAGE, J. Action for injuries alleged to have been sustained by a defect in a way. The plaintiff seasonably gave a written notice of her injury to the municipal officers of the defendant town, in which she described the injury as follows: "Said injury consists of a fracture of both wrists." And in the notice the claim for damages was stated in these words,—"I claim five hundred dollars damages against said town of York for my injuries above specified." At the trial evidence was offered, and admitted without objection, showing that plaintiff suffered injury to her shoulder; also that both wrists were broken. The defendant requested the presiding justice to charge the jury "that the plaintiff can only recover damages arising from such injuries as are specified in her notice to the town." This instruction was refused, and exceptions were taken.

The statute, R. S., ch. 23, § 76, provides that a party injured by a defect in a way cannot recover of a town unless he shall "within fourteen days thereafter notify one of the municipal officers of the town by letter or otherwise, in writing, setting forth his claim for

damages and specifying the nature of his injuries." This clause of the statute has been several times under consideration by the court, and it has been held that such a notice is not to be very strictly construed; that the main object of the notice is that the town may have an early opportunity of investigating the condition of the person injured; and that a notice is sufficient which describes the nature of the injury with sufficient particularity to enable the town to inquire into and ascertain the true condition of the sufferer. *Blackington* v. *Rockland*, 66 Maine, 332. This case, which is much relied upon by the plaintiff, arose under the act of 1874, chapter 215, which required notice to be given "specifying the nature of the injuries," but did not require the notice to be in writing. The notice was given in the form of a bill "for damages of one thousand dollars to horse." And the notice was held good. The plaintiff here contends that the notice in question was sufficient to put the town upon inquiry as to all the injuries sustained by her, including the injury to her shoulder.

But the case of *Blackington* v. *Rockland* has since been greatly limited, if not in effect overruled. In the subsequent case of *Goodwin* v. *Gardiner*, 84 Maine, 278, the notice was of personal injuries to the plaintiff, which were described as "severe bodily injuries," and not otherwise. And in that case the court, speaking by Peters, Chief Justice, who drew the opinion in *Blackington* v. *Rockland*, said of the latter case, "that was a close case, and the rule then established should not be extended beyond the point decided. In that case the statement that 'my horse was injured' at a certain time and place in Rockland, was held to be a sufficient description of the nature of that plaintiff's injury. But the very reasons given for sustaining the sufficiency of that notice illustrate the deficiency of the present notice. A man can tell his own personal sufferings more exactly than he can describe those of a horse. A man can exaggerate, conceal or deceive. A horse cannot. A man may be able to practice an imposition as to his own personal injury, but would find it difficult to do so in respect to an injury to his horse." And in the case of *Lord* v. *Saco*, 87 Maine, 231, wherein the plaintiff in his notice said his horse "was greatly injured

by reason of the defect," the court said, — "The statute requires not only a specification of the nature and location of the defect which caused the injury, but it also requires a specification of the nature of the injuries. Here again the notice is defective. It states that the horse owned by Albert H. Lord was greatly injured, but it fails utterly to state the nature of his injuries." It is difficult and perhaps impossible to reconcile *Lord* v. *Saco* with *Blackington* v. *Rockland*. If the notice in *Lord* v. *Saco* was bad, it would seem that the notice in *Blackington* v. *Rockland* should have been so held.

The injured party in his notice should specify such injuries as he knows of, for it is only reasonable that he should fairly put the municipal officers in possession of such knowledge as he has. But it is not necessary in such a notice to describe with particularity all of the injuries upon which the plaintiff may rely. It frequently would be impossible to do so within the limited time within which a notice must be given. Unknown and even unexpected results may flow from a personal injury received by one through a defect in a way. But that consideration furnishes no ground for excusing want of notice. The remedy for injuries caused by a defective way is one given by statute alone. The legislature in affording a remedy has hedged it about with conditions, as it had a right to do. One of the conditions precedent to a recovery is the giving of a written notice specifying the nature of the injuries. It is not enough for the injured party to state that he has been injured. *Low* v. *Windham*, 75 Maine, 113. It is not enough to say that he has been greatly injured. *Lord* v. *Saco*, supra. It is not enough to state that he received "severe bodily injuries." *Goodwin* v. *Gardiner*, supra. He must state the *nature* of his injuries. And for injuries the nature of which he has stated he may recover, for others he cannot. The difficulty of specifying his injuries, or the impossibility of knowing the precise results, afford no reason for not specifying as far as he can. If he can do no more, he can state the apparent physical condition caused by the injury, and he may do this by comprehensive terms. If he does this, it is notice of such results as actually follow from the injury. It puts the town upon inquiry as to the condition stated. It gives it all the advantage contemplated by the statute.

The party having given true notice and as particularly as he can of his condition, the town must be prepared to meet the results. It was so held in *Wadleigh* v. *Mt. Vernon*, 75 Maine, 79, where the sufferer had given notice that he had been "seriously injured in the thigh, and internally injured in his right lung, and otherwise injured, by being violently shaken up and jarred in his fall to the ground." Under this notice he was permitted to show an injury to one of the testicles, the court holding that the notice was comprehensive enough to warrant the introduction of proof of any bodily injury resulting from his being "violently shaken up and jarred in his fall to the ground. It is essential therefore that the sufferer in his notice should state the nature of his injuries, and the town is entitled to as particular a notice as can reasonably be given. *Goodwin* v. *Gardiner*, supra. In that case where the injuries were described as "severe bodily injuries," it was said "it would have been more natural for the plaintiff, if really injured severely, to state how and to what extent the injury affected him, whether upon the head or back, upon his arms or legs, and whether general or particular. The assertion is that he met with injuries, but not one of them is named. No kind of injury is either included or excluded by the notice. One object of the statute requiring notice within fourteen days after the injury is alleged to have been received, is that the injured person shall thus early commit himself to a statement of his condition when he would be more likely to describe it frankly and fairly than at a later period. There is great temptation to magnify and exaggerate such personal injuries."

But while the plaintiff in the case at bar, did set forth the nature of her injuries in one particular, she mentioned no other even by implication. She stated specifically that both of her wrists were broken, but she did not mention her shoulder, or state any condition of things which might indicate an injury to the shoulder, or from which such an injury might result. There is nothing whatever in the notice, which can relate to an injured shoulder. She was specific as far as she went. She designated a particular injury, and it is not competent for her now to prove or recover damages, for an injury the nature of which was not specified. She must be limited by her

notice. It was error, therefore, to permit the jury to allow her damages for the injury to the shoulder, and the jury should have been instructed in accordance with the defendant's request. Inasmuch as for this reason the defendant's exceptions must be sustained, and the case must go back for another trial, it is not deemed necessary to consider the motion for a new trial, filed on the ground that the verdict was contrary to the evidence.

Exceptions sustained.

ELLEN G. STONE, Admx.,

vs.

LEWISTON, BRUNSWICK & BATH STREET RAILWAY.

Androscoggin. Opinion November 29, 1904.

Negligence. Evidence. Instruction. Custom. Exceptions.

When the evidence is conflicting and the question of liability and damages is one that is peculiarly within the province of the jury, and the evidence does not convince the court that the jury were clearly wrong, a motion for a new trial will be overruled.

A requested instruction, although proper, may be rightfully refused when the presiding justice has covered the whole ground of the instruction in his charge. He is not required to give it again.

In an action against a street railway company to recover damages for personal injuries received by the plaintiff's intestate, testimony is admissible upon the question of the negligence of the defendant to show that it was the custom of the defendant to permit passengers to ride on the running board of its cars, although there was no claim that this custom was known to the plaintiff's intestate.

Exceptions do not lie to the exclusion by the court of photographs. It is in the discretion of the presiding justice to admit or exclude photographs.

Motion and exceptions by defendant. Overruled.

Action against defendant company for negligently causing death of plaintiff's intestate. There was a verdict for the plaintiff for $5000.

Defendant filed a motion for a new trial, also exceptions to the admission and exclusion of certain evidence and to the refusal of the presiding justice to give certain instructions.

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.

SPEAR, J. This is an action on the case to recover damages for personal injuries received by the plaintiff's intestate, Richard Stone, while riding upon the defendant's car. The verdict was for the plaintiff in the sum of $5000. The case comes up on motion and exceptions.

The facts, upon which there is but little controversy, show that the plaintiff's intestate was a passenger on the defendant's car leaving Sabattus for Lewiston, on August 10th, 1902, at about 8.30 o'clock in the evening. It was an open car with two running boards, and, there being more passengers upon the car than could be seated, the plaintiff's intestate rode upon one or both of these running boards, either sitting or standing, from Sabattus to the place of the accident, near the residence of Dr. Alonzo Garcelon, about a mile from the city of Lewiston. As the defendants state in their brief, "at the point where the accident is alleged to have taken place, there was an elm tree standing upon the southerly or pole side of the track, at a distance of seven inches from the outer edge of the lower running board, fourteen inches from the outer edge of the upper running board, and twenty-two inches from the edge of the car floor. The tree leaned somewhat away from the track. The lower running board is six and one-half inches in width and the upper running board is seven inches." The plaintiff's contention is that when near this elm tree, Stone stood up, leaned in as if to speak to his wife, who was sitting in a seat in the car, and that when he leaned back he struck the elm tree, was knocked to the ground, fell under the car, was run over and received injuries from which he died the next day.

There was some dispute in regard to the manner of the accident, but one witness testified positively that it occurred as the plaintiff contended and the jury must have so found and their verdict upon this point must control. While the conductor avers that he said, "You will find room inside, and don't ride on the running board," it does not appear that Stone heard it or was warned against the danger of trees or poles, but was allowed to ride upon the running board in the darkness without instructions or caution. It seems that, on this evening, there were some ten or more passengers than could be seated and the most of them were permitted and did ride on the running board. It also appears that it was the custom of the defendant to allow passengers to ride, between Lewiston and Sabattus, on the running board. The details of these facts, the question of due care on the part of the deceased and a view by the jury of the track, the tree and the car, showing the exact relation of the car to the tree, were all submitted to the jury, with proper instructions and they found the defendant liable, and a careful examination of the testimony does not convince us that they were so clearly wrong as to warrant us in setting the verdict aside upon the question of liability.

The defendant further contends that, admitting liability, the verdict is clearly excessive and therefore erroneous. The verdict was a large one, but the suffering for which it was given was intense beyond description. It is clearly distinguishable from *Ramsdell* v. *Grady*, 97 Maine, 319, cited by the defendant. In that case, as in the case at bar, "only such damages can be allowed as the deceased sustained in his lifetime." In the Ramsdell case the plaintiff's intestate was already ill with diptheria when the physician was called and might have suffered and died even if the physician had diagnosed the case as diptheritic; and the plaintiff's right to recover damages only includes "such injury, expense and suffering as was due to the defendant's default in excess of what they would have been had the case been properly diagnosed and treated."

But in the case at bar, the deceased's suffering and death were due not in part but wholly to the negligence of the defendant.

The evidence, which is almost too shocking to quote, shows that both of his limbs were so mangled and torn that they were merely

hanging by shreds of flesh and muscle. This was at nine o'clock in the evening. He suffered amputation of both legs and lived under circumstances of the most excruciating physical and mental pain until between two and three o'clock the next morning. In addition to these injuries the pelvic bone was also broken. He was conscious nearly all the time, not only suffering great physical pain, but with a full realization of his hopeless condition.

We can hardly conceive of a case capable of involving keener mental suffering. He was a young man, less than thirty in the full vigor of life and health. He had been married a little over a year and there had come into his life, as the result of this union, a little child, at this time about a month old. With the bride of a year and a helpless infant dependent upon him, in the vigor of youth, with a future bright in hope, he was yet fully aware that in a few hours his inevitable doom was death. One of the physicians says, "he looked up into my face and asked if I thought he could live. And I replied that I was very sorry to tell him that I did not think he could; and he made the remark that it was very hard to die, or something to that effect." We think this man suffered about all that man can suffer in this world including death itself. We cannot say that the verdict is so excessive as to require us to set it aside.

The defendant's first exception was to the refusal of the presiding justice to give the following instruction upon the question of due care on the part of the plaintiff's intestate:

"If the jury shall find that the plaintiff's intestate voluntarily assumed the position in which he was riding, sitting upon the running board of the car and bringing portions of his body outside the line of the car and running boards, when he could have ridden upon the rear or front platform of the car, taking into account the rate of speed at which the car was going, the darkness of the night and the insecurity of the plaintiff's intestate's position on the running board, the jury have the right to consider all of these facts as bearing upon the question whether at the time and place of the accident the plaintiff's intestate was in the exercise of such care and prudence as an ordinarily careful and prudent person would exercise under like circumstances." But a careful reading of the charge discloses that the

presiding justice did, in substance, give all the elements of the request. After having instructed the jury, without objection or exception, upon the question of fault on the part of the defendant, he proceeded as follows with respect to the duty devolving upon the plaintiff's intestate:

"If you find they were not in fault, then your verdict would be for the defendant. If you think they were in fault by running their cars too near the tree and the post or so near as to endanger the passengers on the running board, and that they allowed passengers to ride upon the running board and took fare for it, then you will come to the question whether or not Mr. Stone was in the exercise of such care as a prudent man would exercise under the circumstances for his own protection. If he was not, and that failure to exercise care contributed to the injury, then your verdict would be for the defendant; but if the defendant was in fault as I have stated, and if Mr. Stone was in the exercise of due care, and if he was knocked off of the car by striking the tree or the post, and that was so near as to constitute a fault on the part of the company, then the plaintiff is entitled to recover." But the instructions upon this point did not stop here. The justice, in the last paragraph of his charge, gave the following: "I am asked to instruct you, gentlemen, that the burden of proof is upon the plaintiff to show by a fair preponderance of the evidence that at the time of the accident and injury to the plaintiff's intestate he, the plaintiff's intestate, was in the exercise of such care as a prudent man would have exercised under all the circumstances; and in determining this proposition the jury have the right to take into account the darkness of the night, the position which the plaintiff's intestate was sitting or standing upon the running board of the car at the time of the accident and injury to him, and the fact whether or not a prudent man would under all the circumstances have been riding upon the running board of the car at the time and place of the accident. I give you that, and I have practically given it all before."

The above instructions sufficiently covered the subject matter of the defendant's request.

The defendant's second exception is to the admission of testimony tending to show that it was the custom of the defendant company to permit passengers to ride on or upon the running board of the cars between Sabattus and Lewiston, without any claim that this custom was known to the plaintiff's intestate. This evidence may have had but little weight, but it was competent upon the question of the negligence of the defendant company. If neither trees nor poles were near enough to the track to possibly come in contact with a passenger, however situated upon a passing car, it might not be negligence with respect to these objects to permit a person to ride on the running board without any warning. But on the other hand, if trees or poles were situated so near to the track as to possibly come in contact with a person riding, in any manner, upon the running board, it might become a matter of gross negligence to permit a passenger to so ride without caution.

The defendant's last exception is to the exclusion by the court of certain photographs showing, as the defendant claimed, the tree in question, the track, the car on the track by the tree, and a man on the car in the positions in which the testimony of the different witnesses tended to show that Stone was at the time of the accident. It is within the discretion of the presiding justice to admit or exclude a photograph. "Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed and whether it may be useful to the jury are preliminary questions addressed to him, and his determination thereon is not open to exceptions." *Jameson* v. *Weld*, 93 Maine, 354.

Motion and exceptions overruled.

FRED E. ADAMS *vs.* HEBER H. ALLEN.

Franklin. Opinion November 21, 1904.

Intoxicating Liquors. Search and Seizure. Warrant. R. S. (1883), c. 27, §§ 39, 40.

An officer who seizes property without a warrant, is held to a strict compliance with all the requirements of law authorizing such proceedings.

When an officer seizes intoxicating liquors without a warrant and a warrant is thereafterwards obtained, and the name of the person keeping the liquors is stated in the complaint, the warrant should contain a command to arrest such person and hold him to answer as keeping said liquors intended for unlawful sale.

If the warrant contains no such command, it is unauthorized and void upon its face and can afford no protection to the officer seeking to justify under it.

Motion and exceptions by plaintiff. Motion sustained.

Action of trespass for taking and carrying away certain liquors the property of the plaintiff. At the trial in the court below the defendant filed the general issue and a brief statement justifying as a deputy sheriff acting under a warrant issued by virtue of § 39 of c. 27, of the Revised Statutes, (1883.)

The verdict was for the defendant. The plaintiff thereupon filed a general motion for a new trial and also exceptions to the ruling of the court to the introduction of the warrant under which defendant justified, and also certain instructions of the presiding justice in his charge to the jury. The motion having been sustained, the court did not consider the exceptions.

Further facts appear in the opinion.

B. Emery Pratt, for plaintiff.

The statutes of this state are explicit in their requirements for warrants. R. S. 1883, c. 27, § 40, also R. S. 1883, c. 27, page 318, prescribed form. Both require that the warrant should command the officer to apprehend the person named in the complaint and hold him to answer.

This warrant did not command the apprehension of Adams and although he visited Allen within three hours, he was not arrested.

As this warrant was insufficient in form for want of such command to apprehend, it was no justification and should not have been admitted. *Adams* v. *McGlinchy*, 66 Maine, 478; *Gurney* v. *Tufts*, 37 Maine, 133; *Adams* v. *McGlinchy*, 62 Maine, 535; *State* v. *Dunphy*, 79 Maine, 104. This complaint and warrant was the only evidence offered in justification of the taking.

If an officer would invoke the protection of the law, he must himself obey the law. *Railroad* v. *Small*, 85 Maine, 466; *Carter* v. *Allen*, 59 Maine, 297; *Williams* v. *Powell*, 101 Mass. 469; *Dunbar* v. *Johnson* et al., 108 Mass. 521.

E. E. Richards, for defendant.

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

POWERS, J. Trespass for taking and carrying away certain intoxicating liquors and the vessels in which they were contained. The verdict was for the defendant and the plaintiff moves for a new trial.

On June 29, 1901, the defendant without a warrant seized the liquors in question, which were the property of the plaintiff. His plea justified the taking on the ground that as deputy sheriff of Franklin County he lawfully seized the liquors, believing that they were kept and deposited for unlawful sale in this state, and within a reasonable time thereafter procured a warrant commanding him to seize said liquors and vessels and safely keep them until final decision thereon. The plaintiff claims that the proof does not support the plea; that the warrant, which was put in evidence at the trial, was unauthorized and void and could afford no protection to the defendant, because, notwithstanding the name of the defendant as the person so keeping said liquors was known to the complainant and stated in the complaint, yet the warrant contained no command for his arrest.

Every person has a right to be secure against unreasonable seizures and searches, to acquire and protect his property and to a fair trial

before he can be deprived of it. These familiar principles incorporated in our Declaration of Rights should be frequently recurred to and constantly borne in mind in order to protect the rights and liberties of the people from invasion. The officer who resorts to such drastic measures as the seizure of property without a warrant, should be held to a strict compliance with all the requirements of the law authorizing such proceedings. The language and decisions of this court have uniformly been to that effect. "The power given by this statute to seize property at pleasure, without a warrant, is an extraordinary one, and can only be justified on the ground that the public good and the prevention of crime require it. The statute should be construed strictly." *Weston* v. *Carr*, 71 Maine, 357. "It is an integral principle in our system of law and government that ministerial officers assuming to execute a statute or process upon the property or person of a citizen, shall execute it promptly, fully and precisely." *State* v. *Guthrie*, 90 Maine, 448.

The plaintiff justified under R. S. (1883), c. 27, § 39, which, so far as material, reads,—"In all cases where an officer may seize intoxicating liquors or the vessels containing them, upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant." Turning to section 40 following for the form of "such warrant" we find among other things this language: "The name of the person so keeping said liquors as aforesaid, if known to the complainant, shall be stated in such complaint, and the officer shall be commanded by said warrant, if he finds said liquors to arrest said person and hold him to answer as keeping said liquors intended for unlawful sale." In the case at bar the name of the plaintiff was known to the officer and stated in the complaint as the person so keeping the liquor, but the complaint contained no prayer for process against him, and the warrant contained no command for his arrest. It may perhaps be suggested that the right to be arrested is not a valuable one, and that the keeper of the property cannot suffer by such an omission in the warrant. The rule however requiring a strict compliance with all the requirements of law in such cases is founded in reason. The command to arrest is intended for the protection of the rights of the

individual as well as of those of society. Arrest is actual notice of the proceedings. The warrant contrary to the ancient form of the common law and the express words of the statute, contained no provision for actual notice to the plaintiff. In proceedings for the condemnation of property where the statute requires actual notice to be given to the owner, constructive notice cannot be substituted as its legal equivalent. The fact that the plaintiff may have had actual notice of the proceedings does not cure the omission in the warrant. In *Hussey* v. *Davis*, 58 N. H. 317, the search-warrant did not command the officer to make return of his proceedings or an inventory as the statute required. He did make return of his proceedings with the required inventory, but it was held that "the defect in the warrant was not cured by his doing what a valid warrant would have required him to do." In *State* v. *Leach*, 38 Maine, 432, a stronger case for the defendant than the one at bar, the warrant contained a command to summon instead of to arrest the keeper of the liquors and was afterwards amended by striking out the command to summon and inserting one to arrest, yet the proceedings were quashed.

Neither can it avail the defendant that his action concerns the property seized and the omission in the warrant was in regard to the person. After the warrant is issued there are two proceedings, one against the property and the other against the person, but as observed by Peters, C. J., in *State* v. *Riley*, 86 Maine, 144, "There is but one process to start with, and that must be a legal process."

The warrant obtained by the defendant was unauthorized and void. Not having obtained a legal warrant within a reasonable time after the seizure of the property, he became a trespasser ab initio and his justification fails.

It is unnecessary to consider the exceptions.

Motion sustained. Verdict set aside. New trial granted.

JEREMIAH H. FLAHERTY, In Equity,

vs.

PORTLAND LONGSHOREMEN'S BENEVOLENT SOCIETY, et als.

Cumberland. Opinion November 19, 1904.

Equity. Corporation. By-Laws. Ultra Vires.

1. The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those which are expressly granted, but comprise all that are necessary, in the sense of being appropriate, convenient and suitable for such purposes, including the right of a reasonable choice of means to be employed.
2. If a corporation or mutual association has for one of its lawful purposes the mutual aid and protection of its members, and has the power to raise and expend money for the payment of sick benefits to members, the power to afford relief to its members by furnishing them the care of a physician in time of sickness may be fairly implied from the general scope of the corporate purposes.
3. But when one of the by-laws of a benevolent and protective society provides that "the funds of this society shall be appropriated for no other purpose than that necessarily incurred for the maintenance of wages, burying the dead, and other incidental expenses" the payment of a salary to a physician, is not thereby authorized, but is forbidden, although another by-law provides for the payment of sick benefits.
4. When such a society, by another by-law, provided that "resolutions adopted at any general or special meeting of this society for any special purpose shall be as binding on its members as if they were embodied in its by-laws," it is held that by fair construction such resolutions are intended to have, and do have, the effect of by-laws, only when they are not inconsistent with the by-laws, and do not have the effect of amending or repealing them.
5. A society having such by-laws as those stated cannot lawfully vote to pay a salary to a physician for the benefit of its members. To hold otherwise, would be to give to such a vote the effect of amending the by-laws.
6. By-laws are the rules of corporate government. While they aid in the orderly transaction of the corporate business, they also serve as a protection of the corporation itself, or of minority members, against ill advised or illegal acts of the majority.

7. A member of such a society has an interest in its funds, and is entitled to the protection of the by-laws, and he may maintain a bill to enjoin a violation thereof.

In Equity. On appeal by plaintiff. Appeal sustained.

The case appears in the opinion.

John B. Kehoe, for plaintiff.

D. A. Meaher, for defendants.

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

SAVAGE, J. The Portland Longshoremen's Benevolent Society is a corporation, created under the laws of Maine. Its business is conducted under a code of by-laws, somewhat inartificially drawn. Its charter is not made a part of the record, but its object as disclosed by the by-laws is to "bind its members together as one man that we may be better able to protect our interests, regulate our wages, and attend to such other business as may from time to time come before us." Membership is limited to a single class of laborers. Sick benefits are provided for. It is, in short, a corporation benevolent and protective. One of its by-laws provides that "the funds of this society shall be appropriated for no other purpose than that necessarily incurred for the maintenance of wages, burying the dead, and other incidental expenses"; and another, that "resolutions adopted at any general or special meeting of this society for any special purpose shall be as binding on its members as if they were embodied in its by-laws." No provision is made in the by-laws for a physician of the society, but for some years before this controversy arose a physician had been employed by vote of the society, and paid a stipulated annual salary.

At a meeting of the society held October 6, 1903, a committee was appointed "to bring in the lowest terms that a competent physician will serve the society for one year." At a meeting a week later the committee reported the sealed proposals of three physicians, which being opened, it was found that the proposal of Dr. Conneen was the lowest. Discussion ensued, some claiming that the physician should be elected by ballot, and not appointed, but the president

ruled that the lowest bidder was entitled to the position, and accordingly appointed Dr. Conneen. Afterwards the society by vote instructed the recording secretary to notify the previous physician that his services would end October 15, 1903, and to notify Dr. Conneen of his appointment as physician. At the next meeting of the society "the minutes of the last meeting were read and approved."

The plaintiff, a member of the society in good standing, brought this bill, in behalf of himself and of all other members who might desire to become plaintiffs, to restrain the society and its officers from paying any of the monies of the corporation to Dr. Conneen as salary under the foregoing appointment as physician. A temporary injunction was issued. After hearing, the sitting justice below dissolved the injunction and dismissed the bill. The plaintiff appealed.

The plaintiff contends, first, that the election or appointment of any physician by the society was ultra vires, and, secondly, that the appointment of Dr. Conneen was irregular, unauthorized and void. No other questions have been raised or discussed by counsel.

To determine whether the acts of a corporation are ultra vires or not, recourse must be had primarily to its charter. To be ultra vires, an act of a corporation must be shown to be not within the scope of its charter, nor within its express or implied powers. In this case the charter is not before us. Both parties are content with such assumptions as may be made from the by-laws. Therefore the court will be content. There appears to be no specific or express warrant for the appointment of a physician by this society. But the society, though incorporated, partakes largely of the character of a mutual association for mutual aid and protection. It has no stockholders, nor stock. Its object is to protect the interests of its members. It pays sick benefits to its members, and we must assume that it has the right to do so. Affording relief to its members by furnishing them the care of a physician in time of sickness is closely allied to the payment of sick benefits, and we think its corporate power to do so might be fairly implied from the general scope of the corporate purposes. The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those which are expressly granted, but comprise all that are necessary, in the

sense of being appropriate, convenient and suitable for such purposes, including the right of a reasonable choice of means to be employed. Cyclopedia of Law, vol. 10, page 1097. 1 Cook on Corporations, section 3.

But notwithstanding the appointment of a physician may be within the scope of the corporate powers of the society, the plaintiff further contends that the payment of a salary to Dr. Conneen would be in express violation of the by-law which declares that the funds of the society shall be appropriated for no other purpose than that necessary "for the maintenance of wages, burying the dead, and other incidental expenses." The payment of a salary to a physician is certainly not within any of these purposes. But it is argued for the defendants that the binding force of this and all other by-laws is much modified and weakened by that one which provides that resolutions adopted by the society "for any special purpose shall be as binding on its members as if they were embodied in the by-laws." That by-law gives to a mere resolution the effect of a by-law. By-laws are simply the rules of corporate government. While they aid in the orderly transaction of the corporate business, they also serve sometimes as a protection of the corporation itself, or of minority members, against ill advised or illegal acts of the majority. It is within the power of the corporation to modify, limit or abrogate them. And one legally adopted may, in effect, limit or repeal an old one, though not expressly so stated. As we have already pointed out, these by-laws themselves provide for the payment of sick benefits. And as this is outside of, and inconsistent with, the by-law in question, the latter must be regarded as so far modified at least.

Assuming then, but not deciding, that the appointment of Dr. Conneen with a salary, ratified as it was by the action of the society, was in effect a resolution adopted by the society for a special purpose, what was its effect in view of the by-law limiting the right to expend money to specific purposes, of which a physician's salary was not one? Was it valid? If it was valid, it had the effect of so far amending the by-law. Practically it abrogated the by-law. For if a simple resolution could amend the by-law in one particular or one instance, it could do so in all particulars and in all instances.

Money could be voted for any purpose within the chartered powers of the society, the by-law to the contrary notwithstanding. The by-law would thus become of no effect. It would cease to be a protection to the members, which it was evidently intended to be. We do not think such is the proper construction to be placed upon the by-law, which provides that resolutions adopted by the society shall be as binding as if embodied in the by-laws. That by-law, as we construe it, gives to resolutions the effect of by-laws, only when the resolutions are not inconsistent with the by-laws; in other words, only when they would not, if operative, have the effect of amending or repealing the by-laws. But the society cannot override and abrogate a by-law, by a simple resolution, in favor of some object which is forbidden by the by-law. The action of the society in providing for the payment of a salary to a physician was clearly inconsistent with the by-law, which provides that "the funds of the society shall be appropriated for no other purpose than that necessarily incurred for the maintenance of wages, burying the dead, and other incidental expenses," and hence was inoperative and void.

The plaintiff, a member of the society, has an interest in the society's funds, and is entitled to the protection of the by-law, and he may call upon the court for its enforcement.

Bill sustained, with costs. Decree of perpetual injunction to issue as prayed for.

UNITED STATES OF AMERICA FOR THE BENEFIT OF HORACE F. FARNHAM,

vs.

DAVID F. MURDOCK, et al.

Cumberland. Opinion November 19, 1904.

Action. Contracts. Sales. Practice. 28 U. S. Stat. at Large, c. 280.

The act of Congress, chap. 280, 28 U. S. Statutes at Large, provides that any person entering into a formal contract with the United States for the construction of any public building "shall execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor shall promptly make payments to all persons supplying him labor and materials, in the prosecution of the work, provided for in such contract," and that one who has so supplied labor and materials may bring suit on the bond for his own benefit. In a suit brought against the sureties on such a bond, when the contractor had died insolvent while the work was only partially executed, and the sureties had completed the contract, *held:*—

1. That a contract to "furnish all necessary labor and materials required in the construction" of a government building, which also provides for work to be done, and prescribes when and how it shall be done, and in which the government agrees to pay for the "construction" of the building, and not merely for labor and materials, is a contract for the construction of a building, within the meaning of the statute.
2. That a claim in argument for labor supplied to the contractor, which was not made in the writ, declaration or specifications, cannot be allowed.
3. That an agreement to supply materials to a contractor is not supplying them, and that when one has agreed to supply materials, but they have never been delivered to or used by the contractor in his lifetime, nor delivered to or used by his sureties completing the work after his death, it cannot be said that the materials have been supplied to the contractor in the prosecution of the work, within the meaning of the statute.

On report. Judgment for defendants.

Debt on bond. This action was brought in the Superior Court, Cumberland County, and at the hearing thereon it was agreed that the case should be reported to the Law Court and that upon so much of the evidence "as is competent and legally admissible, the Law

Court is to render such judgment as the legal rights of the parties may require."

The case is stated in the opinion.

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

M. P. Frank and A. F. Moulton, for defendants.

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

SAVAGE, J. This is an action of debt upon a bond executed in compliance with an Act of Congress, approved August 13, 1894, 28 U. S. Stat. at Large, chap. 280. That Act in substance provides that any person entering into a formal contract with the United States for the construction of any public building, "shall execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work provided for in such contract." The Act also provides that one who has supplied labor or materials for the prosecution of such work may, under certain conditions, bring suit on the bond in the name of the United States, but for his own benefit.

One Henry Soule contracted with the United States to furnish all the necessary material and labor required in the construction of a Barrack Building at Fort Williams, Maine, according to plans and specifications. He gave the bond required by the statute referred to, which is the bond in suit. The defendants were his sureties. Soule died insolvent May 2, 1902, while the contract was only partially executed. The sureties for their own protection completed the contract, and the building was accepted by the government.

Mr. Farnham, the plaintiff in interest, February 6, 1902, offered to furnish to Soule the window and outside door frames for the building above basement, for $400, and the windows, doors, transoms, cellar sash, storm sash and locker doors for $1860. Soule accepted the latter part of the offer on the following day, saying that he should want the material for the building about the middle of June or first of July following. Soule ordered the window and outside door frames of Doten & Company, but he gave the plans and

specifications to Farnham, who, at Soule's request, made and furnished to Doten & Company a schedule of the doors and windows.

Farnham did not manufacture the various articles necessary to fulfil his contract, but he placed orders for them, namely, for certain brass ventilator covers, with one concern, for the glass with another, and for the doors and sash with a third. He received the ventilators in March, the glass in April, and the doors and sash about the middle of August. The glass, of course, and the ventilators as well, were intended to be used with the sash, and they were not capable of use until the sash arrived. No part of the materials which Farnham had contracted to furnish to Soule were ever delivered to Soule in his lifetime, or to the defendants, or at the building, after his death. On the contrary, Farnham has retained possession of them all,—except a small portion which he has had opportunity to use elsewhere,—since he received them from the parties from whom he ordered them. On June 20, 1902, Farnham notified the defendants, then undertaking to complete Soule's contract with the United States, that he had ordered the material to fill his contract with Soule, that a portion was then in his wareroom and the balance practically completed at the mill, and that he expected Soule's estate, or the defendants as his sureties, to take and pay for the same, and that he should look to the defendants, as such sureties, for payment. The defendants declined to take the materials at the contract price, and as Farnham refused to take less, they supplied themselves elsewhere. August 29, 1902, he notified them that the materials were there in the city and ready for delivery upon reasonable notice, and that he expected them to take all of the materials manufactured under the contract with Soule, and pay for them, which they again declined to do.

To simplify the discussion, we may assume, as was practically held in *Mullin* v. *United States*, 109 Fed. Rep. 817, that if the defendants as sureties by consent of all concerned undertook to complete the contract of their principal, and if Farnham supplied to them the labor and materials in the prosecution of the work, which he had contracted to supply to Soule, then such labor and materials would be within the purview of the statute, and of the bond in suit.

It is evident then that Farnham can recover only by showiug that Soule entered into a formal contract with the United States for the construction of the Barrack building, and that he himself supplied Soule or the defendants with labor or materials in the prosecution of the work. Farnham contends that Soule's contract was such a contract, that he supplied labor to Soule by making and giving to Doten & Company a schedule of the doors and windows called for by the plans, and that having contracted to furnish the windows, doors and sash to Soule, and,—to state it in the language of counsel's brief,—having "become bound to those with whom he had contracted for labor and materials, and having received the same or a portion of it into his possession, and being ready to carry out his part of the contract with Soule," he was thereby "supplying the contractor, within the meaning of the Act, with this labor and materials in the prosecution of the work provided for in such contract." On the other hand, the defendants contend that Soule's contract with the government was not a contract for the *construction* of a public building, and so was not within the language of the statute requiring the bond, and that, in fact, no materials or labor were supplied to Soule or to the defendants.

Two propositions are thus involved. First, was Soule's contract within the statute? And, secondly, did the plaintiff supply labor and materials to the contractor in the prosecution of the work? The statute required the bond of a contractor who had entered into a contract "for the construction of a public building." Soule, however, contracted to "furnish all necessary labor and materials required in the construction" of a building.

It is urged that a contract to furnish all necessary labor and materials differs essentially from a contract for the construction of a building, that one may furnish the materials and may furnish the labor, to wit, the laborers, and still not actually construct the building. As if, for instance, one should furnish the materials and the labor for the use of a contractor. But that is not *this* case. And whatever merit there might be in the proposed construction of the phrase in the contract, to "furnish all necessary material and labor required in the construction," if that phrase stood alone, still taking

the whole contract together, we think such a construction is entirely inadmissible. The contract provides not only for the furnishing of labor and materials, but for work to be done, and prescribes when and how it shall be done, and moreover the government on its part agrees to pay for the "construction" of a Barrack building, and not merely for labor and materials. It is, as a whole, clearly a contract for the construction of the building, and so is within the statute referred to.

In regard to Farnham's claim that he supplied labor to the contractor, in the prosecution of the work, in that he made and furnished to Doten schedules of the doors and windows, at the contractor's request, it is enough to say that no such claim is made in his writ and declaration. The specifications relate solely to materials furnished.

The remaining question is, did Farnham supply these materials to the contractor, or his sureties, in the prosecution of the work, within the meaning of the statute? We think he did not. It may be, as suggested by Putnam, J., in *American Surety Co.* v. *Laurenceville Cement Co.*, 110 Fed. Rep. 717, that materials need not be actually incorporated into the building before it can be said that they are "supplied." It may be that they can be said to be supplied even though they are not put into actual construction. But they must be supplied. And we think that the mere contracting to supply them is not supplying them. Soule's contract with Farnham was a contract for the manufacture of doors, windows and sash according to detailed specifications. The title did not thereby pass to Soule until delivery. *Moody* v. *Brown*, 34 Maine, 107. Soule never had possession. There was no delivery. Though the plaintiff was ready to supply, somewhat later in the season than he contracted to, he did not supply. We think it cannot be said that one has supplied an article, when he has contracted to prepare it, and has prepared it, but retains the possession and ownership, and has not delivered it.

It follows that the plaintiff has failed to bring his case within the statute, and judgment must be rendered for the defendants.

Judgment for defendants.

PENOBSCOT CHEMICAL FIBRE COMPANY, Appellant,

vs.

INHABITANTS OF THE TOWN OF BRADLEY.

Penobscot. Opinion November 19, 1904.

Taxes. Assessment. Valuation. Evidence. Public Laws 1895, c. 122, §§ 1, 3, 6. R. S. (1883), c. 6, § 96. R. S. (1903), c. 9, §§ 77, 78, 79, 81.

1. In the trial of an appeal from the assessment of taxes, the valuation for the purposes of taxation placed by the assessors upon other property in town is inadmissible.
2. Whether it would be admissible upon proof that the assessors had designedly and generally valued the property in town at less than its true value, quaere.
3. The valuation placed upon the appellant's property by the assessors in other years is likewise inadmissible, upon the question of true value.
4. The value, as distinguished from valuation, of other similar property in town, similarly situated, as shown by the evidence of actual sales, or by the opinions of properly qualified witnesses expressed in court is admissible upon the question of true value.
5. The court by this proceeding can grant such an abatement as it deems reasonable, only in case it finds that the appellant has been "overrated," that is, that his property has been rated above its true value.
6. "Overrated" in R. S., 1883, c. 6, § 96, means overrated with reference to the fair value of property in question, and not, by comparison with the valuation placed upon some other specific piece of property in town.
7. If an appellant's property has been rated at no more than its true value, evidence tending to show merely a disproportionate valuation by comparison with the valuation placed upon other property is irrelevant.
8. The assessors are not agents of the towns, and there is no relationship between them and the town which makes their opinion as expressed in their official valuation admissible against the town.
9. The assessment is not vacated by an appeal. The assessment stands, and the burden is upon the appellant to show that he is entitled to relief, by way of an abatement of the tax.
10. Water power, as such, is not taxable. But the value of land upon which a mill privilege exists may be greatly enhanced by the fact that its topography is such that a dam may be erected across a stream upon it,

and water power thereby created. The capability of the land for such use, and the probability, or certainty, as the case may be, of its use, certainly affect its value.

11. The evidence in this case fails to satisfy the court that the appellant was overrated by the assessors.

12. The assessors abated the taxes assessed upon a part of the appellant's property, which it was claimed had been assessed twice. Inasmuch as the appellant had paid the tax before the abatement, it is now entitled to recover the amount of the tax which was abated.

13. But inasmuch as the abatement was made before the appeal was taken, no costs are awarded to the appellant.

On report. Judgment for appellant.

Appeal by plaintiff corporation from assessments of taxes in defendant town for the years 1901 and 1902. After the evidence had been taken out in the Court below, the case was sent to the Law Court on report "for determination upon so much of the evidence as is legally admissible."

The case appears in the opinion.

C. F. Woodard and C. J. Dunn, for plaintiff.

G. T. Sewall and Matthew Laughlin, for defendant.

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

SAVAGE, J. Appeal from assessments of taxes in the defendant town for the years 1901 and 1902; brought under Public Laws, 1895, c. 122, § 1, (R. S., 1903, c. 9, § 79). The property assessed consisted of (1) a mill privilege, including the shore, embracing about eight acres of land, and a small mill used for cutting and splitting poplar wood, (2) about eleven acres of land, upon which was a two story house, and, (3) in the assessment of 1902 only, fourteen lots of land. As to the third class, it is claimed that these fourteen lots are embraced in the general descriptions of land contained in the first and second classes, and that the assessors assessed them as part of the larger tracts described, and also separately and specifically, thereby creating double taxation. In the written notice of their decision upon the application of the appellant for abatement of these taxes, which they were required by statute to give to the applicant, Public

Laws, 1895, c. 122, § 6, (R. S., 1903, c. 9, § 77), the assessors, not conceding that these lots were embraced in the larger descriptions, but expressing a wish "to avoid any possibility of double taxation," stated that they had abated all the taxes upon these fourteen lots. That statement is conclusive as to the abatement so far. Those taxes were abated before the appeal was taken. But as it appears that the taxes had been previously paid, it is conceded that the appellant is entitled to judgment for the amount of the abatement.

The controversy argued before us relates solely to the first and second classes of property assessed. The essential claims of the appellant are these:—that in assessing the taxes complained of, the assessor did not rate and value the property of the appellant equitably and proportionately as compared with other property of like nature and kind in the same town, and that the valuations placed upon such property were greatly in excess of the true values thereof.

It appears that the appellant, by owning the land on both sides of the river, is the owner of the entire dam and mill privilege in the Penobscot river as it flows between Old Town and Bradley, at the point called Great Works in Old Town. By the dam as at present constructed a waterfall of 2000 horse power has been created. The appellant's principal works,—a pulp mill and a saw mill,—are situated at Great Works on the Old Town side, and about 1500 horse power, under varying conditions, is used in the operation of the pulp mill and saw mill. About 25 horse power is used at the cutting up mill in Bradley, and the rest runs to waste. The tract of land in Bradley assessed as the mill privilege and shores, and containing about eight acres, extends along the river from the Milford line to the vicinity of the dam, about a half mile in a straight line, or a mile following the windings of the river. At the Milford line it is 570 feet wide. Proceeding thence southerly it narrows until at the distance of about 1500 feet, it is only 90 feet wide. The remaining distance it has no appreciable width above high water mark. A portion of the land is used for piling purposes, as is also a portion of the land in the eleven acre tract. The latter tract does not border upon the river. The appellant Company is accustomed to cut several thousands of cords of poplar, each year, at the cutting

up mill on the Bradley side, and pile it upon these piling grounds, until it can be taken across the river to the pulp mill on the ice in winter. Otherwise, the company does not make any specific use of either tract, of any value worth mentioning.

The case is now before us upon report, to be determined "upon so much of the evidence in the case as is legally admissible." At the outset we are met with the objection that much of the evidence which the appellant was permitted to introduce below was not admissible.

Briefly stated, the important objections are to evidence showing (1) the valuation of other lots in the town for the purposes of taxation, as also of one other mill privilege, and (2) the valuation placed upon the appellant's property by assessors in other years. The admissibility of evidence of the first kind depends in part, at least, upon whether it is competent in proceedings of this character to inquire into the disproportionate valuation of the property in question as compared with that of other property in the town. Some courts, deciding under the statutes of their respective states, have held that when assessors have designedly made a general under valuation of the property in their town, but have assessed some property for more than the general rate, justice requires that the latter valuation should be reduced to compare with the general valuation, and have ordered a corresponding abatement of the taxes assessed. *Manchester Mills* v. *Manchester*, 57 N. H. 309; *Randell* v. *Bridgeport*, 63 Conn. 321. The appellant contends that the rule thus stated is applicable in this case, and that the evidence referred to was admissible because it had some tendency to show a general undervaluation, or if it did not, then because it tended to show a disproportionate valuation. That is to say, if the other pieces of property were valued fairly at their just value, then, it is claimed, the evidence shows that the appellant's property was greatly overvalued, or if the other property was undervalued, then the appellant's property, valued even at its just value, was proportionately overvalued. We may dismiss the first proposition with a word. If we assume that the evidence is properly in the case, it entirely fails to show a general and designed undervaluation. It relates to three or four pieces of property only. It furnishes no sufficient basis by which

we may judge whether the assessors designedly undervalued the property in the town generally or not. Accordingly we refrain from deciding what should be the rule in a case where such a design was proved.

The other proposition is fairly before us. Can the appellant show itself entitled to an abatement in these proceedings by proving that while other pieces of property were undervalued, its own property was assessed its full value? We think not. If its property was assessed for more than its just value, it has a remedy here and now. But if its property is assessed for no more than its fair value, it cannot complain by this appeal that some of its neighbors have escaped for less.

The constitution of this state declares that "all taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." It is therefore incumbent upon every citizen to bear his full proportion of the expenses of government, according to the value of his estate. It is the duty of assessors to so apportion the burdens of taxation. And in an ideal state of existence they are so apportioned. A decent regard for the equal rights of citizens, as well as the constitutional provision, require that assessors shall use their best judgment so to apportion them. If one citizen pays less than he ought, the others must pay more than they ought, and the constitutional provision is violated. Some are thereby made to bear unjust as well as illegal burdens.

But we are not living in a perfectly ideal state of existence. With the imperfections of human judgment, no way has yet been found by which the burdens of taxation may be adjusted, in individual instances, with perfect equality and true proportion. Necessarily the apportionment is left to men,—to the assessors. They constitute a board which acts judicially. They inquire and determine. But they are only men, after all. The judgment of one man is not that of another man. The judgment of one board is not that of another board. Men look at things differently, value them differently. There is no fixed standard of value by which assessors may be governed. It may happen that assessors, even after the exercise of due

diligence, may fail to understand fully the conditions surrounding a particular piece of property, or properly to appreciate its value. There probably never was a case in this, or any other state, where assessors succeeded in rating all property according to its just value, or in apportioning all taxes with perfect equality. Neither the constitution nor common sense expects so nice a result. To say that a way to an abatement is opened wherever it happens that a few other pieces of property are undervalued, would probably undermine every assessment in every town. The law does not impose so strict a test.

The statute provides that if the county commissioners think an applicant to them for an abatement "is overrated, he shall be relieved by them." R. S. (1883), c. 6, § 96, (R. S., 1903, c. 9, § 78). And that when an appeal is taken to the court, the appellant "may be granted such abatement as the court may deem reasonable, under the same circumstances as an abatement may be granted by the county commissioners." Public Laws, 1895, c. 122, § 3, (R. S., 1903, c. 9, § 81). This means, as we construe it, that the court may grant such abatement as it deems reasonable, if it finds that the appellant has been overrated. We come then to inquire what construction should be given to the word "overrated." Does it mean overrated by comparison with the valuation placed upon some other specific piece of property in the town? Or, overrated with reference to its just value? We think the latter. We have already pointed out the practical impossibility of rating all property with precise equality.

It is, however, to be presumed that, barring the imperfections of human judgment, all property is rated at its just value, and we think the legislature had that presumption in mind and intended to provide a remedy only for him whose property is rated for more than its value. The court is not an equalizing board. If it were to attempt to equalize valuations, what should be the standard? Should it be the lowest valued property in town? May the court upon proper application, abate taxes on all other pieces of property so as to conform to the lowest standard? Yet in no other way can it reach equality by abatement. There seems to be no other fair standard, unless we use the standard of just value. To attempt to use any standard except the latter would open a very Pandora's box of evils.

We think it is the duty of the court to grant an abatement, only if it finds that the appellant's property has been rated above its true value.

The Supreme Court of Massachusetts, in *Lowell* v. *County Commissioners*, 152 Mass. 372, had occasion to pass upon a similar question. The language of the Massachusetts statute is more specific than ours. It is this:—"A person aggrieved by the taxes assessed upon him may apply to the assessors for an abatement thereof; and if he makes it appear that he is taxed at more than his just proportion, or upon an assessment of any of his property above its fair cash value, they shall make a reasonable abatement." It is to be noticed that the legislature in that state distinctly had in mind both phases of the question, namely, a disproportionate valuation and an excessive valuation. The question in that case arose upon a consideration of evidence offered to show the valuation placed upon certain other pieces of property in Lowell, owned by other corporations and individuals, as compared with their valuation of certain like pieces of property of the complaining tax payer. The court held that the evidence was inadmissible for the purpose of determining the proportionate value as distinguished from the actual value, and that such was not the test to be applied in determining whether the complainant had been overrated. The court said:—"Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part or all of the inhabitants at less than its fair cash value, we are of opinion that, in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and the disproportionate taxation arising from such overvaluation, the question is whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons."

We think, therefore, that evidence tending to show merely a disproportionate valuation was not admissible for that purpose, and that the appellant is not entitled to relief in this proceeding on that ground.

It remains to inquire whether the appellant's property was rated at more than its just value. And here we must consider the admissibility of evidence of both classes objected to. First, does the valuation placed upon other similar pieces of property, assuming that they were such, have any legitimate tendency to show the true value of appellant's property? We think not. Value must be distinguished from valuation. That the value of other similar property similarly situated may have some tendency to show what is the value of this property may be admitted. *Warren* v. *Wheeler*, 21 Maine, 484. Actual sales of such other land may be shown as bearing upon the value of the land in question. *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115. Persons properly qualified may express an opinion of the value of such other lands. *Chandler* v. *Jamaica Pond Aqueduct*, 125 Mass. 544.

But such value must be shown by testimony in court. Here it is sought to prove the fact of value, by a valuation out of court, that is, by the recorded opinions of the assessors, out of court. Such evidence is sometimes admitted without objection, for convenience, but we think, strictly speaking, it is not admissible, and is to be regarded as hearsay. It is not competent to prove value, in such a case as this, by the assessors' valuation. *Lowell* v. *County Commissioners*, supra.

Again, the appellant seems to rely upon the recorded valuations of this property, made by the same or other assessors in other years, as having some tendency to show the actual value of the property. We think however that they are not admissible for that purpose. The statutes contemplate an independent valuation each year. And the question at issue is, what was the true valuation the years in question, not, what the assessors of other years thought it was then. There is no relationship between the town and the assessors which makes the opinion of the latter admissible against the former. The assessors are an independent statutory board. They are not agents of the town. Their opinions are not the town's opinions by relation. *Rockland* v. *Farnsworth*, 93 Maine, 178. Though they are elected by the town, the town cannot control them, nor dictate their course of proceeding. Their duties are prescribed by statute. They assess

taxes not for the town alone, but for the county and state as well. Their assessments for other years are, to be sure, conclusive as to value for taxing purposes in those years; but as bearing upon the assessments under consideration, and as having a tendency to show error in them, we think they can be regarded only as the opinion of the assessing boards out of court, and hearsay.

We come now to inquire whether it has been shown that the appellant's property was rated for more than its just value. We think the burden is upon the appellant. An appeal of this character does not vacate the assessment. If the appeal is sustained, and an abatement granted, the town is still entitled to judgment for the amount of the tax assessed, less the abatement, unless the tax has been paid. What is called an appeal is really a petition for an abatement, and the appellant here must show that it is entitled to relief.

The mill privilege with the eight acres of shore, with shore rights, was valued at $17,000 in 1901, and $20,000 in 1902. Included in this valuation was a dam, or so much of it as lies in the town of Bradley. The entire original dam was built in 1887 at a cost of $22,000. Two or three years later the bank on the Bradley side was washed out, and in consequence a new section of dam was built in the place of the washout at a cost of about $5,000, all of which was in Bradley. In the same valuation is also included the cutting up mill, which it is said cost about $900. The appellant contends that the value of the dam has depreciated by age at least 50 per cent from its cost, that the cutting up mill is not worth more than $500, and that the eight acres of land is of comparatively little value, that aside from its limited use for piling purposes, there is no other use of any particular value to which it can be put; that it can indeed be divided into house lots, but that there is no demand whatever for house lots in Bradley, and that land can hardly be said to have a market value for that purpose. The appellant also urges that inasmuch as practically all the water power created by the dam is used in Old Town, it should be regarded as appurtenant to the mills in Old Town, under the authority of *Union Water Power Co.* v. *Auburn*, 90 Maine, 60, and that the additional value which the existence of

the water power creates should not be assessed to the company in Bradley. But the true rule was laid down and the distinction pointed out in *Saco Water Power Co.* v. *Buxton*, 98 Maine, 295. Running water is not property, and is not taxable. So water power, as such, is not taxable. It was so decided in the Auburn case. But land upon which a mill privilege exists is taxable, and the value of the land may be greatly enhanced by the fact that its topography is such that a dam may be maintained across a stream upon it, and water power thereby created. The capability of the land for such use, and the probability or certainty, as the case may be, of its use, certainly affect its value. Such is the law of the Buxton case. The question here is a simple one. It is not, where is the water power created by the appellant's dam used, but how much is its property in Bradley worth. How much is it worth as it stands,—not for farming merely, nor for house lots, nor for any other one thing, but for any and all purposes for which it may be used. How much is it worth, taking into account that it is part of a valuable mill privilege,—one of the best on the Penobscot River, as witnesses on both sides say,—and upon which valuable water power is created. Although the power is used mostly in Old Town, the Bradley bank is just as essential to the creation of water power as that in Old Town. One is worthless without the other. If it did not own the Bradley shore, the appellant must share the use of the water with the riparian owner on that side. It may be that the Bradley shore is not as valuable as the Old Town shore, for it may be assumed that the latter is more available as a mill site, and perhaps also for other uses. Nevertheless, it is not to the purpose to make a comparison of values between the two sides. We come back to the original question,—what is the company's property in Bradley worth, taking into account all the conditions which affect its value?

It would serve no useful purpose to the parties nor to the profession to record an analysis of the evidence bearing upon values. We have already adverted to all the particular features which affect the shore lot. There is nothing in the evidence touching the eleven acre lot, sometimes called the "12 to 20 acre lot," which needs especial mention. It will suffice to say that a very careful examination of

the evidence fails to satisfy us that the appellant was overrrated by the assessors.

But as to the tax on the fourteen lots mentioned in the earlier part of this opinion, it is conceded that the appeal may be sustained, and as the tax on them has been paid, judgment should be rendered for the appellant for $18.20, the amount paid. Public Laws, 1895, c. 122, § 3, (R. S., 1903, c. 9, § 81.) As the assessors corrected this error before the appeal was taken, costs will not be awarded.

Judgment for appellant for $18.20, without costs.

JOHN F. LYFORD

vs.

CONNECTICUT FIRE INSURANCE COMPANY.

Somerset. Opinion November 26, 1904.

Insurance. Contract. Assignment. Custom. Evidence.

1. To recover insurance upon property the plaintiff must prove both an interest in the property and an existing contract of insurance at the time of the destruction or injury of the property.
2. A policy of fire insurance is a purely personal contract and is not annexed to the property insured therein. It is not merely suspended but is wholly terminated by a transfer of the property.
3. The fact that a policy of fire insurance bears upon its back a blank form of assignment, and the fact that the insurance company has heretofore uniformly approved the assignments and thereby made new contracts of insurance with the assignees, do not continue a policy in force for a day after the transfer of the property, and do not constitute any contract of insurance with the assignee in any other case. The approval of the insurance company must be actually obtained in any given case to constitute a contract with the assignee.
4. In this case the transfer of the property terminated the original contract of insurance and the approval of the assignment was not obtained from the insurance company. Hence no contract of insurance was made with the assignee.

5. In such case all questions of breaches of conditions in the policy and all questions of waivers of such breaches after the destruction of the property, are immaterial, because the policy itself was terminated and no new contract was made to be a basis for such questions.

On exceptions by plaintiff. Overruled.

Assumpsit upon a policy of fire insurance issued by the defendant company to the plaintiff on May 15, 1900, against loss by fire, and fire caused by lightning, for the term of three years, covering $1350 on buildings and $450 on personal property.

August 31, 1901, the plaintiff sold and conveyed the farm on which were the insured buildings, and on the same day executed and delivered a deed thereof to the purchaser, and at the same time filled out and signed and sealed the usual printed blank form on the back of the policy transferring to the grantee all his interest in the insurance on the buildings, but retaining his interest in the insurance on the personal property. There was evidence tending to show that the plaintiff, at time of executing the assignment, agreed to take the policy to the local agents of the defendant company (who issued it) for the written assent of the defendant company to the assignment.

September 7, 1901, a week after the aforesaid sale and conveyance, and while the plaintiff was still in occupancy of the premises, the buildings covered by the aforesaid policy were struck by lightning and burned together with certain personal property of the plaintiff likewise covered by the aforesaid policy. Up to this time, the defendant company had not been notified of the aforesaid transfer of the aforesaid real estate, or of the assignment of the policy.

The defendant's agents were duly notified of the fire, and the plaintiff made proof of loss of the personal property destroyed, and informed the defendant's agents that he had sold and conveyed the real estate, on which were the insured buildings, before the fire and that his grantee would undoubtedly make proof of loss as to the buildings as the grantee was the owner of the same at the time of the fire. Afterwards the defendant company offered to pay the plaintiff the amount of his loss on personal property, but refused to pay any part of the loss on the buildings. Thereupon the plaintiff brought this suit.

At the trial it was admitted that the value of the buildings destroyed was $1350, and that the defendant company had proper proofs and sufficient notice. The plea was the general issue with a brief statement to the effect that the policy of insurance declared upon became void as to the buildings specified therein prior to the time of said fire for two reasons, viz: (1) "Because the plaintiff had sold said real estate including said buildings prior to the time of said fire without assent of said defendant in writing or in print as required by the terms and conditions of said policy." (2) "Because the policy of insurance so far as it covered said buildings was assigned by the plaintiff prior to the time of said fire without the assent of said defendant in writing or in print."

The plaintiff claimed that the printed blank form of assignment upon the back of the policy "became a part of the policy itself, modifying the conditions in such policy, and, on its face, contemplated and invited a sale of the property insured, and an assignment of the policy to the purchaser, before any consent of the company or its agents had been obtained, and was an invitation to every person holding the policy, and to every person proposing to purchase the property, to make the sale and assignment before obtaining such consent, and obtain such consent afterwards, within a reasonable time; that in accordance with such invitation it had always been the custom of the company and of the agents to allow sales of property and assignments of policies before any consent was obtained and to approve of them afterwards." Plaintiff offered to prove this custom by certain agents of the defendant company. The court excluded the evidence and plaintiff took exceptions.

After the plaintiff's evidence had been closed, the presiding justice, at the request of the defendant, directed a verdict for the plaintiff for the amount of the loss on personal property only. To this ruling the plaintiff also took exceptions. Plaintiff also took exceptions to certain other rulings made during the progress of the trial, but which are not material under the view of the case taken by the court.

D. D. Stewart, for plaintiff.

Leslie C. Cornish and Norman L. Bassett, for defendant.

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

EMERY, J. Mr. Lyford, the plaintiff, while the owner of a certain lot of land and the buildings thereon, insured the buildings in the defendant insurance company. Afterward while the insurance policy was in force he conveyed the land and buildings to Mr. Brawn. A week after this conveyance the buildings were destroyed by fire. Nothing further appearing, it is evident the plaintiff cannot recover for the loss of the buildings because he had no interest in them at the time of the fire and suffered no loss. It is also evident that Mr. Brawn, the then owner and the sufferer of the loss, cannot recover of the defendant company for such loss because he had no contract with it. The defendant never agreed to indemnify him. The same objection applies to this action by Mr. Lyford, if for the benefit of Mr. Brawn. "A contract of insurance (life excepted) is an agreement by which one party for a consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest." R. S., ch. 49, sec. 1. In order to recover insurance, a plaintiff must have both an interest and an existing contract at the time of the destruction or injury of the property.

But the plaintiff seeks to avoid this conclusion by other circumstances, viz: On the back of the written policy of insurance was a blank form of assignment. At the time of the conveyance of the buildings Mr. Lyford filled out this blank form with an assignment to Mr. Brawn and signed and sealed it. He also promised Mr. Brawn to procure the assent of the company to this assignment, but did not do so, and did not apply for such assent. He claims that the printing this blank on the back of the policy was an invitation by the company to the assured to sell the property and assign the policy before obtaining the assent of the company, and was an assurance to the purchaser that he might purchase first and be sure of the company's assent if applied for within a reasonable time afterward. He offered to prove that it had been the custom of the company to allow

sales of property and assignments of the policies before any consent was obtained and to approve of them afterward. He further claimed that a reasonable time for applying for and obtaining this assent had not expired when the buildings were destroyed.

The contention is that under all these circumstances, assuming them proved, the policy of insurance remained in force and an action can be maintained upon it for the benefit of the owner of the property. This contention hardly meets the real question, which is whether before the fire the defendant company had made a contract of insurance with Mr. Brawn or for his benefit? The original contract was with Mr. Lyford for his benefit, and expired by operation of law as well as by its own terms when he parted with his interest. There was no longer any contract with him. That contract was not negotiable. On the contrary it was stipulated in the policy that its assignment without the written consent of the company should avoid it. It could not be transformed into a contract with Mr. Brawn or for his benefit until the assent of the company was obtained. That assent was never obtained, and never even applied for. It might have been withheld if applied for. The original contract with Mr. Lyford was a purely personal one. The law did not annex it to the property insured and no mere custom can so annex it, even for a limited time however short. However uniform the defendant's custom to assent in other cases with other persons, it might still decline to insure Mr. Brawn or to revive the policy for his benefit. After all is said that can be said in this case these facts remain patent: that the company stipulated that the policy should be void without its written assent; that before the fire it had no knowledge of the assignment and did not assent to it; that it had no knowledge of Mr. Brawn and made no contract to insure him. These facts are decisive against the plaintiff's contention.

The plaintiff advances two other propositions, viz: (1) that sundry acts and letters of officers and agents of the defendant company, after the fire, operated as a waiver of any forfeiture under the conditions of the policy; and (2) that the refusal of the defendant company to submit the question of damages to arbitration as required by the policy, let the plaintiff in to recover them directly on the policy.

Both of these propositions are outside of the case, because of the absence of any contract of insurance to which they can be applied, and hence they need not be considered. The only contract the company did make was with Mr. Lyford for his sole benefit, and that contract came to an end the moment he parted with his interest in the property insured. As already explained, no other contract was concluded.

It follows that the plaintiff cannot recover for himself nor for Mr. Brawn for the loss of the buildings. The rulings of the presiding justice to that effect were right, and the judgment must be,

Exceptions overruled.

LIZZIE CAVEN, Admx., *vs.* THE BODWELL GRANITE COMPANY.

Knox. Opinion November 28, 1904.

Negligence. Master and Servant. Evidence. Exceptions.

1. It is not strictly accurate to say that the law, in measuring the care incumbent upon a master and that owed by a servant, recognizes different standards of care or negligence. Care in every such case is to be measured by reasonableness under all the circumstances of the particular injury. And reasonable care is synonymous with "ordinary" or "due" care.
2. It is the duty of a master to use reasonable care in furnishing his servants reasonably safe appliances with which to work, and in keeping them reasonably safe thereafter, and if the appliances are of such a character as to be likely to become weak, or worn, or out of order by time or use, reasonable care requires the master to make examinations or inspections at reasonable intervals, in order that defects may be discovered and remedied. While the servant is bound to use his eyes and his mind, and to see the things before him which are obvious, and is chargeable with knowledge of the conditions and things which he sees, or ought by the exercise of reasonable care to see, he is not ordinarily bound to examine or inspect appliances, or to discover dangers not obvious, unless charged with that duty by the master, or by the character of his work. He may rely upon the presumption that the master has inspected. It follows

therefore that the care which the master owes cannot be measured by the care which the servant owes. A greater degree of diligence is incumbent upon the master, and that is only reasonable care on his part.

3. A request for instructions that the jury find for the requesting party, based upon a part only of the issues involved, is properly refused.

4. Whether a servant assumed a risk or was guilty of contributory negligence with respect to defective appliances he was using, depends not upon the mere fact that he saw or handled the appliances, but rather upon whether he saw, or ought by reasonable care to have seen,—or knew, or ought by reasonable care to have known,—their defective condition.

5. Re-direct examination of a witness calling out a repetition of a matter which was elicited in a proper cross-examination, is not exceptionable.

6. It is not improper on cross-examination to test a witness by calling for his opinions and conclusions, for the purpose of affecting his credibility, and if the cross-examiner happens to elicit an opinion unfavorable to his view of the case, it cannot be said that he is prejudiced if his adversary on re-examination obtains a repetition of the opinion.

7. An inadmissible question was asked, and against objection, answered. But the Justice presiding, expressing doubts as to its competency, immediately framed another question to be asked in its stead, all of which was in the presence of the jury.

Held; that under the circumstances of the case, the error was sufficiently remedied, and that the defendant received no harm.

8. *Also;* that the evidence is sufficient to warrant the jury in finding that the defendant was negligent, and that the plaintiff's intestate neither knew nor by the exercise of reasonable care ought to have known of the defect in the appliance which caused his death. In such a case, he assumed no risk, and was guilty of no negligence.

Motion and exceptions by defendant. Overruled.

Action brought by the plaintiff as administratrix of her deceased husband, James Caven, to recover under the statute of 1891, c. 124, giving a right of action in case of immediate death for the loss suffered by her, (there being no children) because of the death of her said husband, which death was the result of a stage breaking down, over which stage, coal was being unloaded from a vessel by the defendant at its works at Spruce Head in the town of South Thomaston. Plea, general issue.

The verdict was for the plaintiff for $3,787.08

The case appears in the opinion.

Merritt A. Johnson, for plaintiff.

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

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

SAVAGE, J. The plaintiff is administratrix and widow of James Caven, and brings this action to recover damages for the loss sustained her through his immediate death, alleged to have been caused by the negligence of the defendant, in whose employment he then was. The verdict was for the plaintiff, and the case comes up on the defendant's motion and exceptions.

It appears from the bill of exceptions that Caven was foreman of the defendant's quarry, and as such had charge of loading and unloading vessels at the defendant's wharfs and of selecting from the materials furnished by the defendant such gear as might from time to time become necessary, but had never put up any gear for coal vessels, nor had he unloaded them. At the time of the accident which caused his death, he was at work, with a crew of men under him, unloading defendant's coal from a vessel at its wharf. The stage on which the unloading of coal was done consisted of a stationary wheeling stage extending from the coal shed to the front of the wharf, and a movable stage which, when in use, projected from the outer end of the stationary stage over the hold of the vessel. Two posts supporting the outer end of the stationary stage rested on the capsill of the wharf underneath the stage, and extended about fourteen feet above the level of the stage. At the top, these posts were connected by a timber into which their ends were mortised. When the movable stage was not in use, it lay upon the stationary stage. But when it was to be used, it was pushed out so far that its inner end rested upon and was supported by the outer end of the stationary stage, and its outer end was supported by guys or wire cables reaching from each outer corner to the tops of the posts. These guys were fastened permanently at each end. Other guy cables, one for each post, extended back from the posts towards anchorages in the ground. These were attached permanently to the top of the posts at the outer end. The inshore ends of these guys were made fast to their anchorages by means of tackles, one end of which was hooked into an eye, made by turning the end of the wire guy back on itself and fastening it to the main wire by clamps, and the other end of the

tackle was hooked into an eyebolt in the anchorage. In preparing the stage for use, it was only necessary to make the inshore ends of the guys fast to the anchorages by these tackles, draw them to a proper tension, and then push the movable stage out over the vessel. All the guys and other appliances except the tackles were parts of the permanent structure, furnished by the defendant for the use of its servants. The tackles were selected by the servants as they had occasion to use them, and in this case were selected by Caven. The defendant's superintendent testified that he cautioned Caven "to be sure and select good tackle" and "to be sure and make them (the guys) secure." And Caven, or the men under his immediate supervision, hooked the tackle into the eye of the north guy, the breaking of which, it is claimed, caused his death. Two men under his direction assisted him in making the end of this guy secure to the anchorage, and each of them testified that he did not hook the tackle into the eye of that guy.

After Caven and his men had prepared the stage, and while they were unloading coal from the vessel, the movable stage, upon which they were standing, fell, and Caven was thrown down upon the vessel and instantly killed. Upon examination, it was found that the two posts which have been described had broken off level with the stationary stage, and that the northern wire guy had broken in the eye into which the tackle had been hooked. The plaintiff contends that the posts were weak, rotten and defective, that the breaking of the posts, letting the stage fall, was the proximate cause of the injury, and that the eye in the guy was broken by the great and sudden strain which came upon the guy when the posts gave way, and the movable stage which was supported by them fell. On the other hand, the defendant contends, and we think with better reason, that the eye in the wire guy broke first, and that the posts, being no longer sustained by the inshore guy, were pulled over towards the vessel and broken by the weight of the movable stage and of the men and coal upon it, and therefore that the breaking of the wire guy in the eye was a proximate cause of the injury. The defendant further contends that, under the circumstances stated, Caven was charged with the performance of the duty of the master in seeing that that

part of the guy to which the tackle was attached was sufficient for the purpose intended, and, therefore, that if the guy was insufficient, and the defendant on that account to be held negligent, it is only because Caven himself was negligent, in which case, of course, the plaintiff cannot recover.

Before passing to a consideration of the exceptions based upon this contention, we may say that we do not think the contention itself is well grounded. As already stated, the guys formed a part of the completed structure furnished by the defendant for the use of its servants, and the case is barren of evidence tending to show that Caven's attention was in any way specifically directed to the sufficiency or insufficiency of the guy, or that he was charged with any duty respecting the guy except to make it fast to the anchorage, or that he had any reason for supposing that his master had not performed its full duty in using reasonable care to provide him with a reasonably safe guy. It is true that the superintendent testified that he told Caven to be sure to select good tackle, and to make the guys secure. He did select good tackle, or at any rate, tackle that did not break. And we do not think that the caution to make the guys secure, could have been intended, or understood, as meaning a direction to make examination of, or do anything with, the guys themselves, but rather to see that the eyes and tackle were securely hooked together. If the superintendent had intended that Caven should do more, it is singular that he failed to say so, in apt terms.

We will now consider the exceptions seriatim, all of which relate to the guy which broke.

1. In his charge, the presiding justice in instructing the jury concerning the care which the master is bound to use for the safety of the servant, in providing him a place to work in, and the care which the servant is bound to use for his own safety, used the following language:—"He (Caven) was there as a laborer, without being expected to have the expert knowledge that has been displayed perhaps by some experts who have been called to the stand." Also:—"Now, a greater degree of care in this respect is required of the corporation, the master, than is of the servant, because it is particularly and especially the duty of the master to see that a safe

place is provided to the extent which I have already described, by exercising reasonable care in this respect. It is only the duty of the servant to exercise ordinary care, taking into consideration the assumption that the master in the first instance had done his duty. So that a greater degree of diligence is imposed upon the master in providing and maintaining a reasonably suitable place, than is upon the servant to examine before he goes there."

This instruction related evidently to the contention of the defendant that the weakness of the eye of the guy wire was obvious, and should have been noticed by Caven, that it was as obvious to Caven as it could have been to the defendant, and that therefore it was negligence in Caven in not observing it, as certainly as it was in the defendant to permit it to be used in the condition in which it was.

We think the instruction was unexceptionable. It is true that the presiding justice used the expression that the master is bound to use "a greater degree of care" than the servant, and if it were meant by the phrase to say that the law recognizes different standards of care or negligence, it would not be strictly accurate. The better doctrine is that care or the want of it is not to be measured arbitrarily according to fixed definitions, as "slight care," "ordinary care," or "extraordinary care," or "slight negligence," or "gross negligence," although all these phrases are used somewhat loosely by courts and law writers, but it is to be measured by reasonableness, under all the circumstances of the particular inquiry. The only true measure is reasonable care. And that expression has been declared by the courts in England and elsewhere to be synonymous with "ordinary care." *Fletcher* v. *Boston & Maine R. R.*, 1 Allen, 9. Reasonable care is a relative term, and what is reasonable care in a given case depends upon many considerations. What would be reasonable care under some conditions would clearly be negligence in others. Reasonable care and vigilance vary according to the exigencies which require vigilance and attention. They relate to the work to be done, to the instrumentalities to be used, to the dangers that may result from their use, to the varying duties owed by those who supply or use them. And in all cases reasonable care means such care as reasonable and prudent men use under like circumstances. *Bigelow*

v. *Reed*, 51 Maine, 325; *Palmer* v. *Lumber Asso.*, 90 Maine, 93; *Sawyer* v. *Arnold Shoe Co.*, 90 Maine, 369; *Cayzer* v. *Taylor*, 10 Gray, 274; *Cunningham* v. *Hall*, 4 Allen, 268; *Holly* v. *Boston Gas Light Co.*, 8 Gray, 123. These general remarks are well illustrated in this case.

As has been many times stated in various cases in this state, it is the duty of a master to use reasonable care in furnishing his servants reasonably safe appliances with which to work, and a reasonably safe and suitable place in which to work, and in keeping them reasonably safe thereafter. This is a primary duty. If the appliances are of such a character as to be likely to become weak or worn or out of order by time or use, reasonable care requires the master to make examinations or inspections at reasonable intervals, in order that defects may be discovered and remedied. And the servant has a right, so far, to rely upon the presumption that the master has done its duty in all these respects. The servant on his part is bound to use reasonable care. He is conclusively held to have assumed the risks of dangers which are known to him, and as well, those which are incident to his work and which are obvious and apparent to one of his intelligence and experience. Though he may have the benefit of the presumption that his master has performed its duties, yet he is bound to use his eyes and his mind, and to see the things before him which are obvious. He is chargeable with knowledge of the things and conditions which he sees or ought, by the exercise of reasonable care, to see. And the master has a right to presume that he will see and guard against obvious dangers. If the servant fails in this respect, he is negligent. But he is not ordinarily bound to examine or inspect appliances, or to discover dangers not obvious. He is not bound to do so, unless charged with that duty by the master, or by the character of his work. He may rely upon the presumption that the master has inspected. It is therefore evident that the care which the master owes cannot be measured by the care which the servant owes. A greater degree of diligence is incumbent upon the master. Unless he uses it, he cannot be said to have exercised reasonable care. The charge of the presiding justice, which is made a part of the bill of exceptions, shows that, again and again, in apt and

accurate language, he instructed the jury as to care required of the master, and that required of the servant. We do not think the jury could have been misled, or the defendant prejudiced by the use of the phrase "greater degree of care."

2. The defendant requested that the jury be instructed that if Caven "attached the tackle to the eye of the northern guy, and a want of safety in that eye caused or contributed to this injury, the plaintiff cannot recover."

3. It also requested an instruction that if Caven was in charge of securing the northern guy, or it was secured under his supervision, and a want of safety in the eye of that guy caused or contributed to this injury, the plaintiff cannot recover.

Both of these requests, which may be considered together, were properly refused. These requests seek to place Caven's assumption of risk, or contributory negligence, as the case may be, solely upon the mere fact that he attached the tackle to an unsafe eye, or that he was in charge and had the supervision of securing the guy. They entirely omit the important and only debatable issue upon this branch of the case, and that is, whether Caven saw, or ought by reasonable care to have seen,—knew, or ought by reasonable care to have known,—the weak and dangerous condition of the eye. He may have done all that the requests assume that he did, and yet not have seen or known the defect, or be chargeable with knowledge of its existence. If he did not know, or by the exercise of reasonable care would not have known, the defect, the mere fact that he hooked the tackle into the eye of the guy, or supervised the operation of securing the guy, are, so far, immaterial. These facts showed an opportunity for Caven to observe, but they did not show that he saw. Nor did they show what he would have seen, by the exercise of reasonable care. Admitting that he had the opportunity to observe, it was still for the jury to say whether he did observe, and thereby assumed the risk, or negligently failed to observe, and was thereby guilty of contributory negligence.

4. The defendant contended that the weakness of the eye of the guy was so apparent that Caven, by the exercise of reasonable care at the time the tackle was hooked into it, should have discovered the

defect. The plaintiff contended to the contrary. One Hart, a witness called by the plaintiff, who examined the wire after the break and testified in chief as to its apparent condition, on redirect examination was allowed, against objection, to testify as follows:

Q. Then you say that you might take it up and not notice it?

A. Yes, sir.

Q. I will ask you whether or not a person by ordinary handling of the wire same as I pick this up to hook something into it, would notice that the strands had been rusted off?

A. No, sir.

THE COURT: I don't know as that question is exactly competent, except that the matter has been gone over so voluminously and in such detail in cross-examination. He may answer this question: as to whether or not the condition of the wire at the place of the break which he has described was such that it would be likely to be noticed by a person who simply handled it or looked at it without making an examination of it?

A. No, sir. I will say that they were not.

The court stated that the last question was allowed simply because of counsel's lengthy cross-examination upon precisely the same point. A reference to the cross-examination shows that the witness was asked by the defendant's counsel if the defective condition of the eye would have been perfectly apparent to anyone examining it before it was broken, if it would have been very easy for anyone having anything to do with the guy to see that condition, and he answered in the affirmative. He was asked if the rusty and worn out condition was not perfectly apparent to anyone who had anything to do with the end of that guy before it broke, and the answer was, "For a man that examined it, yes sir, he could tell." Being asked in various forms about the necessity of an examination in order to notice the defective condition of the guy, the witness answered finally in these words. "Merely pick it up and not examine it, why a man might pick up that guy and not examine it and think it was all right."

Then on re-examination, the two questions following were asked and answered without objection:

Q. Speaking about the guys being rusty, did I understand you

to say that a man without looking at that guy, or without examining it carefully, could tell that the pieces were rusted off, or would he have to examine it?

A. Couldn't tell standing looking at the guy, looking at it.

Q. What do you mean, he would have to examine it in order to find it?

A. Have to examine it, yes; a man might pick that guy up and if he wasn't thinking anything about it he couldn't tell; he could see that it was black and rusty.

Then followed the first question to which objection was made as above stated:—"Then you say he might pick it up and not notice it?" It is a sufficient answer to this objection and to the objection to the question as framed by the presiding justice to say that they are in effect merely repetitions of questions relating to the same matter which were put on cross-examination. The defendant complains that the questions called for the opinion or conclusions of the witness, that the witness was not an expert, and the subject matter was not the subject of expert testimony; that because the witness had given such testimony on cross examination affords no reason why the plaintiff should be allowed to call for his opinion on redirect examination; that the admission of incompetent evidence on one side is not ground for the admission of incompetent evidence on the other. But the question presented by the exception does not go so far as the defendant's contention does. This is not a case where incompetent evidence was admitted on one side because the same or other equally incompetent evidence by the same or other witnesses, had been admitted on the other side. It is a case of the re-examination of a witness on a matter drawn out on his own cross-examination. The cross-examination was entirely proper as to subject matter. It was competent on cross-examination for the defendant, by way of testing the witness and for the purpose of breaking the force of his direct testimony, to ask for his opinions and conclusions, not as opinion evidence, but hoping to be able thereby to show that he was unreliable, and that his opinion would prove to be inconsistent with the facts. In this way the effect of direct testimony is frequently qualified or destroyed. Hardly anything in cross-examination is more common than this

method of examination. Now if in the course of a cross-examination, the cross examiner has elicited an opinion unfavorable to his view of the case, can it be said that he is prejudiced if his adversary in re-examination of the same witness upon the same subject repeats the same question and draws out a repetition of the same answer? We think not. The extent to which such re-examination is permissible must, of course, be within the discretion of the court.

The second question to which objection was taken was, we think, inadmissible, and so the presiding justice appears to have thought. Though the question was answered, the justice expressed his doubts as to its competency, and immediately framed another question which might be asked in its stead. All this was done in the presence of the jury. The error was at once corrected. And it does not appear to us that, under the circumstances, the defendant was harmed. The jury could not have failed to understand that the answer given to the question framed by the court was the only answer to stand for their consideration. It certainly must have been as effective upon the minds of the jury for the justice to do what was done in this instance, as it would have been for him to say, as is said so many times of incompetent and immaterial answers, "Strike the answer out." It would be intolerable if an error like the one under consideration could not be immediately remedied. Whether the remedy is deemed sufficient must, of course, depend upon the circumstances of each case. No hard and fast rule can be applied. We are satisfied with the remedy in this case.

5. The motion. The issues in the case have been so fully discussed in considering the exceptions, that it will be necessary to refer to them only briefly under the motion for a new trial. We assume as the defendant does that the breaking of the eye in the guy was the proximate cause of Caven's death. The defendant does not seriously contend that the eye of the guy was in a reasonably safe condition, or that the unsafe condition would not have been disclosed to it, had it used reasonable care to inspect. The defendant rather contends it was so obviously broken, rusted and worn that Caven must have known and appreciated its condition if he saw it, and so must have assumed the risk, or that if he failed to see it it was only through his

own want of due care; in short, that he knew its condition, or ought to have known it. And hence it is claimed that under either hypothesis, the plaintiff cannot recover.

It does not appear that Caven had any previous knowledge of this guy, nor that he knew how long it had been used, or to what wear and tear it had been subjected. It does not appear that he had any information which would make him apprehensive of the danger of its breaking, or had by word or circumstance been put upon his guard. The words of the superintendent to him "to be sure to select good tackle" and "to be sure to make the guy secure" did not go to that extent. Nothing but the appearance of the guy, such as it was, was a warning to him. Whether that appearance was so obviously bad that his failure to perceive it under the circumstances amounted to want of reasonable care was the question submitted to the jury, and we cannot say that in their answer they have manifestly erred. Caven's only duty with regard to that eye was to hook a tackle into it. He was not called upon to inspect, as the defendant ought to have done. For that he might properly rely upon the presumption that the master had performed its duty. *Twombly* v. *Consolidated Electric Light Co.*, 98 Maine, 353. We think the jury were warranted in finding that a reasonably prudent workman, under the circumstances of this case, engaged in his work, and acting with reasonable care, having only to hook a tackle into the eye, might not notice that it was weak and defective. The verdict must stand.

Motion and exceptions overruled.

ELLEN MCCARTHY, Admx.,

vs.

FULLER CLAFLIN AND E. C. HORN.

Androscoggin. Opinion November 28, 1904.

Negligence. Master and Servant. Damages.

By the breaking of a defective putlog in a mason's staging, on a building then being erected by the defendants, the plaintiff's intestate, who was at work for the defendants, as a brick mason, was precipitated to the ground and killed.

1. If the defendants undertook to furnish the staging as a completed structure for the use of the bricklayers, it was their duty to use reasonable care to see that the staging in all its parts was reasonably safe for the use intended, and for negligence of servants selected by them to construct the stage, they would be responsible.
2. But if the defendants only undertook to furnish materials for the staging, and furnished them sufficient in kind and suitable in character, and furnished suitable men in the masons' crew to use them, and if the masons within the scope of their employment undertook to erect and did erect the staging for themselves, out of the materials so furnished, using their own judgment and free from the defendants' control, negligence on the part of the masons' crew, or any of them, in building the staging, or in selecting safe putlogs out of the sufficient and suitable supply furnished by the defendants, was the negligence of a fellow servant of the plaintiff's intestate, for which the defendants are not responsible.
3. The evidence clearly warranted the jury in finding that the masons did not undertake to build the staging, as a part of their employment, but that the defendants did undertake to furnish the staging for the use of the masons as a completed structure.
4. The jury was amply justified in finding that the putlog was defective and unsafe, and that its appearance was such that the defect might have been discovered by the exercise of such reasonable care as was requisite on the part of the defendants, and of the servant who erected the staging for them, and for whose negligence they are responsible.
5. Where the deceased was fifty-one years old, at the time of his death, was healthy, steady, industrious, temperate, of first class ability in the mason's trade, and he left a widow, also five children whose ages range from twelve to sixteen years, a verdict of five thousand dollars under the "death by wrongful act" statute, R. S., ch. 89, § 10, is not clearly excessive.

Motion and exceptions by defendant. Overruled.

Action under chapter 124, Public Laws of 1891, brought by the plaintiff as administratrix of her late husband, Dennis D. McCarthy, to recover for personal injuries to him, received on August 18th, 1903, caused by the falling of a staging upon which he was engaged in laying brick on the walls of the Empire theater, located in Lewiston, and then in process of construction, and by reason of the falling of said staging, the plaintiff's intestate fell therefrom, a distance of about thirty-five feet, to the bottom of the building, receiving injuries which resulted in his immediate death.

The verdict was for the plaintiff for $5000. The defendants filed the general motion for a new trial and also exceptions to certain rulings and instructions of the presiding justice. At the argument in the law court the defendants waived their exceptions and the case was decided on the motion.

The case is sufficiently stated in the opinion.

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

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

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

SAVAGE, J. The defendants, contractors, were engaged in constructing the Empire Theater building at Lewiston. The walls of the building were of brick. The plaintiff's intestate was a brick mason in the defendants' employ. By reason of the breaking of a putlog in the staging upon which he was at work, the staging fell and he was precipitated to the ground, thirty-five feet below, and was killed. Death was immediate. This action is brought under chapter 124 of the laws of 1891, (R. S. 1903, ch. 89, §§ 9 and 10,) to recover compensation for the pecuniary injuries to his widow and children, resulting from such death. The plaintiff recovered a verdict for five thousand dollars.

At the trial exceptions were taken by the defendants, but they have been waived. The defendants also filed a motion for a new trial, upon the usual grounds, which has been argued. The putlog

which broke was of oak, 3x4 inches in size and eight feet long. At the point where it broke off, which was not far from the center, there was a knot. The plaintiff contends that the appearance of the knot and the surrounding wood was such as to indicate upon reasonable examination that the putlog was weak and unsafe for use in such a staging as this was, that it was defective and that the defect was apparent. The defendants deny that there was anything in the appearance of the knot to indicate that the stick was unsound or unsafe, although it was demonstrated by the condition disclosed after the break that it was both unsound and unsafe. We deem it unnecessary to discuss the evidence in detail upon this point. We think it sufficient to say that in our judgment the jury was amply justified in finding that the putlog was defective and unsafe, and that its appearance was such that the defect might have been discovered by the exercise of such reasonable care as was requisite on the part of some one, before the putlog was put to use in the place where it was. And this conclusion is greatly strengthened by the fact that although the broken pieces of the putlog were in the possession of the defendants at the time of the trial, they refused, upon request, to produce them for the inspection of the jury. Such being the condition of the putlog, someone was negligent in putting it to use. It is not contended that the plaintiff's intestate was guilty of any contributory negligence.

The really disputable contention between the parties arises upon another point. The plaintiff contends that the defendants furnished the staging as a completed structure for the use of the brick-layers, and that therefore it was the duty of the defendants to use reasonable care to see that the staging in all its parts was reasonably safe for the use intended. And such, of course, would be their duty, if the plaintiff's contention is true in fact. On the other hand the defendants contend that they only undertook to furnish materials for the staging, sufficient in kind and suitable in character, and to furnish suitable men in the masons' crew to use them, and that they did do all that they undertook to do. And they contend further that the masons, of whom the plaintiff's intestate was one, within the scope of their employment, undertook to erect and did erect the staging for

themselves, out of the materials so furnished, using their own judgment and free from the defendants' control. And upon such a state of facts, the defendants claim, and properly, that if there was any negligence on the part of the masons' crew, or any of them, in building the staging, or in selecting safe putlogs out of the sufficient and suitable supply furnished by the defendants, it was the negligence of a fellow servant of the plaintiff's intestate, for which the defendants themselves are not responsible. And such is the law. *Donnelly* v. *Granite Co.*, 90 Maine, 110; *Amburg* v. *International Paper Co.*, 97 Maine, 327; *Kelley* v. *Norcross*, 121 Mass. 508; *Brady* v. *Norcross*, 172 Mass. 331.

The plaintiff claims that even upon the defendants' own theory, they have failed to show a full performance of duty, in that the men furnished were not all of them suitable in capacity and experience to make a proper selection of putlogs for the staging. This neglect is alleged in the writ. It is claimed that Maheau, a tender and one of the crew, who actually assisted in building the staging, and in putting in the putlog which broke, was inexperienced and incompetent for that service, and that the defendants had not used reasonable care to ascertain whether he was suitable or not. *Laning* v. *N. Y. C. R. R. Co.*, 49 N. Y. 521; *Chapman* v. *Erie Railway Co.*, 55 N. Y. 579; *Indiana Mfg. Co.* v. *Millican*, 87 Ind. 88; *Blake* v. *M. C. R. R. Co.*, 70 Maine, 60. But we prefer to rest the discussion of the case upon the main proposition. We think the evidence warranted the jury in finding that the masons did not undertake to build the staging, as a part of their employment, but that the defendants did undertake to furnish the staging for the use of the masons as a completed structure. They must be judged by their several undertakings.

The defendants are contractors. For quite a number of years they have been engaged in contracting for and building theater buildings in various parts of the United States. Their headquarters are not in this state. One Shuttleworth, of Ottawa, Ontario, has been their superintendent of construction for four years, or one of their superintendents, if they had more than one. One Smith, for thirteen years, has been a foreman of brick construction for them. These two men

appear to have been more or less permanently attached to their working staff, in the several capacities stated. When they got ready to undertake the construction of the Empire Theater, the defendants sent Shuttleworth and Smith to Lewiston to take charge of the work, Shuttleworth as superintendent of the whole work, and Smith as foreman in charge of the brick construction. Shuttleworth purchased the materials and hired some men, but the masons were generally hired by Smith. All the help except Shuttleworth and Smith were local men, so far as appears. Smith worked more or less frequently, as he had opportunities, with the other masons laying brick. As to brick laying, at least, he was their fellow servant. So far there appears to be no serious controversy.

Now, as to their relations to the staging. Shuttleworth and Smith were both witnesses for the defendant, and upon their testimony chiefly we base our conclusion. Shuttleworth, qualifying as an expert on stage building, testified as to the various theaters, the building of which he had superintended for the defendants, and that in all those cases he had had charge of the construction of the masons' stagings. Even if that had been a part of his duty as superintendent elsewhere, it would not necessarily follow that such was his duty in this instance, though we think that if a concern were engaged in a single line of work, like building theaters, and employed a general superintendent for that work, year in and year out, though the work was in different places, it would be competent to show what his general duties were, as such superintendent, and that that would have some tendency to show what were his duties in a particular instance. But we do not rely upon this. Shuttleworth was asked in direct examination,—"So far as the general oversight of the masons' work and their staging and like that was concerned, under whose direction was that done?" and he answered,—"Under mine, and the head overseer, Mr. Smith. Mr. Smith received orders from me, and of course I never interfered with the masons at any time." At another time, he testified as follows:—

Q. Wasn't Smith the man that was building the stages in your concern all over the country?

A. Yes.

Q. He had charge of that work all around, not only in Lewiston, but everywhere?

A. Takes charge of the work where he takes charge of the brick work.

Q. To build stages?

A. To build staging also.

Q. Does that for that concern of Claflin & Horne all over the country?

A. Yes, sir.

Q. He had charge of it here?

A. Yes, sir.

After explaining that the practice on the job was that while the bricklayers continued laying brick at one place, generally, Smith and the tenders went ahead and built stagings for them to use elsewhere, — Shuttleworth was asked, — "So that the masons' crew didn't build their own staging, but it was built by Mr. Smith and these tenders he had?" and he answered, "Yes."

Smith testified that he was foreman of the masons' crew, and that his duties were to look after the masons and look after the scaffolding and lay brick if he had a chance. He said he received his orders from Shuttleworth. On his cross-examination the following appears: —

Q. You and Mr. Shuttleworth work right along together on all these buildings wherever they go.

A. Sometimes we are together and sometimes not.

Q. These buildings that you have spoken of you were together?

A. Yes, sir.

Q. You have charge of the masons?

A. Yes, sir.

Q. And the building of the staging?

A. Yes.

Q. You have charge of the building of stagings, not only here but all over the country, wherever Mr. Horne and his company build?

A. Yes, sir; the same as here.

Q. For how many years have you had charge of that work?

A. In the neighborhood of thirteen years.

Q. You have charge of that work for Mr. Horne and his partner?

A. Yes, sir.

Q. You are the stage builder, not only here as I say, but all over the country?

A. All over the country.

Q. Wherever he builds, that is your business?

A. That is my business, and mason with it of course.

Q. I understand you do other work, but you do that work for them?

A. Yes.

Q. Absolutely and entirely?

A. Yes.

Being asked if anyone else had anything to do with it he said "Mr. Shuttleworth is superintendent over me. He tells me what to do and I do it." He further said that the masons themselves on this job did not build the stages nor have anything to do with them, that the stage was all prepared for them before they went onto it, that all they had to do was to go on and go to work, that just as soon as they got through on one section, they had another stage all built for them, and that they simply moved up to it.

The inference legitimately to be drawn from this testimony is very strong that the defendants, for reasons of their own, furnished a man whose special duty to them was to build the masons' stagings and to build them their way. It was both convenient and economical for them to have the stagings erected in advance of their being needed by the bricklayers. Besides, it appears that in a building of this character, with very high side and end walls and no partition walls, it was prudent, if not necessary, that the whole system of stagings should be so built as to be a support or protection to the walls in case of wind storms or other exigencies. They may not have been willing to have so important a duty, and one fraught with such possible consequences to themselves, in the hands of an unknown and perhaps inexperienced crew to do as they pleased. These may have been the reasons why the defendants chose to keep the stage building

in the charge of their selected and experienced servant, Smith, supervised by his superior, the superintendent. At any rate, the evidence manifestly is sufficient to support a finding that they did do so.

It does not matter that Smith was foreman of the masons, that he laid bricks occasionally, or that he had other duties to perform. In the laying of brick, or in the performance of other duties he may have been fellow servant of the man who was killed. The foreman of a crew of men engaged in a common employment is, as to that employment, a fellow servant of each of the crew though he is their superior and has the right to direct their work. Smith may have been a fellow servant of the members of the masons' crew, in many respects. But if the defendants undertook to build the staging for the masons, and Smith, within the scope of his duty to the defendants did build it for them, then, in that respect, he represented the defendants, and if he was negligent his negligence was their negligence. And so of the negligence of a tender selected by him to assist him. Neither would, as to the staging, be a fellow servant of the masons who worked upon the staging. This court has said that "the test which determines the master's liability for the negligence of one employee whereby injury is caused to another, is the nature of the duty that is being performed by the negligent servant, at the time of the injury, and not the comparative grades of the two servants." *Small* v. *Manufacturing Co.*, 94 Maine, 551.

The verdict was for five thousand dollars. The deceased was fifty-one years old at the time of his death. He appears to have been a healthy, steady, industrious, temperate man, and of first class ability at his trade. He was earning at the rate of $3.25 a day, during the masons' season. He left a widow, age not given, and five children, whose ages range from twelve to sixteen years. It is the pecuniary injury to the widow and children which the verdict is to compensate. On the whole, we do not think the verdict is so large as to justify our interference, having due regard to the principles laid down in *McKay* v. *Dredging Co.*, 92 Maine, 454, and *Oakes* v. *Maine Central R. R. Co.*, 95 Maine, 103.

Motion and exceptions overruled.

D. W. BABB *vs.* THE OXFORD PAPER COMPANY.

Oxford. Opinion November 28, 1904.

Injury to Employee. Pleading. Amendment. Evidence. Photographs. Assumption of Risk. Contributory Negligence.

The defendant operated a coal conveyer, which consisted in part of an endless chain of buckets which passed up through the roof, over an ash hopper on the roof, and then down through openings in the roof and floors below. The buckets sometimes carried ashes, cinders and clinkers from the boiler room to the roof, where they were automatically tripped and emptied their contents into the ash hopper. The plaintiff was a servant of the defendant. He was stationed on the first floor of the building, and his duty was to watch the descending line of buckets, to see that they were right side up, and were clean and free from cinders and clinkers. He claims that while he was at his work, standing within a few inches of the descending buckets, with his head bent slightly forward perhaps, he was hit by a piece of coal, or clinker, or frozen ashes, which fell from the ash hopper above, down through the openings in the roof and the next floor above his, and which struck him on the head with such violence as to stun him and cause him to fall in such a way as to be injured.

1. In the original declaration the only allegation of negligence was "that the said ash box or receptacle became filled and said defendant corporation negligently and carelessly failed and neglected to have said ash box and receptacle, so that the boxes or buckets failed to properly unload in said ash box or receptacle and ashes and clinkers were carried out and fell over the edge of said ash box or receptacle and fell through the openings through which the said coal carrier descended." *Held;* that an amendment setting forth in a new count "that the opening or aperture in the second floor of the carrier room building and the opening or aperture in the roof of said building through which the said coal conveyer descended was larger than necessary for the passage of said conveyer, and were dangerous, hazardous and unsafe, because of the unguarded spaces thus left, all of which dangerous, hazardous and unsafe conditions were due to the carelessness and negligence of the said defendants" did not introduce a new cause of action and was properly allowed.
2. Photographs, to be admissible as evidence, should simply show conditions existing at the time in question. When taken with men in various assumed postures, and things in various assumed situations, in order to illustrate the claims and contentions of the parties, they should not be admitted.
3. When one enters into the service of another, by virtue of the employment, he assumes the risk of all obvious and apparent dangers which are

incident to the business, and of all which, one of his age, capacity and experience, by the exercise of reasonable care, ought to know and appreciate; also of all dangers, of which he knows, and which he should appreciate, whether obvious and visibly apparent or not.

4. The case shows that the plaintiff knew and appreciated the likelihood that ashes and clinkers would come down from the hopper in the operation of the coal conveyer; and though he had notified his foreman of the danger, and had been promised that it should be remedied, he was apprised by falling ashes, not five minutes before the accident, that the hopper was again running over. Nevertheless, knowing that the hopper was full, and that material was likely to come down, he did not exercise reasonable care on his own part, in the presence of a known danger, in placing himself in its track; and this was contributory negligence, and bars recovery.

5. This conclusion, based entirely upon the plaintiff's own testimony, is so indisputable that the presiding justice might properly have directed a verdict for the defendant.

Motion and exceptions by defendant.

Exceptions overruled. Motion sustained.

Action for personal injuries sustained by the plaintiff while in the employ of the defendant corporation. The verdict was for the plaintiff in the sum of $2750. Before opening his case to the jury the plaintiff asked leave to amend his declaration by adding a second count thereto. Defendant objected but the amendment was allowed. In opening its case to the jury the defendant attempted to use as chalks certain photographs to illustrate its theory, as to how the accident happened. The plaintiff objected and the court excluded the photographs and would not allow them to be used as chalks. To these rulings the defendant excepted, and also after verdict, filed a general motion for a new trial.

Further facts appear in the opinion.

A. E. Stearns and J. M. Libby, for plaintiff.

George D. Bisbee and Ralph T. Parker, for defendant.

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

SAVAGE, J. The defendant company, at the time of the injury complained of, was operating what is called a "coal conveyer," in a building especially prepared for its use. The conveyer itself con-

sisted of two endless chains parallel with each other, running over and propelled by sprocket wheels. Between the chains were hung at regular intervals iron buckets, nineteen inches long, sixteen and one half inches wide and seven inches deep. The buckets at each end were attached to the chains by swivels, so that they could easily be turned over. When the conveyer was in operation, the chains, moved by the sprocket wheels, carried the buckets along their endless course. Beginning say at the top of the building and above the roof, the endless chain of buckets descended perpendicularly through openings in the roof and floor below about fifty feet to a point just beneath the first floor, where it turned upon a sprocket wheel and proceeded horizontally beneath a coal hopper to the boiler room, then turned underneath another sprocket wheel, and was returned horizontally and again perpendicularly to the top of the building through the roof, and over sprocket wheels to the point of beginning. On the top of the roof of the building, but underneath the chain of buckets, was an ash hopper, made so that its contents could be discharged through a chute into a railroad car standing upon a trestle outside the building. When the conveyer was being operated, the buckets took coal from the coal hopper, as they were passing horizontally towards the boiler room. On reaching the boiler room they were overturned in their passage by an automatic tripper, and the coal was dumped. Sometimes, but not always, on their return passage they were filled with ashes, cinders or slag, by workmen with shovels. They then carried their contents to the top of the building, where they were tipped by another automatic tripper, and the contents dumped into the ash hopper. At times the ashes and cinders in the boiler room were not taken up to the ash hopper in this way, but were taken out of the boiler room in wheelbarrows and hauled away by teams.

The plaintiff was a servant of the defendant and his place of work was in a room on the first floor of the building, between the two lines of buckets. That is to say, as he worked the descending line of buckets was in front of him, and the ascending line was several feet behind him. His duty was to watch the descending buckets, to see that they were right side up, so as to take the coal when they reached

the coal hopper, and to see that they were clean, free from cinders and clinkers or other things which might clog their movements, and prevent their turning freely on their swivels. Between the side of the conveyer and the wall of the building was a hole into the pit below. This hole was rectangular, twenty-seven inches by twenty-five inches, and its sides were formed, roughly speaking, by the edge of the floor on the near side, and a bar of iron on the farther side, and the ends of course were marked by the conveyer itself and the wall. The sprocket wheel upon which the conveyer turned just beneath the floor was situated at the edge of this hole, but below the level of the floor.

The plaintiff says that while he was at work standing within a few inches of the descending buckets, with his head bent slightly forward perhaps, some object which he claims was a piece of coal, or clinker, or frozen ashes, fell from the ash hopper above, down through the openings in the roof and the next floor below, which were made for the passage of the descending buckets, and struck him so violently upon the head as to stun him, and to cause him to fall forward into the hole spoken of in such a way as to get his foot caught between the chain and the sprocket wheel, causing the injuries for which he now seeks to recover.

The case comes up on the defendant's exceptions and motion. The first exception relates to the allowance of an amendment to the plaintiff's declaration by adding a new count. In the original declaration the only allegation of negligence on the part of the defendant was in these words: "that on said ninth day of January the said ash box or receptacle became filled and said defendant corporation negligently and carelessly failed and neglected to have said ash box or receptacle, [emptied?] so that the boxes or buckets failed to properly unload in said ash box or receptacle and ashes and clinkers were carried out and fell out over the edge of said ash box or receptacle and fell through the openings through which the said coal carrier descended." The plaintiff however was permitted, against objection, to amend by setting forth in a new count, "that the opening or aperture in the second floor of the crusher room building and the opening or aperture in the roof of said building through which said coal

conveyer descended were larger than necessary for the passage of said conveyer, and were dangerous, hazardous and unsafe, because of the unguarded open spaces thus left, all of which dangerous, hazardous and unsafe conditions were due to the carelessness and negligence of the said defendant." The other allegations of negligence in this count are repetitions in substance of allegations in the first count.

We think the amendment was properly allowed. It does not introduce a new cause of action. It merely added an additional description of the conditions which might make the defendant's operation of the ash hopper negligent. The failure to empty the hoppers is still the principal thing. The size of the openings, or in other words the opportunity for coal and clinkers to fall through them from an over loaded hopper affect merely the question of negligence in allowing the hopper to get and remain over loaded. The allowance of such an amendment was within the discretion of the presiding justice. *Chapman* v. *Nobleboro,* 76 Maine, 427.

In the course of the trial, the defendant offered as evidence certain photographs of the conveyer and the room in which the plaintiff worked, which were excluded and exceptions were taken. The admission of photographs lies largely within the discretion of the presiding justice. He must first be satisfied that the photograph is sufficiently verified, that it is fairly representative of the object portrayed, and that it may be useful to the jury. His determination upon these points is not subject to exceptions. *Jameson* v. *Weld,* 93 Maine, 345. To be admissible, photographs should simply show conditions existing at the time in question. But photographs taken to show more than this, with men in various assumed postures, and things in various assumed situations, in order to illustrate the claims and contentions of the parties, should not be admitted. An examination of the excluded photographs shows that they fall within the latter class. They would serve merely to illustrate certain theories of the defendant as to how the accident happened. They were properly excluded as a matter of law. The defendant therefore can take nothing by its exceptions.

Under the motion, we find it necessary to consider only one point. The parties are in serious controversy as to how the accident hap-

pened, and as to the condition of the hopper, whether filled or not at the time. There is indeed some difficulty in understanding how the plaintiff could possibly have been injured by getting his foot caught between the chain and the wheel, if he was hit as he says he was, while standing on the floor in front of the conveyer. But passing that, and assuming but not deciding, that allowing the ash hopper to become so loaded as to overrun was negligence in the master, and not merely negligence in a fellow servant charged with the operation of the conveyer, still there is a ground, which we think, on the plaintiff's own testimony, will forbid his recovery in this action.

It is well established law, reiterated in hundreds of decisions, that when one enters into the service of another, by virtue of the employment, he assumes the risk of all obvious and apparent dangers which are incident to the business, and of all which, by the exercise of reasonable care, one of his age, capacity and experience ought to know and appreciate. He also assumes the risk of all dangers, of which he knows and which he should appreciate, whether obvious and visibly apparent or not. So far as concerns the condition of things in the room where the plaintiff worked there is no controversy. That the hole existed into which the plaintiff says he fell, that it was unguarded, that the chain wound under the sprocket wheel by the edge of the hole, that there was some danger in working near the conveyer and hole,—all these are not denied. On the other hand all these conditions were admittedly obvious to, and known by, the plaintiff. So far as concerns risk or danger from the falling of coal, cinders or clinkers from the ash hopper above, the plaintiff's case must be judged from his own testimony. On direct examination he was asked if he had ever been troubled while working there on the buckets by the falling down from above of ashes and cinders and other materials. He answered:

A. Yes sir, fine ashes and cinders was coming down. It would come down sometimes as often as [once?] a week, and then again there wouldn't be any for two weeks.

Q. At any time before this accident occurred had you known of large stuff coming down?

A. Not very often; sometimes pieces would come down; I didn't see any serious trouble with it.

Q. Large pieces did fall sometimes?

A. Well there was as big as a hen's egg.

Q. Have you ever seen larger pieces than that fall down through there?

A. Well, once in awhile there would be larger pieces fall down through.

There is no testimony as to the size of the object that hit the plaintiff, but Hicks, one of the plaintiff's witnesses, testified that the new coal was put through a crusher, before taken by the conveyer to the boiler room, and that after being crushed it varied in size from "stove" coal up to "egg" coal, "but not very often would you find a piece as big as that, about like stove coal on an average." The same witness testified that the way workmen below would know when the ash hopper was full was that then it "would begin to overflow and would begin to come down through."

It does not, then, in view of the plaintiff's testimony, seem possible to doubt that he well knew that in the operation of the conveyer, pieces of coal or cinders or clinkers could, and frequently did, fall down through the openings above him. And that he knew that they came from the ash hopper, of the condition of which he now complains, is evident from his testimony that he told McLeod, his foreman, a week before the accident, that "ashes and cinders and things" were coming down from above, and that he wanted him "to clean out the ash box so that it wouldn't fall down." If this was all so, how can it be said that the plaintiff did not know and ought not to have appreciated the danger of standing at his work so near to the buckets as to be liable to be hit by objects falling from above? We think he must have known and appreciated.

But the plaintiff seeks to avert this conclusion by saying that he notified the defendant of the dangerous condition, and was assured that it should be remedied, and relying upon the doctrine stated in *Dempsey* v. *Sawyer*, 95 Maine, 295, he contends that he thereby released himself from the assumption of that risk, and that it was thrown back upon the defendant. To this contention there are at

least two answers. First, he did not notify the defendant. He did notify that servant of the defendant who had general charge of the conveyer house and the machinery and appliances there, and who might therefore stand for the defendant. He notified only his foreman, McLeod, who was his fellow servant in the operation of the conveyer, and whose neglect to perform any duty which he owed in respect to the operation of the conveyer and ash hopper would be the negligence of a fellow servant. Secondly, after the notification to McLeod, and about five minutes before the accident, the plaintiff says that the ashes began coming down again, and he so far appreciated the situation that he sent a man "to tell McLeod to clear the ash hopper so that it wouldn't sift ashes down onto me and get down my neck." The plaintiff then understood the situation to be what he now complains of, that the ash hopper was full and running over. He could not have helped understanding that if there were coals or clinkers in the ashes, they were liable to fall over and come down. He must have understood that the dangerous condition of which he had complained to McLeod and of which he now complains, existed at that moment. Common prudence should have suggested that it was dangerous to stand where his head was liable to be hit by an object falling from the hopper. It was not necessary for him to so expose himself. He frequently, so he says, "righted" the buckets, or cleaned them, with a stick, standing or sitting two or three feet away. Knowing, as he believed, that the hopper was full, and that material was likely to come down, he did not exercise reasonable care on his own part, in the presence of a known danger, in placing himself in its track. He was guilty of contributory negligence, and that bars a recovery.

This conclusion seems to us so indisputable that we think the presiding justice might properly have directed a verdict for the defendant. The verdict being clearly wrong, it must be set aside.

Exceptions overruled. Motion for a new trial sustained.

HARRISON G. SLEEPER *vs.* NARCISSE GAGNE.

Androscoggin. Opinion December 1, 1904.

Action by Assignee. Pleadings. Demurrer. Amendment. R. S., 1903, c. 84, § 146.

Where, in an action by the assignee of an account, the declaration alleges a debt due from the defendant to the plaintiff's assignor according to the account annexed, the bill of items annexed has the same effect as if copied in the body of the declaration.

To entitle the assignee to sue in his own name, he must file with his writ, the assignment or a copy thereof.

Where the assignment of an account is made on the bill of items annexed to the writ, it is a sufficient filing with the writ. It is not necessary to have such assignment made on a separate paper.

It is no ground for demurrer in an action of assumpsit on account annexed that the items of account are written on paper which has the business card of a firm printed on one corner thereof.

On exceptions by defendant. Overruled.

Assumpsit on account annexed.

The case is sufficiently stated in the opinion.

J. G. Chabot, for plaintiff.

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

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

STROUT, J. Action upon an account annexed, by assignee of Julius Kessler & Co., the original creditors. The account annexed was not specific, and for that cause a demurrer to the declaration filed at the return term was sustained. Thereupon plaintiff amended, by filing a specific bill of items. To the amended declaration a special demurrer was filed, assigning the causes as

"1st. The amended declaration does not show or pretend to show that the defendant in this action was ever indebted to Julius Kessler & Co. in any amount whatever.

2nd. That said amended declaration contains an assignment written therein as a part of said declaration, the following;—"New York, Nov. 24, 1903. For value received we hereby assign and transfer all our right, title and interest in the above to Harrison G. Sleeper. Signed, Julius Kessler & Co., inc., Per H. P. Wilbur, Assistant Treasurer.

3rd. Because said declaration contains statements as to several distilleries in different parts of the United States which is in no part a portion of this declaration."

That demurrer was overruled, and exception taken.

As to the first cause, the bill of items is, "Nelson Gagne, Dr.",—but does not state the name of the creditor. But the declaration alleges a debt due from the defendant to Kessler & Co., according to the account annexed. The bill of items annexed has the same effect as if copied in the body of the declaration. It is equivalent to an allegation that defendant was indebted to Kessler & Co. for the items enumerated in the declaration itself, without an account annexed, and is sufficient.

The second ground is without merit. To entitle an assignee to sue in his own name, he must file with his writ the assignment or a copy thereof. R. S., 1903, c. 84, § 146. It is quite as well to have that assignment in the account as on a separate paper.

The third ground is baseless. The bill of items has printed on one corner the business card of Kessler & Co., and the names of several distilleries. The items were evidently written on the bill head of Julius Kessler & Co. This is harmless.

Exceptions overruled.

ISABELLE KEYES *vs.* SECOND BAPTIST CHURCH.

Penobscot. Opinion December 2, 1904.

Negligence. Way. Independent Contractor. Verdict.

1. An independent contractor is one who carries on an independent business, and, in the line of his business, is employed to do a job of work, and in doing it, does not act under the direction and control of his employer, but determines for himself in what manner the work shall be done.
2. An employer is not released from liability and cannot avoid responsibility by an independent contract when such contract involves acts which will constitute a nuisance unless properly guarded against, or involves a duty to the public or a third person, or which will necessarily bring wrongful consequences, or that cannot be performed except under the right of the employer who retains the right of access.
3. It is the duty of those whose work necessarily makes dangerous a public street, to give notice by means of proper signals, warnings or barriers, to passers-by that the work is going on.
4. But if the situation of things, regardless of signals, warnings or barriers, is such as to warn a person who is in the exercise of ordinary care, of what is going on, such person, if injured, cannot recover.
5. When the evidence is conflicting upon the question of negligence and contributory negligence, the verdict of the jury upon the questson of liability must stand.

On motion and exceptions by defendant. Exceptions overruled.

Motion sustained unless plaintiff files a remittitur of all of verdict over $750.00.

Action on the case to recover damages for personal injuries sustained by the plaintiff, caused by the alleged negligence of the defendant society. Plea, the general issue. Plaintiff recovered a verdict for $1500.00.

The case is stated in the opinion.

Hugo Clark and B. L. Fletcher, for plaintiff.

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

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

SPEAR, J. This is an action for the recovery of damages for personal injuries and comes up on motion and exceptions. The defendants are the owners of a church edifice situated on Columbia Street, in the City of Bangor, and were making alterations therein. A license having been obtained therefor, a portion of the sidewalk and street in front of the church had been fenced off, and stagings erected for the prosecution of the work, across the entire front of the church on Columbia Street and coming out about two and a half feet from the wall, and going up pretty much the whole height of the building.

On the morning of July 28th, 1902, the plaintiff had occasion to pass along Columbia Street past the church and in so doing went under the stagings. When near the center of the church a piece of green hemlock board fell, some 35 or 40 feet, from a staging, striking the plaintiff upon the shoulders and producing the injuries of which she complains. The plaintiff claims to recover, not because the piece of board fell, for there is no evidence with respect to how that happened, but because the defendants did not properly perform the duty resting upon them, under the circumstances of the case, in erecting suitable warnings and safeguards across the sidewalk at each side of the church, to give notice to travelers of the danger attendant upon passing under the stagings.

The defendants claim that they are not liable, even if proper safeguards were required and not erected, on the ground that the duty of erecting them did not devolve upon them, at all, but upon Otto Nelson, who was doing the carpenter work upon the church as an independent contractor. That is, they say that they placed the contract of enlarging the church in the hands of a competent contractor, whose duty it was to put up the guards and warnings; that after having so placed the contract the defendants had nothing more to do with it; that the contractor took charge, assumed the control and management of the work, obtained a building permit in his own name, selected, hired, controlled, paid and discharged the workmen and that the defendants had no control over them or their acts, no power to

dictate to the men as to how they should work or what they should do, no authority to instruct or discharge them, no matter how negligent they may have been.

The above is substantially the defendants' own statement of the elements which it is necessary to find in this case in order to constitute Otto Nelson an independent contractor, and we think they are fairly stated.

On the contrary, while claiming that the defendants are directly liable, the plaintiff asserts that, granting the position taken by the defendants that Nelson was an independent contractor, yet they are not released from liability, as the case comes within the well established rule that they cannot shun their responsibility by an independent contract, when such contract involves acts which will constitute a nuisance, unless properly guarded against, or involves a duty to the public or a third person. *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335; *Wilbur* v. *White*, 98 Maine, 195; or which will necessarily bring wrongful consequences, or that cannot be performed except under the right of the employer who retains the right of access. *Boomer* v. *Wilbur*, 176 Mass. 482, and numerous other cases to the same effect. But a decision of this case does not necessarily involve a further consideration of the question of independent contractor, although the exceptions do not show, upon which ground the presiding justice ruled, as a matter of law, that the duty of providing sufficient safeguards and precautions rested upon the defendant society. If upon either ground the ruling was correct, and the exceptions must be overruled. We think the ruling was correct upon the ground that Nelson was not an independent contractor and that the duty of providing proper safeguards rested directly upon the defendants. This depends of course upon the construction of the contract of the defendants with him to do the work. *Linnehan* v. *Rollins*, 137 Mass. 123. What constitutes an independent contractor within the meaning of the law applicable to this class of cases is stated in *McCarty* v. *Second Parish of Portland*, 71 Maine, 318, to be "one who carries on an independent business, and, in the line of his business, is employed to do a job of work, and in doing it, does not act under the direction and control of his employer, but determines for

himself in what manner it shall be done." In *Linnehan* v. *Rollins*, supra, the presiding justice in charging the jury, upon the question of what constitutes an independent contractor said, "You will observe that although there has been evidence introduced, on the one side and the other, as to the actual control which the trustees, through one of their number, exercised over the work, and that is all proper and competent evidence for you in considering the matter. Yet, that the absolute test is not the exercise of power of control but the right to exercise the power of control." Upon exceptions the ruling was sustained.

The contract of the defendants with Otto Nelson, is in the form of a letter written by Mr. Nelson to the Church Committee in which, after stating that he has all kinds of appliances for doing such work, a large crew of men at all times in his employ, his own team with which he might save them some trucking and could give such personal attention to the work as was necessary, he makes this proposition which is the essential part of the contract, namely: "I will furnish you one man to take charge who will be perfectly competent for $2.75 per day, as many first class men as you can work to advantage for $2.50 per day, and men for plain, ordinary, coarse work for $2.25 per day, and what time as will be necessary for me to spend personally, together with team, would be 30 cents per hour." This offer was accepted without any modification or change, whatever. This contract does not state, nor can it be reasonably implied from its terms, that Nelson was "employed to do a job of work." He and his men, in express terms, were hired by the day. No time was specified in which he should complete the work; no specifications as to what work or how it should be done. The defendants so far as the contract itself shows not only had the right, but must necessarily have controlled and directed not only Nelson's men, but Nelson himself, with respect to everything that was to be done upon that church, for the contract does not refer to any plans, specifications, architect or any person, even, to whom Nelson should go for instructions. All the contractor could have done under this bare contract, without any other information or directions, when he and his men arrived at the church ready for duty, would have been to remain idle

and wait, until some person vested with proper authority, directed them what to do. Under the contract Nelson was to furnish the labor and the materials, and every thing else essential to the performance of the work, was, by necessary implication, to be furnished by the defendants.

In *Doane* v. *Cochran Chemical Co.*, 164 Mass. 453, it is held, "When there are no specifications in advance of what is to be done, and no round price agreed upon, and a carpenter is employed to make repairs and alterations to the satisfaction of his employer, to be paid according to the amount of work to be done by a carpenter and the men he employs, it would seem a reasonable inference that the employer retains the right to direct the manner in which the carpenter should do the work."

So far we have considered the written contract only, but when we come to an examination of the testimony the evidence discloses the fact that the defendants, by their committee, supplemented the contract with respect to all those things omitted, but necessary, in order to constitute Nelson an independent contractor. They not only reserved the right of access but exercised it. They furnished an architect. The committee were in daily attendance. The plans were not made in advance; "not settled at any one time, but grew as time and the work went on," as the chairman of the committee testified. He further says that he frequently consulted about the work with Mr. Nelson and that they "frequently brought the architect in to settle questions which we could not—such as how the work should be accomplished, and that he had authority to control Mr. Nelson." We need not quote further. The evidence taken in connection with the written contract of Nelson conclusively shows that Nelson instead of "not acting," did act under the direction and control of his employers, "and did not determine" for himself in what manner the work should be done. He was compelled to so act, if he worked at all, and did so act. We are also unable to see any reason why, at any time if they so desired, the defendants could not have discharged Nelson and all his men without subjecting themselves to any liability whatever, for breach of contract. Nelson was not an independent contractor and the ruling of the presiding justice must stand. Upon

the question of liability the motion must also be overruled. The court properly ruled that the defendants were not liable for the falling of the board, *Jager* v. *Adams*, 123 Mass. 26, but that it was their duty under the evidence, "To cause the proper signals or warnings or barriers to give notice to passers-by that the work was going on." He also ruled that, if the situation, regardless of warnings or barriers, was such as to warn a person who was in the exercise of ordinary care of what was going on, the plaintiff could not recover.

These were the main issues of fact presented to the jury and they found in favor of the plaintiff. The testimony upon these issues was sharply conflicting. It is not always prudent to say from the effect of testimony in cold type that the truth lies even on the side of preponderance. Cold type is entirely impersonal and one witness looks and appears as well in it as another. Not so however with the witness upon the stand. His appearance and manner of giving his testimony may modify, in a greater or less degree, the credence to be placed in his testimony. The jury heard and saw the witnesses, the testimony was conflicting, and their verdict upon the question of liability must stand.

But upon the matter of damages we are not so clear. The assessment of damages in a case like this is largely a matter of judgment. There is no positive evidence upon which to base it. The testimony shows that the plaintiff was injured on the 28th day of July and on the 14th day of September following, made a trip to Boston and remained there about six days, buying goods, in connection with her sister, for her fall trade. After this time she was able to attend to her business. In forty-eight days after the plaintiff was injured she was able to go to Boston on business and ever after to substantially attend to her business. The plaintiff recovered a verdict of fifteen hundred dollars. Our conclusion is that she should remit the amount of the verdict above seven hundred and fifty dollars, otherwise a new trial is granted.

Exceptions overruled. Motion sustained unless plaintiff files a remittitur for all of the verdict over $750.00 within thirty days.

MARY E. BELCHER, Admx., *vs.* HENRY P. ESTES.

Androscoggin. Opinion December 5, 1904.

Misconduct of Jurors. Waiver. New Trial. R. S., 1903, c. 123, § 10.

A verdict should be set aside when it appears that a witness for the prevailing party discussed the merits of the case in the presence and hearing of certain jurors before final submission.

The court not only holds parties responsible for their own misconduct, but for indiscretions of their friends in conveying to jurors private information relating to a case on trial before them, and for such irregularities, a verdict in the court below will be set aside by the court, if the objection is insisted upon and has not been waived.

Where it appears that the information of such misconduct on the part of jurors was communicated to the senior counsel for the plaintiff, before the jury retired to consider the verdict, and he did not choose to insist upon the objection, to have these jurors set aside, and a new jury empanelled to try the case, but went on and closed the trial, and took his chance of obtaining a verdict in his favor, the objection must be regarded as waived, and after the verdict, comes too late.

Motion by plaintiff. Overruled.

The verdict in the court below was in favor of the defendant, and comes to this court on a motion by plaintiff to set aside the verdict because of alleged misconduct of a witness for defendant, and of certain jurors.

The material facts appear in the opinion.

Michael T. O'Brien, and Matthew McCarthy, for plaintiff.

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

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

WHITEHOUSE, J. The plaintiff had a verdict returned against her by the jury, and now brings the case to this court on a motion to set aside the verdict by reason of the alleged misconduct of two of the jurors before whom the case was tried, and of one of the witnesses

for the defense. It is represented in the sworn statement accompanying the motion that "after the evidence was all in" a witness who had testified for the defense made certain "statements about the case on trial" in the presence and hearing of the two jurors named, "concerning beams and distances which were material facts in controversy between the parties." But both the motion and the evidence reported entirely fail to show what the issue was at the trial in the court below, or what objectionable statements were made by the witness in the presence of the jurors after the testimony was closed, and thus the court fails to receive that definite information requisite to enable it to determine for itself whether or not the statements made in the presence of the jurors were in fact material to the issue, as alleged by the plaintiff's counsel in their sworn statement.

It appears from the testimony that at the noon recess the witness in question, who was an employee of the defendant and had testified in behalf of his employer, repeated the substance of his testimony in response to an inquiry from a juror on the other panel, and that his statements were listened to by the two jurors named in the motion who were members of the jury engaged in the trial of the plaintiff's case. There is no evidence, however, that he addressed any of his conversation to either of these two jurors, or that he had any knowledge that any of the jurors sitting on that case were listening to his statements. Nor is there any evidence that these statements were made by the witness either by the procurement or with the knowledge of the defendant himself. But it does appear from the testimony that the two jurors in question listened to the statements of the witness, made after the adjournment of the court, in relation to the case on trial before them. These statements may have been only a recapitulation of the testimony given by the witness on the stand, as suggested in the evidence reported, but whether or not in the unrestricted form in which they were uttered out of court they would have been legitimate evidence if offered in the regular course of the trial under the rules of law, was a question upon which the plaintiff had a right to be heard before the court. It may be true, also, that these jurors listened to these statements out of court without any understanding on their part that they were guilty of any impropriety

in so doing. But section 10 of chapter 123 of the Revised Statutes makes it a criminal offense for a juror to receive any information or evidence relating to any matter for the trial of which he is sworn, without the authority of the court and without immediately disclosing it to the court. The mischievous consequence would probably be the same whatever may have been the motives which actuated the witness in making the statements or the jurors in listening to them. A decent regard for the proper administration of justice compels the court not only to hold parties responsible for their own misconduct, but for the indiscretions of their friends in conveying to jurors private information relating to a case on trial before them. Such irregularities are sternly discountenanced by the courts, and jurors are admonished that in receiving evidence or information in this manner they are not only acting in violation of their oaths and of the statutes of the state, but are doing injury and injustice to both parties to the suit;—injustice to him who has lost the verdict in the court below, and injury to his opponent who will lose it in this court if the objection is insisted upon and has not been waived. *Bradbury* v. *Cony*, 62 Maine, 223; *McIntire* v. *Hussey*, 57 Maine, 493; *Heffron* v. *Gallupe*, 55 Maine, 563.

But it appears from the positive testimony of the messenger of the court, introduced by the plaintiff as his principal witness in support of this motion, that all of the information now presented to the court in relation to any misconduct on the part of the jurors in this case, was communicated to the senior counsel for the plaintiff before the jury retired to consider their verdict. The attorney, it is true, has the "impression" that this information did not come to him until after the verdict was returned; but while the integrity of both witnesses is unquestioned, it is the opinion of the court that the "mere impression" of the attorney is not sufficient to overbalance the clear and emphatic statement of his own witness who gave him the information, and that it must therefore be deemed an established fact that the plaintiff's counsel had knowledge of the alleged misconduct before the jury retired. The conclusion can therefore be concisely stated in the language of the court in *Hussey* v. *Allen*, 59 Maine, 269: "As the plaintiff did not then choose to insist upon the objec-

tion, and to have those jurors set aside, and a new jury impanelled to try the case, but on the contrary went on and closed the trial, and took his chance of obtaining a verdict in his favor, we think the objection must be regarded as waived and that it now comes too late." See also *Fessenden* v. *Sager*, 53 Maine, 531, and cases cited.

Motion overruled.

NATHANIEL B. DOE, In Equity,

vs.

ARTHUR S. LITTLEFIELD, Admr. de bonis non, and the WISCASSET SAVINGS BANK.

Knox. Opinion December 5, 1904.

Equity. Pleading. Demurrer. Mortgage. R. S., 1903, c. 92, § 15.

A bill to redeem real estate from a mortgage by virtue of the statute will not be entertained without full compliance on the part of the plaintiff with the statutory prerequisites.

Where the plaintiff in such a bill makes no offer to pay the sum found to be equitably due on the mortgage, and the bill contains no allegation of any prior tender of payment by the plaintiff, or of any neglect or refusal on the part of the defendant to render an account of the amount due as requested by the plaintiff, or that the defendant has "in any other way by his default" prevented the plaintiff from performing or tendering performance of the conditions of the mortgage, the bill cannot be maintained.

Where in a bill to redeem real estate from a mortgage by virtue of the statute, a demurrer must be sustained by reason of the lack of certain essential statutory allegations, the court, in order that the plaintiff may not be without remedy, will grant an amendment introducing such allegations, when it appears that without such amendment a second bill could not be seasonably commenced before the mortgage would be "forever foreclosed."

Exceptions by defendant. Sustained.

Bill in equity by the plaintiff against the defendant to redeem a mortgage of real estate from a foreclosure commenced by said defendant Littlefield as administrator de bonis non of the estate of Hiram Bliss, late of Washington, deceased.

The defendant Littlefield filed a general demurrer which was overruled by the presiding justice, and the defendant excepted.

The causes of demurrer fully appear in the opinion of the court.

L. M. Staples and L. F. Starrett, for plaintiff.

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

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

WHITEHOUSE, J. This is a bill in equity brought by the plaintiff to redeem certain real estate from a purchase-money mortgage given by the plaintiff to Hiram Bliss, the defendant's intestate, May 16, 1896. The defendant demurred to the bill, and the case comes to this court on exceptions to the overruling of the demurrer.

Section 15 of chapter 92, R. S., provides that "any mortgagor . . . . may demand of the mortgagee . . . a true account of the sum due on the mortgage and of the rents and profits and money expended in repairs and improvements, if any; and if he unnecessarily refuses or neglects to render such account in writing, or in any other way by his default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his bill in equity for the redemption of the mortgaged premises within the time limited in section seven, and therein offer to pay the sum found to be equitably due, or perform any other condition as the case may require; and such offer has the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such tender."

A bill to redeem real estate from a mortgage by virtue of this statute will not be entertained by this court without full compliance on the part of the plaintiff with these statutory prerequisites. *Brown* v. *Snell,* 46 Maine, 490; *Munro* v. *Barton,* 95 Maine, 262. The plaintiff not only fails to make any offer in his bill to pay the sum found to be equitably due on the mortgage, but the bill contains no allegation of any prior tender of payment by the plaintiff, or of any neglect or refusal on the part of the defendant to render an account of the amount due as requested by the plaintiff, or that the defendant

has "in any other way by his default" prevented the plaintiff from performing or tendering performance of the condition of the mortgage. Under such circumstances it has uniformly been held in this state that a bill to redeem cannot be maintained. *Brown* v. *Snell*, 46 Maine, supra; *Dinsmore* v. *Savage*, 68 Maine, 191; *Monro* v. *Barton*, 95 Maine, supra. So in this case in the absence of any amendment to the bill the appropriate mandate would be "exceptions sustained, demurrer sustained, bill dismissed without prejudice." But it appears from the representation in the plaintiff's bill that proceedings to foreclose the mortgage were commenced by the defendant November 10, 1902; and although no copy of the mortgage has been produced for the inspection of the court, and the time within which the mortgage would become "forever foreclosed" is not stated in the plaintiff's bill, it appears to be assumed by counsel that in the event of the dismissal of this proceeding a second bill to redeem could not be seasonably commenced. In order therefore that the plaintiff may not be without a remedy, the cause will be remanded for an amendment to the bill by the introduction of such allegations respecting an offer or tender of payment by the plaintiff, or an unreasonable neglect or refusal to account on the part of the defendant, as the facts in the case may warrant.

Exceptions sustained. Demurrer sustained. Cause remanded for further proceedings in accordance with this opinion.

JAMES B. STEVENSON, Trustee,

vs.

THE MILLIKEN, TOMLINSON COMPANY.

SAME *vs.* THE TWITCHELL-CHAMPLIN COMPANY.

SAME *vs.* J. H. FLETCHER, et als.

Oxford. Opinion December 5, 1904.

Bankruptcy. Preference. Evidence. Bankrupt Act 1867. Bankrupt Act 1898, § 1, clause 15, § 60 a, § 60 b.

Under the Bankrupt Act of 1867 the term insolvency was construed to mean an inability to meet one's obligations in the ordinary course of business, while in the present act it is equivalent to the word bankruptcy in the former statute; but the principles of construction laid down by the courts in determining the force and effect to be given to the phrase "reasonable cause to believe," found in the former act relating to preferences, are equally applicable in considering the meaning of this phrase in the act of 1898.

It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt.

In the case at bar the evidence fails to disclose the existence of any desire or purpose on the part of the bankrupts to give the defendants any advantage over other creditors, or that the defendants had reasonable cause to believe that it was intended thereby to give them a preference.

On report. Judgment for the defendants.

Three actions brought by the plaintiff as trustee in bankruptcy to recover certain payments made to the defendants by the bankrupts, which payments the plaintiff alleged to be preferences under the Bankrupt Act of 1898. The three actions were tried together and by agreement of the parties are reported to the law court to render

such judgment in each case, upon so much of the evidence as is legally admissible, as the legal rights of the parties require.

Further facts appear in the opinion.

J. B. Stevenson, for plaintiff.

J. S. Wright, for defendants.

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

WHITEHOUSE, J. These three actions were brought by the plaintiff as trustee in bankruptcy of the firm of Voter & Wing of Rumford Falls to recover the amount of certain notes alleged to have been accepted by the defendants in payment of their respective claims as creditors of Voter & Wing, under circumstances which rendered the transactions voidable as preferences under the Bankrupt Act of 1898. As the same question was raised in each suit and must be determined with reference to the same facts, the cases were heard together and the evidence presented in a single report.

The partnership of Voter & Wing, composed of Clarence P. Voter and A. W. Wing, was engaged in the business of retail grocers at Rumford Falls from May 1st to September 15, 1902. At the time the firm commenced business it gave to Morrell Wing, the father of A. W., a mortgage of its entire stock and fixtures to secure the sum of $1,000; and it appears from the testimony of Clarence P. Voter, a witness for the plaintiff, that the genuineness of this mortgage was never questioned by the firm in any of its negotiations with the defendants, it being uniformly represented that it was a mortgage for $1,000. It appears that September 15, 1902, the firm was owing Milliken, Tomlinson Company $446.28, the Twitchell-Champlin Company $272, and J. H. Fletcher & Company $326.20, but neither of the defendants had refused to fill the orders of Voter & Wing, payments on account of goods purchased being overdue only a month or six weeks. In addition to these large claims, however, the firm owed James S. Morse $103.15, and smaller amounts to several other creditors, and it is not in controversy that at that time the firm was unable to meet all of its liabilities as they matured in the ordinary course of business.

Under these circumstances the firm of Voter & Wing gave to Perry C. Lapham, who had been employed as a clerk in the store, a bill of sale of the entire stock and fixtures dated September 15, 1902, in consideration of an agreement on his part to assume the payment of the mortgage given by the firm to Morrell Wing May 1st, 1902, and the firm's indebtedness to the defendants and James S. Morse. The next day, September 16, A. W. Wing went to Portland and informed the defendants of this sale to Lapham. A. T. Laughlin, president of the defendant corporation of Milliken, Tomlinson Company, testifies as follows, inter alia, in relation to the interview between Wing and himself:

"He said that he wanted to dissolve the firm of Voter & Wing. He stated at that time that his reasons for wanting to dissolve the firm were that Mr. Voter had borrowed money from his mother and was endeavoring to pay it back out of the concern, and that they were not in a position to do it; that they were also taking goods out of the store, and he didn't want to do it; that they put in this capital and he wanted it to remain there, but that Mr. Voter was letting his mother run a bill, etc. He said he wanted to go on in the business alone, or he wanted Mr. Lapham to have the business and go on with it, as it was a good business, and he wanted to get out of it. That was the idea. He stated that he had made arrangements with Mr. Lapham to buy the stock of goods, assume the mortgage that was due his father of a thousand dollars, and assume four other bills, including Milliken, Tomlinson Co., The Twitchell-Champlin Co., and Fletcher & Co., and another man in Rumford Falls, provided they would agree to it; that the stock of goods amounted to $2200 and the mortgage and the four bills which Lapham would assume amounted to about $2000. He further said that he had some other small creditors—these were the large creditors—and that there was enough on the book accounts to more than take care of the other creditors, and that he thought the easiest way to close up the firm of Voter & Wing was to sell to Mr. Lapham, take care of his large creditors in this way and collect his book accounts and pay little bills; and that that was his idea in making this transfer. He came to my place first, and we went to the Twitchell-Champlin Co., and talked it

over with Mr. Pitt. They agreed to it. We went to Mr. Fletcher's, and they agreed to it. He stated at that time that there was a good business at Rumford Falls, and that the store was doing a nice business; that Mr. Lapham, to whom he had sold, a very fine young man, entirely responsible, and that we were taking no risk whatever, and it was a good sale. He told us a very plausible story, and we agreed to it. He represented that his firm was entirely solvent."

Mr. Laughlin further testifies that these statements were substantially repeated by Mr. Wing, or by himself in Wing's presence, in the conversations held with the other defendants. The arrangement accordingly proposed by Mr. Wing was that each of the defendants should accept Lapham's note, indorsed by himself, for the amount of its claim against the firm of Voter & Wing. The defendants finally assented to the proposition and accepted Lapham's notes with Wing's indorsement in settlement of their respective claims. Receipts bearing date October 6, 1902, signed by Milliken, Tomlinson Co., and Fletcher & Co., respectively, discharging all claim and right of action against Voter & Wing, appear in evidence. James S. Morse declined to assent to the proposition and did not accept Lapham's note in settlement of his claim.

September 17, 1902, Voter & Wing made an assignment to Swasey & Swasey for the benefit of creditors, in order that the accounts due the firm might be collected and the amount realized therefrom be applied to the payment of the small debts which Lapham had not assumed.

October 9, 1902, Clarence P. Voter filed his petition in bankruptcy individually and as a member of the firm of the copartnership of Voter & Wing, and on the same day the partnership was adjudicated bankrupt. In the partnership schedule, under the title of unsecured creditors, appears the name of Morrill Wing as a creditor to the amount of $1000 secured by a mortgage of the firm's stock in trade, contracted "on or about May 7, 1902." The number of unsecured creditors is thirty, their claims aggregating the sum of $3344.11. In the schedule of the assets of the firm it is said: "There are debts due the partnership of $1000. This may reach $1500." . . . "Stock in trade sold Perry C. Lapham who

assumed the partnership debts in payment thereof to the amount of $2157.63." With reference to the book account, however, the plaintiff testifies that it would be utterly impossible to realize from that source more than $250 or $300.

In the meantime Perry C. Lapham had taken possession of the stock of goods by virtue of his bill of sale of September 15, and continued to carry on the business under the name of the "Rumford Falls Grocery Company" until January 21, 1903. The defendants continued to supply the store with goods on credit until that date, but received no payments on the notes given for their claims against Voter & Wing. Mr. Laughlin for Milliken, Tomlinson Co., and Mr. Pitt, the "credit man" of Twitchell-Champlin Co., thereupon had an interview with Lapham at Rumford Falls which resulted in a sale from Lapham to Laughlin of the entire stock in trade and fixtures, together with Lapham's book accounts, in consideration of Laughlin's agreement to assume the Morrell Wing mortgage, pay all outstanding debts against Lapham and relieve him from all liability on account of the notes given to the defendants in settlement of their claims against Voter & Wing. From the sale of the stock of goods and from the book accounts Mr. Laughlin realized $1419.70. He purchased the Morrell Wing mortgage for $500, and paid other bills to the amount of $545.34, leaving a balance of $364.36 to be appropriated to the payment of the three notes given to the defendants on account of Voter & Wing.

Upon these facts the defendants contend that no preference to them was ever given or intended by the firm of Voter & Wing, or if so, that they did not have reasonable cause to believe that the firm intended to give them a preference.

The provisions of the Bankrupt Act of 1898, pertinent to the question thus presented, are as follows:

(Section 1, clause 15) "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 intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

(Section 60 a) "A person shall be deemed to have given a preference if, being insolvent, he has 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."

(Section 60 b) "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The amendments to these sections adopted February 5, 1903, are not involved in this case.

Although the evidence tends strongly to show that at the time of their transfer to Lapham of September 15, Voter & Wing did not consider the firm insolvent within the definition above quoted from the Bankrupt Act, it must be admitted that in light of subsequent developments the firm was in fact insolvent at that time, and whatever may have been the intention of the firm respecting that transfer it cannot be denied that the transactions above recited resulted indirectly in a transfer of a larger part of the property of the firm for the benefit of the defendants, the effect of which was to enable them to obtain a greater percentage of their debts than any other of such creditors of the same class. But whether upon the facts and circumstances known to the defendants and their agents September 16, 1902, or which might have been ascertained by them by the exercise of reasonable diligence on their part, the defendants had reasonable cause to believe that a preference was thereby intended, is a question the solution of which is not entirely free from difficulty.

Under the act of 1867 the term insolvency was construed to mean an inability to meet one's obligations in the ordinary course of business, while in the present act it is equivalent to the word bankruptcy in the former statute; but the principles of construction laid down

by the courts in determining the force and effect to be given to the phrase "reasonable cause to believe," found in the former act relating to preferences, are equally applicable in considering the meaning of this phrase in the section 60a above quoted from the act of 1898. In the leading case of *Grant* v. *Bank*, 97 U. S. 80, it was said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicions a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-founded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate, and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would in fact have the effect of producing bankruptcy in many cases where it might otherwise be avoided." See also *Barbour* v. *Priest*, 103 U. S. 293; *Stucky* v. *Bank*, 108 U. S. 746. But in *Dutcher* v. *Wright*, 94 U. S. 553, it

is said: "If it appears that the debtor giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained that fact by reasonable inquiry." See also *Bank* v. *Cook*, 95 U. S. 343.

In re Eggert, 102 Fed. Reporter 735, the question of a preference under the present act was under consideration; and after comparing the cases above cited, the court say: "The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. . . . The only fact brought home to the creditor, and which it is claimed should have aroused inquiry, is that he was somewhat behind in the prompt payment of his obligation. We cannot say, as a conclusion of law, that knowledge of that fact standing alone was sufficient to put the creditor upon inquiry. Indeed it may be said that a majority of merchants absolutely solvent, in the sense in which the term is employed in the Bankrupt Act, are not at all times able to promptly meet their obligations as they mature. To hold that a creditor receiving payment of or security for a past due debt is, by the mere fact of knowledge that the debt is past maturity, put upon inquiry of his debtor's inability to pay all his debts, and that under such circumstances he received payment or security at his peril, would be to put at hazard many business transactions and make the act oppressive. The fact of such inability, coupled with other facts and circumstances brought

home to the creditor, might be sufficient to put him on inquiry; but this is the only fact from which the deduction is sought that the creditor had reasonable cause to believe his debtor insolvent, and, standing alone, it is insufficient to raise an inference of law that the creditor is chargeable with knowledge of the facts which inquiry would have elicited."

In the case at bar the evidence fails to disclose the existence of any desire or purpose on the part of Voter & Wing to give the defendants any advantage over other creditors. The defendants had shown no anxiety about their claims. They had made no effort to enforce the collection of them or obtain security for them. Perfunctory requests for further payments had been made by their agents, but the defendants continued to give further credit. The transfer to Lapham of September 15th was made without the suggestion or knowledge of any of the defendants or their agents. Mr. Wing went to Portland and proposed the arrangement which was made with the defendants September 16th, not in pursuance of any request from them, but by reason of a desire on his own part to effect a dissolution of the firm. The defendants had no knowledge respecting the financial standing of the firm except that arising inferentially from a failure to make prompt payment of all obligations at maturity, and were not in a state of mind to question the confident assurance of Mr. Wing that "the firm was entirely solvent," and that there was enough on the book accounts, not included in the sale to Lapham, to take care of all the other creditors. It appears from the testimony of Mr. Lapham, called as a witness for the plaintiff, that he purchased the stock in good faith for the purpose of carrying on the business, and that according to the account taken at that time the property transferred to him was sufficient to pay in full all of the liabilities which he proposed to assume, including Morse's claim of $103.15, and he was assured by the firm that the book accounts were ample to pay all other bills. And in this connection it may be observed that if Mr. Laughlin had been compelled to pay the full value of the Wing mortgage, as it was understood by all of the parties and as stated in the schedule of secured claims, the balance realized by him from the sale of the property would have been insuf-

ficient to pay the liabilities assumed by him, and there would have been nothing whatever to apply to the payment of the defendant's notes. Again, if the firm's book accounts had possessed the value which Voter & Wing and Mr. Lapham evidently believed that they had, or the minimum value stated in the schedule of assets, the defendants, with a balance in their favor of $364.36, would have obtained a less percentage on their debts than the other creditors.

Mr. A. W. Wing was not called as a witness, and the testimony of Mr. Laughlin, corroborated as it is by that of Mr. Pitt and of Mr. Lapham, remains unquestioned and substantially unmodified by any other evidence in the case.

It is accordingly the opinion of the court that the evidence reported does not warrant the conclusion that at the time the defendants accepted Lapham's notes, in settlement of their claims against Voter & Wing, they had reasonable cause to believe that it was intended thereby to give them a preference.

The entry in each case will therefore be,

Judgment for the defendant.

STATE OF MAINE *vs.* JOHN DORAN.

York. Opinion December 5, 1904.

Criminal Law. Indictment. Arrest of Judgment. R. S. 1903, c. 132, §§ 9, 10; c. 120, § 8; c. 121, § 1; c. 136, § 3; Const. of Maine, Art. 1, § 6.

An indictment under the statute for attempting to break and enter a railroad car that contains no description of the overt act done by the accused in attempting to commit the crime charged, nor a specification of the particular felony which the defendant is charged with attempting to commit, is clearly insufficient.

Where the offense is created by statute and the facts constituting it are fully set out, it is undoubtedly sufficient to charge the offense in the language of the statute without further description. But if the statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment.

Where a mere generic term is used, or where the words of the statute by their generality may embrace cases which fall within the terms but not within the spirit or meaning of it, the specific facts must be alleged to bring the defendant precisely within the inhibition of the law.

To constitute an attempt there must be something more than mere intention or preparation. There must be some act moving directly towards the commission of the offense after the preparations are made.

An indictment for an attempt to commit burglary must not only allege the attempt and intent but it is essential that it must also allege the overt acts relied upon as constituting the attempt.

The word felony is not the name of any specific offense, but is a generic term employed to distinguish certain high crimes from other minor ones known as misdemeanors, and an averment that the accused broke and entered the car for the purpose of committing a felony wholly failed to apprise him of the specific offense which it is claimed he intended to commit.

An indictment which fails to specify the particular felony which, it is alleged, the defendant intended to commit, is fatally defective.

Exceptions by defendant. Sustained.

Judgment arrested.

The defendant, at the January term, 1904, of the Supreme Judicial Court, York County, was indicted for attempting to break and enter a certain car of the Boston & Maine Railroad "for the purpose of commiting a felony," and upon trial was found guilty; thereupon he moved in arrest of judgment. The motion was overruled, and the defendant excepted. Three reasons were assigned why judgment should be arrested but the court only considered the last.

The material facts appear in the opinion.

George L. Emery, County Attorney, for the State.

Anthony Dwyer, for the defendant.

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

WHITEHOUSE, J. It is alleged in the indictment that the defendant "with force and arms the car numbered 18656 of the Boston & Maine Railroad . . . . feloniously, wilfully and maliciously did attempt to break and enter for the purpose of committing a felony." The jury returned a verdict of guilty, and the defendant moved in arrest of judgment, among other reasons, "because no

specific offense against the laws of this state is alleged against the said Doran in said indictment, and that no judgment could be rendered upon the verdict in said court." The motion was overruled by the presiding judge, and the case comes to this court on exceptions to this ruling.

The indictment appears to be founded on section 9 of chapter 132, R. S., relating to "attempt to commit offenses," and section 8 of chapter 120, R. S., descriptive of the offense which the defendant was charged with attempting to commit. Section 9 of chapter 132 provides that "whoever attempts to commit an offense, and does anything towards it, but fails, or is interrupted or prevented in its execution," shall be punished as therein provided; and section 8 of chapter 120 declares that "whoever, with intent to commit a felony, breaks and enters a . . . . railroad car of any kind, or building in which valuable things are kept," shall suffer the penalty therein specified.

It appears from a comparison of these provisions with the language of the indictment, that only the general terms of the statute have been employed to state the charge against the defendant, both with respect to the "attempt" to commit the offense and the "felony" which he intended to commit. The indictment contains neither a description of the overt act done by the accused in attempting to commit the crime charged, nor a specification of the particular felony which the defendant is charged with attempting to commit, after breaking and entering the car.

Where the offense is created by statute and the facts constituting it are fully set out, it is undoubtedly sufficient to charge the offense in the language of the statute without further description. 1 Bish. Cr. Proc. § 611. But "in all criminal prosecutions the accused shall have a right . . . . to demand the nature and cause of the accusation." Const. of Maine, Art. 1, § 6. He has a right to insist that the facts alleged to constitute a crime shall be stated in the indictment against him with that reasonable degree of fullness, certainty and precision requisite to enable him to meet the exact charge against him, and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense.

Hence if a statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment. "And where a mere generic term is used, or where the words of the statute by their generality may embrace cases which fall within the terms but not within the spirit or meaning thereof, the specific facts must be alleged to bring the defendant precisely within the inhibition of the law." Ency. of Pl. and Prac., Vol. 10, p. 487; Wharton's Cr. Pl. and Prac., § 220. Indeed it is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment.

With respect to indictments for attempts to commit offenses Mr. Bishop says: "An attempt is an intent to do a particular criminal thing with an act towards it falling short of the thing intended, (1 Bish. Cr. Law, § 728), and on principle we see that we must set out the act which was committed and the specific intent which accompained it." Bish. on Stat. Cr., § 394; 2 Crim. Proc. §§ 1 and 92; Directions and Forms, § 100. In 2 Wharton's Crim. Law the author says: "'Attempt' is a term peculiarly indefinite. It has no prescribed legal meaning. It relates from its nature to unconsummated offenses. . . . Attempts may be merely in conception or in preparation, with no casual connection between the attempt and any particular crime. . . . In an indictment for an attempt it is essential to aver that the defendant did some act which directed by a particular intent, which must be averred, would have apparently resulted in the ordinary and likely course of things in a particular crime." §§ 2703 and 2705. To constitute an attempt there must be something more then mere intention or preparation. There must be some act moving directly towards the commission of the offense after the preparations are made. *People* v. *Young*, 122 Mich. 292. "An indictment for an attempt to commit burglary must not only allege the attempt and intent but it is essential that it also allege the overt acts relied upon as constituting the attempt." Cyc. of Law and Proc., Vol. 6, p. 225. See also Ency. Pl. and Prac., Vol. 3, p. 799, and cases cited.

Again, as already noted, the indictment fails to specify the particular felony which, it is alleged, the defendant intended to commit. This is another fatal defect. The word felony is not the name of any distinctive offense. It is a generic term employed to distinguish certain high crimes, as murder, robbery, rape, arson and larceny, from other minor ones known as misdemeanors. The averment that the defendant broke and entered the car for the purpose of commiting a felony wholly failed to apprise him of the specific offense which it is claimed he intended to commit. Whether it would be contended by the state that he intended to commit murder, or robbery, or rape, or larceny, he is not informed. Upon the trial of such an indictment he was liable to be oppressed by the introduction of evidence which he could not anticipate or be prepared to meet. The authorities are substantially unanimous in support of the proposition that such an allegation is wanting in the precision and certainty required by the constitution and the rules of criminal pleading. "Though in burglary and statutory house-breaking the intent, as defined by the law, is simply to commit a felony, it is not sufficient in the indictment to follow these general words, but the particular felony intended must be specified." Bish. Cr. Proc., 1, § 527, and 2, § 142. See also Ency. Pl. and Prac., Vol. 3, p. 772, and 6 Cyc. Law and Proc., 217, title "Burglary," and cases cited; Wharton's Cr. Pl. and Prac., § 163 a.

But while all the authorities substantially agree that it is necessary, in order that the charge may be certain, to specify the particular felony intended, they are not in harmony respecting the degree of particularity required in setting out the specific offense. According to the great weight of authority, however, as well as upon sound reason, the ulterior felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of such felony. 2 Bish. Cr. Proc., § 142. It is ordinarily sufficient to state the intended offense generally as by alleging an intent to steal, or commit the crime of larceny, rape or arson. Such is the rule in Massachusetts. In *Com.* v. *Doherty*, 10 Cush. 55, the court say: "From the very nature of the case in many instances the charge in its formal details could not be given. Suppose the alleged

intent were to commit larceny, but of what particular goods, or the property of what particular individual, it could not be known unless the theft was actually perpetrated. A general intent to steal goods would complete the offense, and the averment of such intent without more is sufficient." *Josslyn* v. *Com.*, 6 Met. 239. Nor is it necessary under our statutes, in the case of an alleged intention to commit larceny, to aver that the property intended to be stolen exceeded $100 in value. By section 1 of chapter 121, R. S., the larceny of property less than $100 in value is punishable by "imprisonment for not more than two years," and is therefore a felony under our statutes. By section 10 of chapter 132, and section 3 of chapter 136, R. S., the term felony is made to include every offense "punishable by imprisonment" "for the term of one year or more." See *State* v. *Goddard*, 69 Maine, 181.

The indictment being clearly insufficient for the reasons above set forth under the third specification contained in the defendant's motion, it is unnecessary to consider the causes assigned in the first and second specifications.

Exceptions sustained. Motion sustained. Judgment arrested.

MARTHA MCGUIRE, In Equity, *vs.* MARY GALLAGHER, et als.

Cumberland. Opinion December 7, 1904.

Will. Construction. Life Estate. Power of Sale. Bond.

The controlling rule in the exposition of wills to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it is consistent with the rules of law, and the entire will should be considered with a view to give effect, so far as the law allows, to its every provision.

The intention, as to any particular item in a will, is often aided and sometimes deduced from other provisions, and from the general scope and trend of the instrument.

The testator's will contains the following clauses:

"1st. I give, bequeath and devise to my wife, Martha McGuire, during her life, all my property, real, personal and mixed, to be used by her according to her desire.

2nd. After the death of my wife, I order and direct that all the property remaining be divided among my brothers and sisters then alive, and the direct descendants of any deceased brothers and sisters."

Held: 1st. That the wife took a life estate in the entire property with a power of sale of any or all of it, real and personal, and the right to use the proceeds for her support and comfort, as she may desire. If at her death any part of the original estate remains unchanged, or if sold by her, any part of the proceeds remains unexpended by her, such remainder goes to the brothers and sisters, and their descendants as provided in the second item.

2nd. That as the testator requested that no bond be required by Mrs. McGuire, as executrix, there is no necessity for any bond from her in regard to the life estate.

Bill in equity. Sustained. Decree according to opinion.

On report.

Bill in equity brought by the widow of Bernard McGuire, late of Portland, and executrix of his will, for the construction of said will.

The case is stated in the opinion.

James A. and William A. Connellan, for plaintiff.

L. M. Webb, for defendants.

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

STROUT, J. In this bill the construction and effect of the following two clauses in the will of Bernard McGuire is sought:

"1st. I give, bequeath and devise to my wife, Martha McGuire, during her life, all my property, real, personal and mixed, to be used by her according to her desire.

2nd. After the death of my wife, I order and direct that all the property remaining be divided among my brothers and sisters then alive, and the direct descendants of any deceased brothers and sisters."

The testator's estate consisted of real estate

appraised at..... .... $1200.00

and personal..... 1472.63

Out of this, of course, any debts he may have owed and funeral expenses and costs of administration must be paid.

The testator intended to provide for the support and comfort of his wife. All of his personal, except ten dollars, was in a savings bank, drawing less than four per cent interest. By a liberal estimate of income from the real estate, the total annual income from the whole estate would not exceed one hundred and thirty dollars, — probably would be less. From this taxes must be deducted. The net income, therefore, was insufficient for the support of the widow. With this condition of the estate in his mind, he made his will.

The controlling rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it is consistent with the rules of law. *Shaw* v. *Hussey*, 41 Maine, 497. The entire will should be considered with a view to give effect, so far as the law allows, to its every provision. The intention, as to any particular item, is often aided and sometimes deduced, from other provisions, and from the general scope and trend of the instrument.

It remains to apply these rules to this will.

By the first article he gave his wife all his property during her life. No distinction between real and personal estate is made. If he intended only a life estate, he would have stopped there, — no other words were necessary or suitable. But he added, — "to be used by her according to her desire." Something was intended by this language, and something more than a mere user of a life estate, as such. The language is without meaning, if only a life estate was given, as it added nothing to the bequest, nor qualified it.

The term "to use" is defined by Webster among other definitions, as "to make use of, — to convert to one's service, — to avail one's self of, — to put to a purpose, as to use flour for bread."

The income of the estate being manifestly insufficient for her support, it is a legitimate, almost necessary inference, that he intended her "to use" not only that income, but the corpus of the estate, for her comfort, as she desired. The language being general, must be deemed to apply to the real as well as to the personal estate.

A power of sale is often implied, though not given in express terms. Thus in *Shaw* v. *Hussey*, supra, where one item of the will gave all the property to the wife during her life, and a subsequent article pro-

vided that at the decease of the wife "all my real estate that may remain unexpended by her" be divided, this Court held that the wife had a power of sale of the real,—notwithstanding a subsequent article in express terms made all the personal property subject to the disposal of the wife by will or otherwise, and made no mention of real estate.

By the gift she did not take an absolute title, but she did take a life estate in the entire property, with a power of sale of both real and personal, "according to her desire," and the right to use any portion or all of it for her support and comfort. If at her death anything remains, either of the original estate or its proceeds, that residue will pass under the second item of the will to the beneficiaries therein named.

If anything was needed to strengthen this conclusion it is furnished by the second item in the will, which directs the disposition of "the property remaining" at the death of his wife,— a plain implication that the corpus of the estate was likely to be diminished during her life. The language is general, as in the first item, applying to real and personal both. There is no devise over of the real estate, or any specific part of the personal. The language is equivalent to the phrase,—if anything of this estate remains at her death, it is to go over. *Harris* v. *Knapp*, 21 Pick. 412. In that case the devise over was of "whatever shall remain," and the Court said that those words "necessarily mean that portion of the property bequeathed, which shall be undisposed of at her decease; but there is no allusion in the will to any mode by which the sum thus given is to be diminished, except the disposition thereof to be made by Mrs. Harris; and therefore the implication is irresistible that she had a power to make such disposition." That case is on all fours with the present. So held also in *Ramsdell* v. *Ramsdell*, 21 Maine, 288, and *Scott* v. *Perkins*, 28 Maine, 22.

The testator requested that no bond be required of Mrs. McGuire, as executrix, and there is no necessity for any bond from her in regard to the life estate.

Decree in accordance with this opinion.

THOMAS A. FISHER

vs.

THE BOSTON & MAINE RAILROAD COMPANY.

Aroostook. Opinion December 12, 1904.

Common Carrier. Railroads. Shipping Contract. Duty and Liability of Carrier to Shipper.

When a common carrier has transported goods over its own lines to its terminus, or to the point of intersection with a designated connecting carrier, and is thereby unable to deliver them to the connecting carrier, without any fault upon its part, its duty and liability as a common carrier ceases, but the duty still rests upon the carrier, as a forwarder, to exercise reasonable care and diligence to prevent unnecessary loss to the goods and to save unnecessary cost to the owner in storage or transportation. Such forwarder should exercise the same degree of care to prevent loss or unnecessary expense that a prudent owner would have in the same situation.

It is a general rule that where the carrier is unable to deliver the goods to the next designated carrier, and has an opportunity to do so, it is his duty to at once notify the shipper or consignee, and failure to give such notice will render him liable for any loss or injury resulting therefrom.

Where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him. And this is true even where there is a stipulation in the contract of shipment to the effect that every carrier shall have the right, in case of necessity, to forward the goods by any railroad or route between the place of shipment and the place of designation.

On report. Judgment for plaintiff.

Action on the case to recover the increased cost of transportation which the plaintiff was obliged to pay on three cars of potatoes shipped by him from Fort Fairfield, Maine, to Philadelphia, caused by the defendant forwarding the potatoes from Boston to Phiadelphia by a route other than that designated by the plaintiff. In addition to the general issue, the defendant filed a brief statement alleging:

"1st. That under clause two of the contract of shipment made by the plaintiff with the defendant through the Bangor & Aroostook R. R. Co., the initial carrier and the agent in that behalf of the defendant, the defendant was specially licensed and authorized by the plaintiff, in case of necessity, to forward the potatoes described in the plaintiff's writ by any railroad or route between the point of shipment and the point to which the rate was given, to wit, Philadelphia; and the defendant was not bound to carry said potatoes by any particular train or route, or in any time for any particular market otherwise than with as reasonable dispatch as the general business of the defendant would permit. And the defendant says that on account of strikes and labor troubles, involving freight handlers and teamsters, in said Boston at the time said potatoes should have been delivered in the due course of business to said Boston & Philadelphia Steamship Company it was impossible for the defendant to deliver said potatoes to said Steamship Company.

2nd. That it was also impossible for said Steamship Company to receive and handle and forward same to Philadelphia. And it was also impossible for the defendant or said Steamship Company to form any idea of the duration of said strikes and labor troubles, or to form any idea as to when the same could be forwarded by said Steamship Company to Philadelphia.

3rd. That it was further impossible for the defendant, with its large amount of business to communicate at that time with the plaintiff.

4th. That in forwarding said potatoes by the Metropolitan Steamship line it acted, as it believed, for the best interests of the shipper, said potatoes being perishable goods and the weather during said month of March being uncertain, said Metropolitan Steamship Company affording the surest and quickest means of forwarding said potatoes to their destination."

All material facts are fully stated in the opinion.

B. L. Fletcher, for plaintiff.

John B. and A. W. Madigan, for defendant.

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

WISWELL, C. J. On March 1, 1902, the Bangor & Aroostook Railroad Company received of the plaintiff a carload of potatoes to be transported over its own and connecting lines and delivered to a consignee in Philadelphia; and on March 7, it received from the plaintiff two other carloads of potatoes, consigned to the same person in Philadelphia, for the same purpose. The route designated by the shipper for these three cars was by rail to Boston, and from Boston to Philadelphia by the Boston & Philadelphia Steamship Company, this designated route being plainly shown by this language in the bill of lading, or shipping receipt, given by the initial carrier: "Route via Boston and Philadelphia Steamship Company." The same language being contained in each of the three shipping receipts. It is not claimed that there was any ambiguity whatever as to the route chosen by the shipper and thus designated in the shipping receipts. These cars were duly transported by the initial and an intermediate carrier and delivered to the defendant, a common carrier, at Portland, the point of intersection. The defendant there received these three carloads of potatoes and transported the same to its terminus in Boston, the first car arriving on March 7, and the other two on March 11, 1902.

At the time of the arrival of the last two cars in Boston a general strike of teamsters and freight handlers existed which commenced on March 10, and continued until about March 14, and this strike was of such extent that, as may be conceded, it became impossible, or, at least, impracticable by the exercise of reasonable diligence, for the defendant to transfer these potatoes and deliver them to the next designated connecting carrier, the Boston and Philadelphia Steamship Company. Thereupon the defendant, without notifying either the consignor or the consignee, either by mail, telegraph or telephone, although, as it appears, there were ample means of communication, both by mail and by wire, delivered these potatoes on March 11, to the Metropolitan Steamship Company, by which they were transported to New York, delivered to the Pennsylvania Railroad Com-

pany, and from them transported by that Company by rail to Philadelphia where they were delivered to the consignee. The cost of transportation by this route to the plaintiff was $91.31, for the three carloads, more than it would have been if they had been transported by the route chosen by the shipper and plainly designated in the shipping receipts. The plaintiff, having paid this extra cost of transportation under protest, seeks to recover that amount in this action, which comes to the law court upon a report of the evidence.

Independently of any stipulation in the contract limiting its liability, the defendant would unquestionably be liable for this loss to the plaintiff caused by its failure to forward the goods by the designated route. The defendant's contract, by virtue of the acceptance of these cars with the route designated, was to transport them over its own line to Boston, and there to deliver them to the next designated connecting carrier, and for its failure to do so, to the injury of the plaintiff in the manner referred to, it would be liable to the plaintiff for the increased cost of transportation. *Proctor* v. *Eastern Railroad Company*, 105 Mass. 512. That the intermediate carrier is liable to the shipper for any loss which occurs through its fault, after the goods have come into its possession, and that the liability of the former carriers in the route terminates, when they have respectively transported the goods over their lines and delivered them to the next connecting carrier, is now almost universally established in this country.

But the contract of shipment between the initial carrier and the shipper contained various stipulations affecting the rights of the parties and limiting the liability of that corporation. These stipulations enured to the benefit of the defendant. *Morse* v. *Canadian Pacific Railway Company*, 97 Maine, 77. And it was expressly agreed in these contracts that the stipulations should be applicable to each carrier over any portion of the route. It is also well settled in this state, as well as universally in this country, that a common carrier may by agreement limit to a reasonable extent his common law liability, but not his liability for the consequences of his own negligence. *Morse* v. *Canadian Pacific Railway Company*, supra.

These stipulations, so far as they affect this case, are as follows:

"No carrier . . . . shall be liable for any loss thereof or damage thereto, by causes beyond its control, or by floods or by fire from any cause wheresoever occurring; or by riot, strikes or stoppage of labor." "No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given."

We may assume, for the purposes of this case, that for causes beyond its control, and without any fault upon its part, the defendant could not for the few days commencing Monday, the 10th, and extending to Friday, the 14th, deliver these goods to the designated connecting carrier at Boston, and the causes affecting its inability in this respect were covered by the stipulations above referred to. It is also undoubtedly true that at the time the goods were forwarded by another route, it was impossible to tell with any degree of certainty how long the situation caused by the strike would continue, or how soon the potatoes could be delivered to and received by the Steamship Line between Boston and Philadelphia. There is also no question but that these stipulations, especially the one to the effect that the defendant, in case of necessity, had the right to forward the goods by any other railroad or route, were reasonable limitations. We come then to the question whether the defendant, under the circumstances of the case in acting as a forwarder only, acted with that degree of care and diligence that the law and the situation demanded, and whether such a case of necessity existed as justified the defendant in forwarding these goods by the much more expensive route without in any way communicating with the shipper, and without giving him any opportunity to give new and different instructions in view of the exigency which existed.

In determining this question, we assume that the duty and liability of the defendant as a common carrier had ceased when these goods had been transported over its own line to its terminus in Boston, and when it was unable to deliver them to the next carrier because of the situation referred to. *Plantation No. 4* v. *Hall*, 61 Maine, 517, but

the duty still rested upon the defendant, as a forwarder, to exercise reasonable care and diligence to prevent unnecessary loss to the goods, and to save unnecessary cost to the owner in storage or transportation. Such forwarder should exercise the same degree of care to prevent loss or unnecessary expense that a prudent owner would have in the same situation. This is a familiar principle which may be frequently found stated in the decisions. *Hooper* v. *Wells, Fargo & Company*, 27 Cal. 11, 85 Am. D. 211.

The gravamen of the plaintiff's complaint is, that this deviation in route was made by the sender without communication with him and without giving him an opportunity to give new instructions when, as claimed by him, if he had been informed of the condition existing, and had an opportunity to exercise his discretion in this situation, he could have disposed of the potatoes in Boston without any loss, and, in fact, at a profit. It is undoubtedly a general rule that where the carrier is unable to deliver the goods to the next designated carrier, and has an opportunity to do so, it is his duty to at once notify the shipper or consignee, and failure to give such notice will render him liable for any loss or injury resulting therefrom. "Where goods are thus held after failure or refusal of the connecting carrier to receive them, it is the duty of the initial carrier to at once notify the shipper or consignee, as the case may be." 6 Cyc. 484, and cases cited. "But, where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route, without notice to him and instructions from him." *Louisville & Nashville Railroad Company* v. *Odil*, 96 Tenn. 61, 54 Am. St. R. 820. Some of the numerous cases to the same effect which might be cited are, The Convoy's Wheat, 3 Wall. 225; *Michigan Central Railroad Company* v. *Mineral Springs Manufacturing Company*, 16 Wall. 318; *Peterson* v. *Chase*, 21 Fed. R. 885; *Inman* v. *St. Louis & South Western Railroad Company*, 14 Texas Civ. App. R. 39, 37 S. W. 37; *Johnson* v. *New York Central Railroad Company*, 33 N. Y. 610; *Goodrich* v. *Thompson*, 44 N. Y. 324.

In *Regan* v. *Grand Trunk Railway*, 61 N. H. 579, a case somewhat relied upon by defendant, the carrier failed to give notice of its

inability to forward the goods by the conveyance designated, but it was expressly found that "that such notice would not have avoided the loss, and that the plaintiff suffered no injury by reason of the defendant's agent. Thereupon, the court decided that: "Neglect to notify the consignee of a change of route does not render the carrier liable for loss or damage happening from delay in the delivery of the goods, if such notice would not have avoided the injury." With which statement we entirely agree.

Applying these rules to the circumstances of this case, we think that the defendant failed to perform its duty toward the plaintiff by not giving him an opportunity to prevent, if possible, this largely excessive cost of transportation. No such exigency existed as prevented the defendant from holding the potatoes until the plaintiff could have been communicated with, and instructions received from him. One of these cars was an Eastman Heater Car and the other two were lined cars, as they are called, all supplied with means of heating. In this situation the potatoes were not of such a perishable character as required that they should be sent forward before there was time to hear from the owner, because, by the exercise of slight care, if the state of the weather had required it, the potatoes could have been kept from any injury from the frost. The arbitrary deviation from the route selected by the shipper, without awaiting instructions, was entirely unnecessary. As said by the court in *Michigan Central Railroad Company* v. *Mineral Springs Manufacturing Company*, 16 Wall. 318, "common fairness required that at least he should have been told of the condition of things there and thus left free to choose, if he saw fit, another mode of conveyance," or given an opportunity to dispose of his goods, if possible, without subjecting them to this large charge, in proportion to the value, for the transportation. And we are satisfied, from the evidence in the case, that this extra cost could have been prevented, and all loss to the plaintiff would have been avoided if this notice had been given, and if the plaintiff had had an opportunity to dispose of his property where it was.

Judgment for plaintiff for $91.31 and interest from the date of the writ.

ALWILDA S. DAVIS *vs.* LUTHER O. POLAND.

LUTHER O. POLAND *vs.* ALWILDA S. DAVIS, et al.

Knox. Opinion December 12, 1904.

Real Action. Trespass, q. c. Mortgage for Support. Possession. Breach of Condition. Burden of Proof. R. S. 1903, c. 77, § 1; c. 97, § 5.

Ordinarily, in the case of a mortgage given to secure the payment of money, the burden of proving the payment of the mortgage indebtedness is on the mortgagor, and in an action to recover possession by the mortgagee in a mortgage given for his support, where there is no agreement to the contrary, and no clause from which such an agreement may be fairly inferred, the mortgagee is entitled to possession of the mortgaged premises, and to maintain a real action to recover such possession, whether there has been a breach of the condition of the mortgage or not.

But it is otherwise in the case of a mortgage given for the support of the mortgagee where it is provided in the mortgage that the support shall be furnished the mortgagee upon the premises described in the mortgage. In such a case, the implication is clear that it was not the intention of the parties that the mortgagor should retain possession of the premises until a breach of the condition, because possession by him is absolutely necessary in order to enable him to perform the condition of the mortgage. In such a case, the burden of proving that there has been a breach of the condition of the mortgage is upon the mortgagee, or upon an assignee, who seeks to recover possession of the premises.

These two actions were tried together, and at the close of the evidence the presiding justice directed a verdict for the plaintiff in each action. *Held:* that the facts as shown by the evidence, and which appear in the opinion, were not sufficient to warrant this direction, and that the verdicts must be set aside.

On exceptions, by plaintiff and defendant in trespass action and by defendants in real action. Sustained.

Real action and an action of trespass quare clausum for an alleged trespass upon the premises demanded, tried together by order of the presiding justice. At the close of the evidence the presiding justice ordered a verdict for the plaintiff in each action. The jury returned verdicts as directed, assessing damages in trespass action at $63.

The case sufficiently appears in the opinion.

D. N. Mortland, for Alwilda S. Davis and Alwilda S. Davis, et al.

C. E. & A. S. Littlefield and Frank B. Miller, for Luther O. Poland.

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

WISWELL, C. J. These two cases, by direction of the court, were tried together. That of *Poland* v. *Davis* et al. is a real action, while that of *Davis* v. *Poland* is an action of trespass quare clausum for an alleged trespass upon the same premises that are demanded in the real action.

In the first case the presiding justice ordered a verdict for the plaintiff; he also ordered a verdict for the plaintiff in the action of trespass, submitting the question of damages to the jury, but instructing the jury that there was no evidence of any malice on the part of the defendant in that action and that the plaintiff could not recover damages for the injury done to the realty as the title was in Poland.

First, as to the real action: One Edward Crouse, under whom both parties claim, was at one time the owner of the demanded premises, he conveyed them to his daughter, the defendant in the real action, who, with her husband, gave a bond to her father for his support and secured the same by a mortgage upon the premises; both bond and mortgage were conditioned for the support of Edward Crouse during his natural life "in the house this day deeded by said Edward to said Alwilda and at his death give him suitable burial." At the time of the conveyance from Crouse to his daughter, he had a wife living, from whom he had separated, who did not join in the conveyance, and who was not mentioned in the bond and mortgage given back for the support of the grantor.

It further appears that the mortgagee, Crouse, left the premises conveyed to Mrs. Davis, in the fall of 1900, and thereafter lived with his son, Mark B. Crouse, in another town in the same county until the time of his death shortly after midnight on March 18, 1901. Upon the petition of a person claiming to be a creditor, an admin-

istrator was appointed upon the estate of Edward Crouse, who subsequently attempted to foreclose this mortgage to secure the support of his intestate by publication in the newspaper, the last publication being on July 4, 1902. After the expiration of the period allowed for redemption, the administrator, having obtained license therefor from the Probate Court, conveyed the premises to the plaintiff in the real action. This is the title of the plaintiff, except that in addition to this, it also appears that the widow of Edward Crouse, who did not join in the conveyance to Mrs. Davis, after the death of Crouse, conveyed her interest in the property to Poland. The plaintiff sought to recover the whole of the demanded premises, and the verdict ordered by the presiding justice for the plaintiff was for the whole of the premises.

Various questions are raised by the defendants as to the validity of the attempted foreclosure, and as to other matters, which need not now be considered, both because of our conclusion as to the propriety of the direction of the verdict, and also, so far as the validity of the foreclosure is concerned, because we think that it is immaterial whether the mortgage was foreclosed or not, since, if the foreclosure was invalid, the deed from the administrator to the plaintiff would probably be sufficient to affect an assignment of the mortgage, if it then existed unextinguished, and this would be sufficient to authorize the plaintiff to maintain this action, if the other necessary facts exist.

But, except as to the title to an undivided interest, which Poland has by reason of the conveyance to him from the widow of the previous owner, it is plain, we think, that before the plaintiff in the real action would be entitled to a judgment for possession of the whole of the demanded premises, or to a verdict upon which such a judgment would be based, he must show that this mortgage was existing and unextinguished at the time of the appointment of the administrator, at the time of the conveyance or assignment to him, and at the time of the commencement of the suit, except perhaps as it may have been extinguished by the foreclosure; in other words, he must show that there had been a breach of the condition of the mortgage. Ordinarily, in the case of a mortgage given to secure the payment of money,

the burden of proving payment of the mortgage indebtedness is on the mortgagor. *Crooker* v. *Crooker*, 49 Maine, 416. And where a common law judgment for possession only is sought it is not even necessary for the mortgagee to produce the notes referred to in the mortgage or other evidence of the existence of the mortgage indebtedness, where there is no evidence to the contrary and no circumstances from which a payment of the indebtedness may be inferred. Although it is otherwise when either party asks for a conditional judgment. *Morse* v. *Stafford*, 95 Maine, 31. And so, too, in an action to recover possession of premises by the mortgagee in a mortgage given for his support, where there is no agreement to the contrary and no clause from which such an agreement may be fairly inferred, the mortgagee is entitled to possession of the mortgaged premises, and consequently can maintain a real action to recover such possession, whether there has been a breach of the condition of the mortgage or not. *Hadley* v. *Hadley*, 80 Maine, 459, and numerous other cases in this state.

But in this case, where the condition both of the bond and of the mortgage provided that the support to be furnished Crouse should be in the house upon the premises described in the mortgage, the implication is clear that it was the intention of the parties that the mortgagors should retain possession of the premises until a breach of the condition, because such possession is absolutely necessary in order to enable the mortgagors to perform the condition of the mortgage. Therefore, neither the mortgagee in his lifetime, nor his administrator nor an assignee or grantee of the administrator can maintain this action for possession, so far as it is based upon the mortgage, unless it be shown that there was a breach of the condition of the mortgage. Without any evidence at all upon this question the defendant would prevail. Therefore in accordance with the familiar principles, in order to maintain this action for the recovery of the whole of the demanded premises the burden of proving a breach of the condition is upon the plaintiff. This was decided in *Bryant* v. *Erskine*, 55 Maine, 153. The burden then being upon the plaintiff, we do not think that the facts stated in the bill of exceptions so clearly show a breach of the condition of the mortgage as to warrant the presiding

justice in taking the case from the jury and in directing a verdict for the plaintiff. As we have already seen, the mortgagee left the defendants' home some months before his death and made his home with his son, in another part of the county until the time of his death. There is no evidence whatever of any failure upon the part of the mortgagors to support him up to that time. To perform the condition of this mortgage, it was not the duty of the mortgagors to support the mortgagee elsewhere, and, although it was a part of the condition that they should give him a suitable burial at his death, that did not require the mortgagors to follow him wherever he might see fit to go, and to provide for his burial wherever he might be at the time of his death, after he had voluntarily abandoned the home which they were bound to provide for him.

It further appears from the exceptions that the mortgagee's son employed an undertaker to attend to the burial of his father, who rendered all necessary services, furnished the casket and other things necessary, and took charge of the funeral. Whatever may have been the duty of the mortgagors to attend to these matters under some circumstances, if somebody else voluntarily assumes this duty it was not a breach of the condition by the mortgagors, and neither was it a breach upon their part to refuse to pay the expenses thus voluntarily incurred by the son. *Daniels* v. *Eisenlor*, 10 Mich. 454, cited in Jones on Mortgages, § 393.

But, it is said in the exceptions, and this is the only breach that is substantially relied upon, that the mortgagors were notified of the mortgagee's death, that all arrangements had been made for the funeral, and were requested to dig the grave or to have it dug at their expense, and that they refused to do so. We do not think that it can be said from this bare statement, without the other facts and circumstances appearing, that there was unquestionably and clearly a breach of the condition. It does not appear where the burial was desired by the son who had assumed to take charge of the matter. The mortgagors were certainly not obliged to go to the town, in another part of the county, in which the mortgagee died, and take the remains from there, nor were they required to provide for the burial in that town, and whether or not this was the purpose and

request of the son who made the request does not appear. They were not required to perform this duty in any particular place. Their only duty, under any circumstances, was to give him a suitable burial; this might have been upon the premises or in a cemetery, or it might have been entirely suitable and proper to have placed the remains in a receiving tomb, until, in some more favorable season of the year, than the month of March, they could select a suitable place and have a grave dug for the remains of the deceased. Where the only breach of the condition that can be claimed, is the failure to pay the trifling expense that would be necessary in the respect referred to, we think, that it should be made to appear very clearly that there was such an unreasonable refusal to perform this service as would constitute a breach of the condition, before a verdict should be directed, necessarily based upon such breach.

In the action of trespass quare clausum both sides have alleged exceptions; the defendant because a verdict was ordered against him, the plaintiff, because of the ruling that the plaintiff could not recover for injuries done to the freehold since the title was in Poland, as well as for other reasons. Upon the death of Edward Crouse in 1901, leaving a widow and issue, one-third of these premises, of which he had been seized during coverture, descended to his widow, her interest therein not having been barred or released. R. S., c. 77, § 1. She thereby became a tenant in common with the owner of the other two-thirds. *Longley* v. *Longley*, 92 Maine, 395. And upon the conveyance from the widow to Poland, he became such tenant in common. The trial of the case, however, proceeded upon the ground that Poland was the owner of the whole of the premises, that the plaintiff was a tenant, and that under the circumstances of the case, she could maintain an action of trespass against her landlord for such acts as were committed by him. This was an erroneous theory, so far, at least, as the facts now appear and in view of our conclusion in the real action. A new trial must, therefore, be ordered in this case as well as in the other.

We need not now determine whether or not the acts complained of as trespasses, and the circumstances of the case are such as to authorize the maintenance of an action of trespass quare clausum by

one co-tenant against another. This can be done under some circumstances, for instance, as provided in R. S., c. 97, § 5, and perhaps under other circumstances.

Defendants' exceptions in the real action, and plaintiff's exceptions in the action of trespass, sustained.

GEORGE H. HATHORN *vs.* GEORGE WHEELWRIGHT.

Penobscot. Opinion December 12, 1904.

Promissory Note. Failure of Consideration. R. S. 1903, c. 84, § 40.

A promissory note given in consideration for the sale of an invention which is adjudged to be non-patentable, or for a patent which is void for want of novelty and utility, or from any other cause, is not enforceable by the original promisee.

For a long time a rule prevailed in this state to the effect that a partial failure of title constituted no defense to a suit on a note given for real estate. But this rule was abrogated by the legislature in 1897, R. S., c. 84, § 40, and it was never applicable, in this state, to a note given for other considerations. Upon the contrary, it is well settled that a partial failure of consideration may be shown in reduction of damages.

Whenever a promissory note is given for two or more independent considerations and there is a failure of consideration as to one, as where the title to one of the articles sold is not in the vendor at the time of the same, or where there is a breach of warranty or a misrepresentation as to quality, for the purpose of avoiding circuity of action, the law will allow the defendant, in an action between the original parties, or between others standing in no better position, to show such partial failure of consideration in reduction of damages.

In this case, one of the inventions sold by the plaintiff to the defendant, and for which the note was given in part, proved to be void because it was an infringement upon former patents; this fact is a defense pro tanto to the note.

On report. Remanded to nisi prius for trial.

Assumpsit on a promissory note of $2957. Defense failure of consideration. At the hearing in the court below, the case was reported to the law court for determination upon so much of the evidence as is legally admissible.

The case sufficiently appears in the opinion.

B. C. Additon and L. C. Stearns, for plaintiff.

A. J. Merrill and P. H. Gillin, for defendant.

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

WISWELL, C. J. Action upon a promissory note for $2957, by the payee against the maker. This note was a partial renewal of a former one for $3000, in consideration of which the plaintiff, the payee of the note, sold to the defendant an interest in certain inventions and patent rights. The instrument of sale was in part as follows: "In consideration of three thousand dollars to me paid by George Wheelwright of Bangor I hereby sell and convey to said Wheelwright eight twentieths of all my patents and inventions in the Fancy Forging and ball business as now carried on by me." The instrument contained certain other provisions which need not be here considered.

Among other inventions, either patented or to be patented, which were being used by the plaintiff in his business as described in this instrument at the time of this sale, and which were used subsequent to the sale by a corporation formed by the parties to carry on the same business, was an invention which, in appropriate proceedings in the United States Circuit Court for the District of Maine, was decided by that court to be an infringement upon certain patents belonging to the Simonds Rolling Machine Company, and the corporation formed by these parties, together with its officers, were enjoined by a decree of the Circuit Court from the further use of this invention, and were compelled to account for and pay over the profits previously received.

The fact of this adjudication was shown in evidence as a defense to the suit upon the promissory note given in part therefor. It is well settled that a note given for the sale of an invention which is

adjudged to be non-patentable, or for a patent which is void for want of novelty and utility, or from any other cause, is not enforceable. 6 A. & E. Encyl. of L., 2d Ed., 782, and cases cited. This was early decided in Massachusetts in the case of *Dickinson* v. *Hall*, 14 Pick. 217, and the same doctrine has been frequently reaffirmed in that state. *Lester* v. *Palmer*, 4 Allen, 145; *Nash* v. *Lull*, 102 Mass. 60; *Harlow* v. *Putnam*, 124 Mass. 553; *Chemical Electric Light, etc., Co.* v. *Howard*, 148 Mass. 352. The same principle was recognized by our court, although perhaps it was not necessarily involved in the decision of the case, in *Jones* v. *Burnham*, 67 Maine, 93, in this statement: "It is well settled, that a note given in consideration of a sale of a patent, or of an interest in the same, where the patent has been adjudged void for want of novelty, cannot be enforced." In an earlier case in this state, *Elmer* v. *Pennell*, 40 Maine, 430, it was held that evidence that a patent for which the note in suit was given was void, because an infringement of a prior one is not admissible until that fact has been determined by a circuit court of the United States. But the correctness of this decision to the effect that this matter must first be adjudicated in a circuit court has been frequently questioned in other jurisdictions, and was overruled by this court in *Carleton* v. *Bird*, 94 Maine, 182.

We do not understand that the counsel for the plaintiff at all questioned this doctrine, but their answer is, that, inasmuch as the note was given for other patent rights and inventions, as well as for other considerations, the defense set up is of a partial failure of consideration only and cannot be shown in reduction of damages. It is true that for a long time a rule prevailed in this state to the effect that a partial failure of title constituted no defense to a suit on a note given for real estate. This doctrine became so firmly established and was reiterated in so many decisions of the court that the legislature of this state in 1897 deemed it wise and expedient to abrogate it by legislation which now appears in R. S., c. 84, § 40, as follows: "In any proceeding in law or in equity in which the amount due on a promissory note given for the price of land conveyed, is in question, and a total failure of consideration would be a defense, a partial failure of consideration may be shown in reduction

of damages." But this rule has never prevailed in this state with respect to a note given for any other consideration. Upon the contrary, we regard it as well settled that such partial failure of consideration can be shown in reduction of damages.

This was early decided in Massachusetts in the case of *Harrington* v. *Stratton*, 22 Pick. 510, wherein many authorities were examined in support of the two doctrines then existing in the different jurisdictions, and the more liberal one was adopted, that, in order to avoid circuity of action a defendant should be allowed to introduce in evidence a partial failure of consideration, rather than be compelled to resort to a cross action. And even before the decision of this case, Chief Justice Shaw, in the opinion of the court in *Parish* v. *Stone*, 14 Pick. 198, used this language: "It seems, therefore, very clear, that want of consideration, either total or partial, may always be shown by way of defense; and that it will bar the action, or reduce the damages, from the amount expressed in the bill, as it is found to be total or partial respectively."

This court, in *Herbert* v. *Ford*, 29 Maine, 546, citing *Harrington* v. *Stratton* and *Parish* v. *Stone*, decided that: "In an action upon a note between the original parties a partial failure of consideration, though the amount of it be unliquidated, may be proved by the defendant in mitigation of damage, and the jury, upon the evidence, may determine the amount of the failure." The rule is thus stated, and many cases cited in its support, including the Maine case above referred to, in 4 A. & E. Encyl. of L. 2d. Ed. 195: "Though some of the earlier cases denied the doctrine, there is now no question, in the light of recent decisions, that a partial failure of consideration is a defense pro tanto when such failure is liquidated in amount, or can be definitely ascertained by computation, and it has been expressly held that even though the amount of the failure be unliquidated, it may be shown."

The rule then is this, whenever a promissory note is given for two or more independent considerations and there is a failure of consideration as to one, as where the title to one of the articles sold is not in the vendor at the time of the sale, or where there is a breach of warranty or a misrepresentation as to quality, for the purpose of avoiding

circuity of action, the law will allow the defendant, in an action between the original parties, or between others standing in no better position, to show such partial failure of consideration in reduction of damages.

In this case, as we have seen, one of the inventions sold by the plaintiff to the defendant, and for which the note was given in part, proved to be void because it was an infringement upon former patents; this fact is a defense pro tanto to the note. Although the case was reported to the law court for its determination, we do not think that the evidence as to the extent of this partial failure, or as to the injury to the defendant by reason of the fact that this invention proved to be void for want of novelty, is sufficiently definite for us to pass upon that question, the trial of the case having apparently proceeded upon the theory that the result depended upon the question as to whether or not partial failure of consideration could be shown in partial defense of the action. We are therefore of the opinion that the case should be remanded to nisi prius for trial upon this question.

So ordered.

CHARLES F. CURTIS, Collector,

vs.

ANDROSCOGGIN LODGE, No. 24,
INDEPENDENT ORDER OF ODD FELLOWS.

Androscoggin. Opinion December 12, 1904.

Taxes. Exemptions. Beneficial Associations. R. S. 1903, c. 9, § 6, Par. II.

The real estate of a benevolent and charitable institution incorporated by the state, consisting of a building, and the land upon which it sits, designed for use by it for its own purposes, and a substantial use of all of which is made by the institution for its own purposes in good faith, is exempt from taxation under R. S., c. 9, § 6, Par. II, notwithstanding the occupation by the institution may not be exclusive, and the owner may sometimes allow other associations and individuals to use some portions of the property for a rental, when it can be done without interfering with the use of the same by the owner for its own purposes.

The occupation contemplated by the statute must undoubtedly be an actual occupation, and something more is required than that which results merely from ownership and possession on the part of the institution, or from the use of the property for investment purposes.

There may be cases where the use of the property of such an owner for other purposes is of such a dominant character, and the occupation by the owner for its own purposes is so incidental and trivial, or where the use of the property by the owner for its own purposes is so plainly an attempt to evade taxation, the substantial use and occupation being for other purposes, that such occupation would not be sufficient to make the property exempt from taxation under our statutes.

It follows that the decision of the question as to whether or not the use and occupation by such an association, for its own purposes, of its property are sufficient to bring it within the exemption of the statute must depend upon the particular facts of each case. It is considered by the court in this case that the occupation of the property by the defendant is sufficient to bring it within the exemption of the statute.

Agreed statement. Judgment for defendant.

Action of debt brought by Charles F. Curtis, Collector of Taxes for the City of Auburn, to recover from the defendant lodge certain taxes assessed thereon for the year 1903, and for which the said

lodge claims an exemption. The writ was entered at the April term of the Supreme Judicial Court for Androscoggin County, and by agreement, reported for the decision of the Law Court.

The case is stated in the opinion.

Reuel W. Smith, for plaintiff.

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

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

WISWELL, C. J. In this action by a tax collector to recover a tax assessed upon the real estate of the defendant, the only question presented by the agreed statement of facts, upon which the case comes to the law court, is, whether or not this real estate is exempt from taxation under the provisions of R. S., c. 9, § 6, paragraph II. By this paragraph, "the real and personal property of all benevolent and charitable institutions incorporated by the state," is exempt from taxation, but, by the same section of the paragraph, "so much of the real estate of such corporations as is not occupied by them for their own purposes, shall be taxed in the municipality in which it is situated."

It is agreed that the defendant, the owner of the real estate taxed, is a benevolent or charitable institution within the meaning of the language quoted from this section, and that the property is exempt from taxation unless it comes within the exception to this exemption, that so much of the real estate of such corporations "as is not occupied by them for their own purposes shall be taxed in the municipality in which it is situated." With respect to the character, situation and occupation of the real estate in question, the following facts appear from the agreed statement: The real estate in question consists of a three story building owned and occupied by defendant; in the lower story of the building there is a large room fitted up as a hall with a small kitchen connected, a small room known as a parlor and another room known as a dressing room; on the second floor there is a lodge room, with anterooms, designed especially for use by the defendant as a lodge room; and on the third floor there is one

large room used principally as a smoking room in connection with the lodge room. The building is heated by steam throughout supplied from the basement, and is in the care of a janitor employed and paid by the defendant.

The agreed statement contains also the following: "The defendant occupies all of the building for its own purposes, using it whenever required. It holds regular weekly meetings in the lodge hall on the second floor, using the lodge hall and the anteroom connected with it, and the third floor; and at such times as are convenient, uses also the hall on the first floor and the rooms on the first floor for its other meetings from time to time as it may have occasion. But it lets the lodge hall and the anterooms to associate branches of the Odd Fellows, viz: The Rebecca Lodge and the Odd Fellows Encampment, for their regular meetings, and to Christian Scientists, Sundays, for a meeting in the forenoon, for which it receives a rental; and it lets the hall on the first floor with the other rooms, from time to time, as they may be desired by other parties satisfactory to the defendant, and receives pay for such letting. A single room in the second story is also let for two hours a day to the Christian Scientists. The furniture and fixtures throughout the building belong to the defendant corporation, and the entire building is at all times under its control, subject only to use as above stated. Light, as well as heat, is provided by the defendant when any part of the building is let as aforesaid."

It is evident that this real estate does not come within the literal meaning of the exception to the exemption. There is no part of the building which is not used by the defendant for its own purposes. It is expressly agreed that "the defendant occupies all of the building for its own purposes." But it is not the exclusive occupant, and the plaintiff claims that the meaning of this clause of the paragraph is the same as if it read, "so much of the real estate of such corporations as is not exclusively occupied by them for their own purposes, shall be taxed," etc. But the legislature did not say this. If this had been its intention the adoption of one more word would have made such meaning clear, and we cannot believe that if this had been the intention of the legislature, this one word, which would

have made the intention beyond all question, would have been omitted. And for other reasons we are of the opinion that it was not the intention of the legislature that only the real estate of such benevolent and charitable institutions as is occupied by them exclusively should be exempt from taxation.

The purpose and meaning of this exception seems to us obvious. It frequently happens that such an institution desires to erect or to purchase a building which will afford accommodations for its own uses and purposes, but at the same time it is considered desirable, for economical and financial reasons, that the building should contain other space that could be used and rented for stores and for other commercial purposes, the rent of which would help to pay the cost of maintenance and the interest upon the investment; and the purpose of the legislature in making this exception to the general exemption, was, we think, that such portions of the building as were intended to be used and were used for other purposes, commercial or otherwise, should not be subject to this exemption, but should bear its just proportion of the burden of taxation. An illustration of a situation of this kind is found in *Auburn* v. *Young Men's Christian Association*, 86 Maine, 244, where a portion of the defendants' real estate was let for a boarding house, and other portions for stores, and were not at all occupied by the defendant for its own purposes. And a similar situation existed in *Foxcroft* v. *Piscataquis Camp Meeting Association*, 86 Maine, 78, where a portion of the real estate of the defendant, a religious association, was not needed or used by the defendant for its own purposes, and consequently was let for uses and purposes entirely alien to those of the association.

The occupation contemplated by the statute must undoubtedly be an actual occupation, and something more is required than that which results merely from ownership and possession on the part of the institution, or from the use of the property for investment purposes. *Phillips Academy* v. *Andover*, 175 Mass. 118. The decision of this question must undoubtedly depend very largely upon the facts and circumstances of each case. There may be cases where the use of the property of such an owner for other purposes is of such a dominant character, and the occupation by the owner for its own pur-

poses is so incidental and trivial, or where the use of the property by the owner for its own purposes is so plainly an attempt to evade taxation, the substantial use and occupation being for other purposes, that such occupation would not be sufficient to make the property exempt from taxation under our statutes.

What we decide is simply this, that where a building of such an association is designed for use by it for its own purposes, and a substantial use is made of all of the building by the association for its own purposes, in good faith, the property is exempt from taxation under our statutes, notwithstanding such occupation may not be exclusive, and the owner may sometimes allow other associations and individuals to use some portions of the property for a rental, when it can be done without interfering with the use of the same by the owner for its own purposes.

The decisions of courts of other states, in construing somewhat similar exemption statutes of their state, are not of much assistance, since the result depends entirely upon the construction of the particular language of our own statute, but a discussion of the general subject and a construction of statute more or less similar to ours, but still differing in important particulars, may be found in the following cases. *First Society of Hartford* v. *Hartford*, 66 Conn. 368; *Saint Mary's Church* v. *Tripp*, 14 R. I. 307; *Salem Lyceum* v. *Salem*, 154 Mass. 15; *Harvard College* v. *Assessors of Cambridge*, 175 Mass. 145.

In accordance with the stipulation of the report, the entry will be,

Judgment for defendant.

AMERICAN AGRICULTURAL CHEMICAL COMPANY

vs.

THOMAS G. AND ARVILLA F. HUNTINGTON.

Aroostook. Opinion December 12, 1904.

Attachment. Fraudulent Conveyance. Levy. Practice. Bankrupt Act 1898.

A general attachment of all of a defendant's real estate and interest in real estate, in a certain county, made more than four months before the filing of a petition in bankruptcy by or against the defendant, in an action wherein the cause of action is provable in bankruptcy, is sufficient to entitle the plaintiff to a special judgment against the property claimed to have been attached, where the defendant had the title to certain real estate after the debt sued was contracted, which had been conveyed prior to the commencement of the suit, but which conveyance is claimed by the plaintiff to have been made in fraud of creditors and therefore void as to him, a creditor at the time.

If the real estate which the defendant owned prior to the attachment, was conveyed by her for the purpose of defrauding her creditors, such conveyance was void as to this plaintiff, a creditor at the time of the conveyance. If void, as to creditors, it was a nullity and should be entirely disregarded in these proceedings. That question we do not and cannot now decide. After the plaintiff has judgment against the property claimed to have been attached, has taken out execution, and levied upon this property the question as to whether or not the conveyance was fraudulent, and as to whether or not it was in fact the property of the defendant at the time of the attachment, can then be raised and decided in appropriate proceedings, in which all persons interested may be, and necessarily must be, made parties.

As a matter of practice, inasmuch as the record does not show what real estate is claimed to have been covered by the attachment, the plaintiff should make a written motion for the judgment desired, particularly describing the property against which judgment is desired, and which, it is claimed, is covered by the attachment, because conveyed in fraud of creditors, supported by the affidavit of the plaintiff or his attorney that it is believed that such property was fraudulently conveyed and was covered by the attachment.

On report. Case remanded to nisi prius for further proceedings in accordance with the opinion.

Assumpsit upon account annexed.

The case is stated in the opinion.

Herbert W. Trafton, for plaintiff.

Ira G. Hersey, R. W. Shaw and W. S. Lewin, for defendant.

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

WISWELL, C. J. On February 2, 1901, the plaintiff commenced an action of assumpsit upon an account annexed to a writ against the defendants, and on the same day caused a general attachment to be made of all the real estate and interest in real estate which the defendants, or either of them, had in Aroostook County. The action was duly entered in court and continued from term to term until the September Term, 1903, of this court in Aroostook County. In the meantime, on September 3, 1901, one of the defendants, Arvilla F. Huntington, filed her voluntary petition in bankruptcy in the United States District Court, and on the seventh of that month was duly adjudicated a bankrupt by that court; later, she received her discharge. At the September term, 1903, of the court the plaintiff discontinued against the other defendant and asked for a special judgment against the real estate of the bankrupt which had been attached more than four months prior to the commencement of the bankruptcy proceedings by her.

The case comes to the law court upon a report, for this court to determine whether the plaintiff is entitled to such judgment. The case further shows that at one time, since the debt sued was contracted, but before the commencement of the suit, the defendant had in her own name the title to real estate, which has since been conveyed to her husband. The plaintiff claims that this conveyance was void as to him, a creditor at the time of the conveyance, because conveyed in fraud of creditors.

This statement of facts presents precisely the same question that was decided in *Stickney & Babcock Coal Company* v. *Goodwin*, 95 Maine, 246, except in one particular. In that case the officer was directed to especially attach, and did so attach, certain real estate particularly described and alleged to have been conveyed by the

defendant in fraud of the plaintiff, a creditor at the time of the conveyance. In this case there was no such special attachment directed or made, but, as we have seen, there was a general attachment made of all of this defendant's real estate in the county. We cannot see why this difference in the manner of making the attachment should affect the result, or why the plaintiff should not have a special judgment against the property claimed to have been attached, and which attachment if any was not dissolved by the bankruptcy proceedings.

A general attachment such as was made upon the plaintiff's writ, is sufficient to create a lien upon any real estate owned by the defendant at the time of the attachment. If the real estate which, as is admitted, she owned prior to the attachment, was conveyed by her for the purpose of defrauding her creditors, such conveyance was void as to this plaintiff, a creditor at the time of the conveyance. If void as to creditors it was a nullity and should be entirely disregarded in these proceedings. That question we do not and cannot now decide. After the plaintiff has judgment against the property claimed to have been attached, has taken out execution, and levied upon this property, the question as to whether or not the conveyance was fraudulent, and as to whether or not it was in fact the property of the defendant at the time of the attachment, can then be raised and decided in appropriate proceedings, in which all persons interested may be, and necessarily must be, made parties.

Certain statements contained in the opinion of the court in *Bowley* v. *Bowley*, 41 Maine, 542, are relied upon in opposition to this motion for a special judgment, but an examination of that case shows that the case was decided upon the ground that the creditor had proved a part of the indebtedness sued against the estate of the bankrupt, in the bankruptcy proceedings, and this was held to be an abandonment of the attachment.

Our conclusion is, that, notwithstanding the attachment was general instead of special as in *Stickney & Babcock Coal Company* v. *Goodwin*, supra, the plaintiff is entitled to judgment against the property claimed to have been attached. We think, however, that as a matter of practice, inasmuch as the record does not show what real estate is claimed to have been covered by the attachment, the

plaintiff should make a written motion for the judgment desired, particularly describing the property against which such judgment is desired, and which it is claimed is covered by the attachment, because conveyed in fraud of creditors, supported by the affidavit of the plaintiff or his attorney that it is believed that such property was fraudulently conveyed, and was covered by the attachment.

Case remanded to nisi prius for further proceedings in accordance with this opinion.

ALICE M. CURRIER *vs.* ROBERT J. MCKEE.

Aroostook. Opinion December 13, 1904.

Intoxicating Liquors. Proximate Cause. Civil Damage Act. R. S. (1883), c. 27. § 49, R. S. 1903, c. 29, § 58.

The law looks to the proximate and not the remote cause of an injury; but if the original act was wrongful and would naturally according to the ordinary course of human events prove injurious to some person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury is referred to the wrongful cause passing by those which are innocent.

It is not the lawful but the wrongful or negligent act of a third party intervening, which breaks the chain of causation and relieves the original wrongdoer of the consequences of his wrongful act.

A person is responsible for such consequences of his acts as ought to have been apprehended according to the usual experience of mankind.

Whether one, who lets loose such a dangerous agent as intoxicating liquor, is not bound to apprehend that the intoxication thereby produced is likely to cause unjustifiable assaults and consequent injury to the assailant, is a question of fact for the jury.

In an action under R. S. 1883, c. 27, § 49, there was evidence tending to prove that the defendant sold intoxicating liquor to the plaintiff's son upon whom she was in part dependent for her support, that the liquor caused him to make an assault upon one B., by whom in self defense he was struck and his jaw broken, resulting in his decreased ability to labor and consequent injury to the plaintiff's means of support.

Held: that if these issues are found in the affirmative and the jury also finds that the defendant ought to have apprehended the resulting injury to the son, the injury to the plaintiff's means of support would then be by reason of the intoxication of the son, and the defendant would be liable therefor.

Exceptions by plaintiff. Sustained.

Action on the case under the Civil Damage Act, R. S. 1883, c. 27, § 49, now R. S. 1903, c. 29, § 58, brought by the plaintiff to recover of the defendant damages for selling intoxicating liquor to her son, by means of which she alleged she had been injured in her means of support, etc.

At the close of plaintiff's testimony, on motion of defendant, the presiding justice ruled that on the evidence of the plaintiff the action could not be maintained and ordered a nonsuit, and plaintiff excepted.

The material facts appear in the opinion.

Frank L. White and Ira G. Hersey, for plaintiff.

George H. Smith and Louis C. Stearns, for defendant.

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

POWERS, J. This is an action under the civil damage act, and comes to the law court on exceptions to the ruling of the presiding justice directing a nonsuit.

There was evidence tending to prove that the plaintiff lived with her son Will A. Currier aged thirty-four upon his farm and was dependent upon him for her support; that the defendant sold intoxicating liquor to the son which caused his intoxication; that while so intoxicated he entered the store of one Boulier who ordered him out of the store; that he went out but turned and tried to come back with the intention of striking at Boulier and having a fight with him; that he did strike at Boulier who thereupon struck him and broke his jaw, by reason whereof his ability to labor was decreased and the support which he afforded his mother sensibly diminished.

The defendant contends that no recovery can be had except for those injuries of which the intoxication is the proximate cause; that the independent act of an intelligent and responsible human being

intervened and caused the broken jaw from which all damage to the plaintiff resulted, and that the intoxication was therefore the remote and not the proximate cause of the injury.

R. S. 1883, c. 27, § 49,—now R. S. 1903, c. 29, § 58,—creates a new cause of action unknown to the common law, and so far as is material reads as follows: "Every wife, child, parent, guardian, husband or other person who is injured in person, property, means of support or otherwise, by any intoxicated person, or by reason of the intoxication of any person, has a right of action in his own name against anyone who by selling or giving any intoxicating liquors, or otherwise, has caused or contributed to the intoxication of such persons." The statute is aimed at the suppression of a great evil, and while no effort should be made by a forced interpretation to extend its meaning beyond what was fairly intended, it should be liberally construed so as to effect the beneficent purpose for which it was enacted. In its terms it is very broad. It is not confined to unlawful sales as was the original act of 1858, c. 33, § 11, R. S. 1871, c. 27, § 32, which was repealed by the public laws of 1872, c. 63, § 4, and the present statute substituted. The giver equally with the seller is made liable for the injurious consequences of his act. It is not necessary that the intoxicating liquor furnished by the person sued should have been the sole cause of the intoxication; it is sufficient if it "contributed" to it in an appreciable degree. A right of recovery is given for injuries produced in two ways, first, "by any intoxicated person," and second, "by reason of the intoxication of any person." When the injury is caused by an intoxicated person, it need not be shown that the intoxication caused the injurious act. In such case it is sufficient if while in a state of intoxication, to which liquors furnished by the defendant contributed, such intoxicated person commits the act which results in injury to the "person, property, means of support or otherwise" of the plaintiff. The furnishing by the defendant of the intoxicating liquor must have contributed as a proximate cause to the intoxication, and the act of the intoxicated person must have been the cause of the injury, but it is not necessary that the intoxication should have been the proximate cause of injury or of the act which caused it. *Neu* v. *McKechnie*

et al., 95 N. Y. 632, *Brockway* v. *Patterson*, 72 Mich. 122. The legislature seems to have regarded intoxicating liquor as dangerous to society, and to have intended that whoever by furnishing liquor contributed to the intoxication of any person should be held responsible for injuries inflicted by him while in that condition, without placing upon the sufferer the burden of showing that the injury was due to the intoxication.

This, however, is but to show the scope of the statute and that it should be construed in no narrow or illiberal spirit. The plaintiff claims that she was injured in her means of support not by an intoxicated person but "by reason of the intoxication" of her son.

If this provision is to be regarded as calling for the same sequence and connection of causation required by the maxim of the common law which the defendant invokes, that the law looks to the proximate and not to the remote cause, the oft embarrassing question remains of what is a proximate and effective although not the immediate cause of the injury. Giving to the defendant the full benefit of the application of the principle which he claims, still the statute does not require that the furnishing of the liquor by the defendant should be the proximate cause of the plaintiff's injury, but only that it should have contributed to her son's intoxication and that the intoxication should have been the proximate cause of the injury. It is urged that the act of an intelligent and responsible human being, the blow struck by Boulier, intervened between the intoxication of the son and the resulting injury to the plaintiff. Upon the evidence, however, the jury might have found that the illegal sales of intoxicating liquor by the defendant to the plaintiff's son caused his intoxication, and that his intoxication caused him to make an assault upon Boulier, and that the blow of the latter was solely in self defense when struck at by the intoxicated son. If so, the intervention of Boulier was rightful. It is the wrongful or negligent act of a third party intervening which breaks the chain of causation and relieves the original wrongdoer of the consequences of his wrongful act; but if in the right he is not responsible and the party injured must seek reparation from him whose wrongful act was the first in the order of events causing the injury.

A reference to some of the authorities will show that this principle has been frequently recognized ever since the squib case, *Scott* v. *Shepard*, 3 Wilson, 403, and also the liberal manner in which statutes, giving a right of recovery for injuries to person, property or means of support "in consequence of" or "by reason of the intoxication of any person," have been construed.

It is a principle of law, applicable to the doctrine of proximate cause, that "if the original act was wrongful and would naturally according to the ordinary course of events prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause passing by those which are innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as a proximate cause, and not to that which is more remote." Cooly on Torts, page 76.

The plaintiff's son was struck by a railroad train while walking upon the track in an intoxicated condition. It was held that, the railroad company not being in fault, the intoxication might be found to be the proximate cause of the injury. "Men are held liable every day in tort for the natural and proximate results of their wrongs, although the particular result could not be foreseen as necessary at the time of the act." *McNary* v. *Blackburn*, 180 Mass. 141.

In *Gage* v. *Harvey*, 66 Ark. 68, 74 Am. St. R. 70, an intoxicated person was robbed of his money, and the person selling the liquor was held not liable. "The intervening act produced the injury complained of, and was the wrongful act of a third person for which he was legally responsible."

In *Schmidt* v. *Mitchell*, 84 Ill. 195, it was held that if a person in consequence of intoxication should get into a difficulty resulting in his being shot in the thigh, the party selling the liquor might be responsible for the direct consequences of the injury received, but that if after becoming sober, his disregard of his physician's instructions should necessitate the amputation of his leg, the liquor seller would not be responsible for the loss of life. There the wound was

lawfully inflicted by one Freidenback in defence of his house. *Shugart* v. *Egan*, 83 Ill. 56, is sometimes cited in support of a contrary doctrine. There, however, the plaintiff's husband, in consequence of mere words used by him while intoxicated, was assaulted and slain by one McGraw. It is evident that mere words would not justify the assault and that McGraw was a wrongdoer. The same court commenting upon *Shugart* v. *Egan*, in a later case said: "It was there said to be the common experience of mankind that the condition of one intoxicated invited protection against violence rather than attack, and that it was not a natural and probable result of intoxication that the person intoxicated should come to his death by the wilful criminal act of a third party. . . . It was not the intention that the intoxicating liquor alone, of itself exclusive of other agency should do the whole injury. That would fall quite short of the measure of remedy intended to be given. The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning." *Schroden*, v. *Crawford*, 94 Ill. 357. Intoxication was held to be the proximate cause of death when a person was drowned in bathing. *Meyer* v. *Butterbrodt*, 146 Ill. 131. The party causing intoxication cannot escape liability because he may not reasonably have foreseen the consequences. *Roth* v. *Eppy*, 80 Ill. 283, a case of insanity caused by habitual intoxication. Plaintiff's husband while intoxicated made an assault upon one Morceau by whom he was killed. Held that defendant would be liable on account of the sale and intoxication resulting from such sale if such intoxication was the effective cause of the injury. *Baker & Reddick* v. *Summers*, 201 Ill. 52.

The leg of plaintiff's husband was broken by one Free, in a drunken scuffle. Both the husband and Free were intoxicated at the time by liquor sold by the defendant. In affirming a verdict for the plaintiff the court said: "If the injury was occasioned by reason of the intoxication of Thomas or Free, and such intoxication was produced, in whole or in part, by the liquors sold by the defendant Dansby, then the case would fall within the terms of the statute, and a recovery could be had if the plaintiff by reason thereof was injured

in her means of support." *Thomas* v. *Dansby*, 74 Mich. 398. A conviction of drunkenness has been held a proximate result of intoxication such as will render the one furnishing the liquor liable to the wife for injuries resulting therefrom. *Lucher* v. *Liske*, 111 Mich. 683.

The question of proximate cause is for the jury under appropriate instructions of law. One is not bound to anticipate what is merely possible, nor on the other hand is he liable for such consequences only as usually follow. It is sufficient if the result ought to have been apprehended according to the usual experience of mankind.

The defendant need not have intended that the plaintiff's son should make an assault upon Boulier or even have expected it or the injury which followed. Enough if according to human experience it was to be apprehended that such results were likely to happen from the intoxication. The legislature deals with intoxicating liquor upon the assumption that it is the enemy of society, that intoxication weakens the will, disturbs the judgment, saps the moral forces and is the fruitful source of vice and crime attended by personal injury and loss. It is natural as well as lawful that one assaulted should use reasonable force to repel the assailant even to his personal injury. It is for the jury to say who is the assailant, and whether, under the circumstances, the force used was reasonable and appropriate. It is also for them to determine whether one, who lets loose such a dangerous agent as intoxicating liquor, is not bound to apprehend that the intoxication thereby produced is likely to cause unjustifiable assaults and consequent injury to the assailant.

In the case at bar there was evidence tending to show that the intoxicating liquor sold by the defendant caused the intoxication of the plaintiff's son, that by reason of such intoxication he made an assault upon Boulier, and that the latter acting in self defense struck the blow which diminished the son's capacity to labor, resulting in injury to the plaintiff's means of support. If these issues are found in the affirmative, then, under the broad and sweeping provisions of the statute we are considering, we think it may be said that the plaintiff was injured in her means of support "by reason of the intoxication" of her son. The court cannot say that the intoxication

would not then be the "one efficient procuring cause without which the injury would not have happened." *Gilman* v. *E. & N. A. Ry. Co.*, 60 Maine, 235. The case should have been submitted to the jury.

Exceptions sustained.

BRUNSWICK AND TOPSHAM WATER DISTRICT

vs.

MAINE WATER COMPANY.

Cumberland. Opinion December 14, 1904.

Water Company. Eminent Domain. Instructions to Appraisers. Franchise. Valuation. Damages. Evidence. Private and Special Laws, 1903, c. 158.

In a proceeding for the condemnation and appraisal of a portion of a system of water works by the exercise of the right of eminent domain, under a statute which created a water district composed of two towns, with power to take a specified portion of an entire system, being operated in those two and other towns, and which provided that appraisers appointed by the court should fix the valuation of the plant, property and franchises taken, so that the owner should receive just compensation therefor; and further that the appraisers should assess damages for the severance of that portion of the plant, property and franchises taken from the owner's entire water system and franchises, the declared intent of the act being that the amount of the valuation of the property taken, and of the additional damages for severance, if any, taken together, should be so fixed as to equal the difference between the valuation, before severance, of the entire plant, property and franchises, and the value after severance of that portion of the plant, property and franchises not taken, both of the last named valuations to be determined under the principles of eminent domain; and it was further provided that the act itself should take effect when approved by a majority vote of the inhabitants of each of the towns which were to compose the water district, and that such an approval should constitute an acceptance by said water district of the methods of appraisal prescribed by the Act, and should bind the water district and the water company thereto, it is held that the appraisers should be instructed, among other things, in accordance with the following principles:

1. In applying the rule that the basis of all calculations as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the service of the public, franchise values are not to be disregarded, that the element of going concern value is not to be considered only as involved in structure value, and that property value, in this connection, is not merely structure value.
2. The fact that the structure taken is in use, and the further fact that it may lawfully be used where it may properly enhance its value.
3. The direction of the statute to the appraisers to fix the valuation of the plant and of the franchises is in substance a direction to fix the valuation of the plant as affected by the franchises.
4. While actual cost bears upon reasonableness of rates, and as well, upon the present value of the structure as such, in estimating structure value, prior cost is not the only criterion of present value. If by the rise of prices, the present value of the structure is greater than the cost, the owner is entitled to the benefit of it; if less than the cost, the owner must lose it. And the same factors should be considered in estimating the reasonableness of rates.
5. Reasonable is a relative term, and what is reasonable depends upon many varying circumstances. But in determining what are reasonable rates so as to produce a reasonable return to the owner upon his investment, the amount of money which has been actually and wisely expended in producing the plant is a primary consideration.
6. The question of the reasonableness of rates relates to both, the owner and the customer. But in case of conflict, they must be reasonable to the customer in any event.
7. A public service company cannot lawfully charge more than the services are reasonably worth to the public as individuals, even if charges so limited would fail to produce a fair return to the owner upon his property or investment.
8. Profits which in the aggregate exceed a fair return on the owner's property and franchises do involve unreasonable rates, and furnish no criterion of either franchise values or going concern values. But what would be a fair return must depend upon the circumstances of each particular case.
9. The issue of the reasonableness of rates charged, as well as all other issues affecting value, are to be determined by a preponderance of the evidence.
10. The value is to be fixed as of January 1, 1904, and in determining the value on that day, market prices of materials and labor on that day or during a period long enough before that time for construction, are the standards, rather than former prices. And as to be completed on that day, the construction of the plant must have been begun before, interest upon the money invested in the plant during construction, and before completion, is a part of the cost of construction.

11. Damages for severance are to be allowed as prescribed in the plaintiff's charter.

12. While it is not constitutionally competent for the legislature to prescribe a rule of damage, the rules prescribed in this case are to be deemed effective, not because they were established by the legislature, but because by the approval of the charter they were assented to by the inhabitants of the water district.

13. In estimating the value of a public service to the public or the customers, one of the elements necessary to be considered is the expense at which the public or customers, as a community, might serve themselves, were they free to do so, and were it not for the practically exclusive franchises of the supplying company. Water is to be regarded as a product, and the cost at which it can be produced or distributed, is an important, though not the only, element of its worth.

14. The worth of a water service in such connection, is the worth to the customers as individuals, but as individuals making up a community of water takers.

15. Communities are entitled to the benefit of existing natural advantages. If there is more than one source of supply, other things being equal, the community is entitled to have the least expensive one used, and the supplying company is not entitled to charge an enhanced rate based in part, at least, upon the cost of using a more expensive source.

16. When the rates which furnish a basis for estimating value are earned in part by property taken and in part by property not taken, the appraisers must discriminate, and so far as value may depend upon rates, they should charge the property taken for only its fair proportion of the earnings.

17. While the award of the appraisers must be made under the principles of eminent domain, it must be made upon such principles of eminent domain as were agreed to by the voting constituents of the water district, by approving the charter.

On report. Instructions to appraisers in accordance with opinion.

Proceedings under chapter 158, of the Private and Special Laws of 1903. After the appointment of appraisers, the petitioner filed a written request for instructions to the appraisers so appointed. The case was thereupon reported to the Law Court to determine what instructions, if any, should be given to the appraisers so appointed.

The case and requested instructions fully appear in the opinion.

Weston Thompson and Barrett Potter, for petitioner.

C. F. Libby, F. W. Robinson and Levi Turner, for Portland Trust Co.

Orville D. Baker, for Maine Water Company.

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

SAVAGE, J. The Brunswick and Topsham Water District was incorporated by act of the legislature, chapter 158, of the Private and Special Laws of 1903. By section 6 of that act, it was authorized to take, by condemnatory proceedings, the entire plant, property and franchises, rights and privileges of the Maine Water Company, within the district, with the exception of Thompson's brook and its tributaries. It was also provided in section 7 for the appointment of appraisers by the court, who should, after due notice and hearing, fix the valuation of the plant, property and franchises taken, so that the Maine Water Company should receive just compensation therefor. As was the case in *Kennebec Water District* v. *Waterville*, 97 Maine, 185, so here, it was provided that either party might ask the court for instructions to the appraisers, and that all questions of law arising upon such requests for instructions might be reported to the law court for determination, before the appraisers should act. The water district has commenced the condemnatory proceedings by petition filed in court, as provided by the act, appraisers have been appointed, and the petitioner has availed itself of the privilege of asking for instructions to the appraisers.

We cannot refrain from saying, as we intimated in the Waterville case, supra, that while there are some practical advantages in obtaining the judgment of the court in regard to the proper rules governing the fixing of compensation and the assessment of damages in cases of this character, in advance of the hearing by the appraisers, yet there are many difficulties, if not dangers, in attempting to formulate rules which are to be applied to facts not yet ascertained. While it may be easy enough to state rules in the abstract, it is much more satisfactory, in an opinion of the court, to express them in terms which are applicable to the facts in the precise case in hand. We cannot refuse to perform the duty laid upon us by the legislature, but it must always be understood that our answers to these questions are intended to be given only in the most general and comprehensive terms, which may, or may not, be found to be fitted to the facts

which may subsequently be developed. No other course would be wise or safe.

1. We are asked to say that "in applying the rule that the basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public, franchise values are to be wholly disregarded, and the element of going concern value is to be considered only as involved in the structure value, that property value, in this connection, means structure value only." As no particular franchises are spoken of, we assume that reference is made to the ordinary franchises by which the company maintains and operates its existing plant, supplies water to customers and demands rates from them. In order to see the precise bearing of the requested instruction, it is necessary to remember that this is a proceeding to ascertain and fix the fair value of a water company's plant and property in active operation, and as well of the franchises by virtue of which it operates the plant, and that it is not a proceeding to reduce rates alleged to be excessive, nor is it a proceeding like most of those in which this question has been discussed, and which have been cited by counsel, where it is claimed by a public service company that rates have been made by statute or ordinance unreasonably or unconstitutionally low. All these may, or may not, arrive at the same conclusion. A public service property may or may not have a value independent of the amount of rates which for the time being may be reasonably charged. A public service company may, under some circumstances, be required to perform its service at rates prohibitive of a fair return to its stockholders, considering their property as an investment merely. *Smyth* v. *Ames*, 169 U. S. 466; *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79. It is true that the fair value of the property used is the basis of calculation as to reasonableness of rates, but as was pointed out in the Waterville case, this is not the only element of calculation. There are others, as for instance, the risks of the incipient enterprise, on the one hand, and whether all the property used is reasonably necessary to the service, and whether as a structure it is unreasonably expensive, on the other. For a simple

illustration, suppose that a five hundred horse power engine was used for pumping when a one hundred horse power engine would do as well. As property to be fairly valued the larger engine might be more valuable than the smaller one, yet it could not be said that it would be reasonable to compel the public to pay rates based upon the value of the unnecessarily expensive engine. But it may not be that any of these distinctions are vital to the determination of the pending question. We allude to them merely to show that all of the principles applicable to the two classes of proceedings referred to are not necessarily identical.

Now, what is the property which the district has taken by the power of eminent domain? In the first place it is a structure, pure and simple, consisting of pipes, pumps, engines, reservoirs, machinery and so forth, with land rights and water rights. As a structure it has value, independent of any use, or right to use, where it is, — a value probably much less than it cost, unless it can be used where it is, that is, unless there is a right so to use it. Nevertheless it has value as a structure. But more than this, it is a structure in actual use, a use remunerative to some extent. It has customers. It is actually engaged in business. It is a going concern. The value of the structure is enhanced by the fact that it is being used in, and in fact is essential to, a going concern business. We speak sometimes of a going concern value as if it is, or could be separate and distinct from structure value, — so much for structure and so much for going concern. But this is not an accurate statement. The going concern part of it has no existence except as a characteristic of the structure. If no structure, no going concern. If a structure in use, it is a structure whose value is affected by the fact that it is in use. There is only one value. It is the value of the structure as being used. That is all there is of it.

But, again, it is not only a structure, and a structure being used, but it is a structure built, maintained and used by authority expressly granted to the company by the state, that is, it was built and is maintained and used by virtue of a franchise or franchises. The structure is lawfully in existence, and may rightfully continue to be used as a going concern structure, until the state determines other-

wise. This also makes the structure in use more valuable. It is the difference between a structure existing by sufferance, and one maintained by right. The franchise, however, is a limited one. It is not perpetual. It may be recalled by the state. It is not exclusive. Other and competing franchises may be granted. It is not absolute. The right may be limited or qualified by express enactment. One franchise is limited in the nature of things, and that is the franchise to charge tolls or rates for water furnished. It cannot charge arbitrary rates beyond the power of revision. It may not, as we have seen, under some circumstances charge rates even fairly remunerative upon the investment. It can only charge reasonable rates in any event. A franchise may exist entirely independent of the structure. There may be franchises when there is no structure. This water company may have franchises within this district which are not connected with the use of the structure which the district has taken. Of that we have no knowledge. But so far as the structure is maintained and used by virtue of a franchise, that fact may add to the value of the structure. One would be likely to pay more for it as a structure if it could be rightfully used than he would if it could not. What is it then that the district is taking and for which the company is entitled to just compensation? It is a structure, in actual use, and with a right on the part of its owner to use it, and to charge reasonable rates to customers for services rendered. This is all. It is three fold in discussion, but it is single in substance. The district obtains and the company yields its plant, its structure, but it is the structure as being used, with the rights to use it as stated, no less, no more. We apprehend that some difficulty in discussion has arisen from attempting to differentiate in logic what is inseparable in fact. The property taken is a single thing, to which belong certain characteristics which affect its value. The thing cannot be taken without these characteristics. If it is attempted to value the thing, separate from its inherent characteristics, elements which add value to the thing are omitted. If these elements are omitted, the owner fails to receive the full and fair value of the thing, and thereby is denied just compensation.

The petitioner thinks that the property of the company should be

valued in entire disregard of its franchise characteristic. It says truly that the company has voluntarily devoted its money and property to a public service, that is, it is doing the work of the state or public. It says that in entering upon the business it put in its money and the state put in the franchises, and that the company ought to be satisfied with the fair present value of what it has itself put into the enterprise, and to receive nothing but the present worth of that actual investment, or as it would be more accurate to say, the present worth of the mere structure which was created by and represents the actual investment. But unfortunately for the petitioner's contention, the state actually gave these franchises, such as they were, to the company. They became the property of the company, but not beyond revocation, not, perhaps, beyond the power of the state to permit the property to be taken, without valuation of the franchises, as has been done in at least one other state. But until the state should say otherwise, the company would have the benefit of them. Now instead of saying otherwise, the state, by section 7 of the act under which these proceedings are had, has directed the appraisers to fix and award to the company the value of the franchises, which so far as the structure is concerned practically means, we think, the value of the property as affected by the franchises. And even in cases where by statute franchises were not to be included in the valuation, we conceive that it must have been implied that the property was to be valued as rightfully where it was, and rightfully to be used, for what are pipes in the ground worth as pipes, or reservoirs or dams or fixtures, unless they can be rightfully used, and reasonable tolls charged? And these rights are the franchises, at any rate, the most important ones.

Much of the petitioner's argument is based upon the contention that when it is said that reasonable rates are to be calculated upon the fair value of the property used, it means upon the actual money investment which has been reasonably expended. In this connection it should be noticed that to say that the reasonableness of rates depends upon the fair value of the property used, and that the fair value of the property used depends upon the rates which may be reasonably charged, seems to be arguing in a circle. If we should

say that reasonableness of rates depended solely upon the value of the property, and that value of the property depended solely upon the rates which may be reasonably charged, such would be the case. But neither proposition is true. Other considerations than reasonableness of rates, as we have already observed in the Waterville case, and as we shall have occasion to observe later herein, affect the fair value of the property. And the rates which it would be reasonable for the company to ask depend upon what would be a fair return, under the circumstances, upon the value of the property used, a question which we shall discuss later on. In determining what would be a fair return, undoubtedly, the amount of money actually and wisely expended is a primary consideration. Actual cost bears upon reasonableness of rates, as well as upon the present value of the structure as such. It thus bears upon what is a fair return upon the investment, and so upon the value of the property. In estimating structure value, prior cost is not the only criterion of present value, and present value is what is to be ascertained. The present value may be affected by the rise or fall of prices of materials. If in such way the present value of the structure is greater than the cost, the company is entitled to the benefit of it. If less than the cost, the company must lose it. And the same factors should be considered in estimating the reasonableness of returns.

Again upon the same point it should be said that those who engage in a public service cannot be put upon quite the same level as those who make mere investments. They are not like the depositors in a savings bank, whose right to draw out is limited to precisely what they have put in, with its earnings. They are, on the contrary, engaged in a business, with the ordinary incidents of a business, with some of the hazards and the hopes of a business. To be successful they must be wise and prudent, thrifty and energetic. These virtues, if they have them, they impress upon the property, making it more valuable than it would otherwise have been. Is it to be said that they can have no return for skill and good management? We do not think so.

They are entitled to charge reasonable rates. Reasonable is a relative term, and what is reasonable depends upon many varying

circumstances. An equivalent to the prevailing rate of interest might be a reasonable return, and it might not. It might be too high or might be too low. It might be reasonable, owing to peculiar hazards or difficulties in one place to receive greater returns there, than it would in another upon the same investment. Then, their reasonableness relates to both the company and the customer. Rates must be reasonable to both, and if they cannot be to both, they must be to the customer. That the amount of the investment does not control either way is decided in *San Diego Land and Town Co.* v. *Jasper*, 189 U. S. 439, and *Stanislaus County* v. *San Joaquin, etc., Co.*, 192 U. S. 201. In the former case the court said that the rule that the company is entitled to demand a fair return upon the reasonable value of the property at the time it is being used for the public "is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses." And in the latter, the court said,—"To take the amount actually invested into 'estimation' does not mean necessarily that such amount is to control the decision of the question of rates." So that while it is strictly true that the company is entitled to no more than a reasonable return upon its necessary investment, which is embodied in the structure and its natural increment, if any, that goes but a little way toward the solution of the problem, owing to the difficulty of saying just what is reasonable in a given case. That must for the most part be left to the good judgment of the tribunal which passes upon each particular case.

Now to go back to the original question, we say that changing the form of expression from structure to investment does not change the fact that the value of money invested, in whatever form it now is, is affected by the right to use it in that form, that is, by the franchise.

So that we conclude, because of the inherent impossibility of justly valuing the structure, separate from existing conditions and rights of user, and because of the statute which declares that the franchises shall be valued, that we cannot approve the requested instruction.

2. The second requested instruction is that "the rule that the public, that is, the customers, may demand that the rates shall be no

higher than the services are worth to them, not in the aggregate, but as individuals, is to be invoked only for the protection of the public, and that in a case requiring its application, it may result in reducing rates, even if reasonable within the rule stated in the foregoing request, never in raising rates otherwise fair to the company." We understand the purport of this request to be that a public service company cannot lawfully charge in any event more than the services are reasonably worth to the public as individuals, even if charges so limited would fail to produce a fair return to the company upon the value of its property or investment. Such, we think, is the law. We have already so stated in the discussion of the preceding request. In the Waterville case at page 202, we said: "The public, that is, the customers, may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. The value of the services in themselves is to be considered, *and not exceeded.*" The company engages in a voluntary enterprise. It is not compelled, at the outset, to enter into the undertaking. It must enter, if at all, subject to the contingencies of the business, and subject to the rule that its rates must not exceed the value of the services rendered to its customers. It has accepted valuable franchises granted by the state, franchises ordinarily exclusive for the time being, franchises which ordinarily debar the public from serving themselves satisfactorily in any other way,—and in return it must perform the duties to the public which it has voluntarily assumed, at rates not exceeding the value of the services to the public, taken as individuals, and this irrespective of the remuneration it may itself receive.

3. The third requested instruction is that "profits which in the aggregate exceed a fair return on the structure value, involve unreasonable rates and furnish no criterion of either franchise values or going concern values. The water district is entitled to the benefit of this and the foregoing rule, not only when rates or profits are obviously extortionate, but when the preponderance of testimony shows them to be unreasonable or excessive." This request involves two distinct propositions. As to the first it is sufficient to say that in its present form it is not approved. This follows from the discus-

sion already had under the first request. It may be said, however, that profits which in the aggregate exceed a fair return on the company's property and franchises as already defined in this opinion, do involve unreasonable rates and furnish no criterion of either franchise values or going concern values. The company is entitled, considering only its side of the question, to a fair return based upon the value of its property and franchises, as already stated, and no more. To charge more than necessary to secure such a return would be unreasonable.

We think the second proposition in this request should be given as stated. It is true that when the court is called upon to pass its judgment upon rates established by other tribunals, or when it is called upon to lay its strong arm upon a company and prevent what are alleged to be excessive charges, it will do so only when it is clearly made to appear that justice requires its intervention. It will not, for a slight cause, undertake to interfere with an established course of business, and disturb existing relations between a company and its customers. But this is a different proposition. Here the whole case is open. It is a valuation of property, and all elements proper for consideration in fixing that value are to be determined in accordance with the preponderance of the testimony.

4. The next request is:—"If, and so far as structure value depends upon cost, the market prices of pipe, labor, skill and supervision are to be taken as they were on the first day of January, 1904, and not as they were at prior times when the contract would have been necessary for the building of the structure to be completed for delivery on that day." This is not an accurate statement of the law. The ultimate fact to be ascertained is the value on January 1, 1904. The act provides that the valuation shall be fixed as of that date. Prior cost in this respect is only evidence, more or less valuable, as having a tendency to show value on that day. The value on that day may be more than the cost, or it may be less. To say nothing of depreciation, prices may have gone up or they may have gone down. If they have gone up, the company is entitled to the benefit of it, if they have gone down, the company loses it. This we have already stated in the former part of this opinion. The cost of pres-

ent reproduction is evidence of the strongest character of the present value of a structure, though other things are to be considered also. In determining, not cost, but present value, present prices of course are the standard, rather than former prices. It is suggested that in fixing the value on January 1, 1904, allowance must be made for the fact that a plant ready to be delivered on a given date must have been commenced a considerable time before. Certainly. When we say present prices we mean prices within a period necessary for construction. And a fair rate, usually the prevailing rate of interest, upon the money invested in the plant during construction, and before completion, is as much a part of the cost of construction, as is the money itself which is expended for materials and labor.

5. The fifth request is based upon the following assumed facts, which the petitioner says it claims and will undertake to prove to the appraisers: —

Until the year 1891 and for many years prior thereto, the Pejepscot Water Company, a corporation, was owner of a water system at Brunswick and was in possession and operating the same; and the same was all the while a going concern.

Until the year 1891 and for many years prior thereto, the Bath Water Supply Company, a corporation, was owner of a water system at Bath and was in possession and operating the same; and the same was all the while a going concern.

Each of said systems had its own separate source of supply, pumping station, force mains, distribution pipes in the earth, stand pipes, hydrants, service pipes and complete and independent equipment.

The two distribution systems were nine miles apart and there was no legal or physical connection between them.

The source of supply and pumping station for the Bath system were at Thompson's brook in Brunswick, four miles or more distant, easterly, from any part of the distribution system and from any property of the Pejepscot Water Company.

In 1891, the Maine Water Company, by purchase, legally acquired the ownership and possession of all the property, rights and franchises of both said other corporations and afterwards, of its own volition, laid a new pipe, connecting the Brunswick system with the

pumping station at the brook and abandoned the source of supply previously used by the Pejepscot Water Company.

Afterwards, finding the supply at the brook inadequate for both systems, the Maine Water Company established a new pumping station at Nequasset Pond in the town of Woolwich, three miles distant, easterly, from the city of Bath, and connected the same by a force main with the Bath system and thenceforth made the pond its source of supply, retaining the station at the brook for use in case of accident interrupting the flow from the pond; so that since the establishment at the pond, the water supplied to the system at Brunswick, except when the same has been interrupted by accident or damage to the structure, has been brought from the pond, a distance of thirteen miles through the two rivers and through the city of Bath and the town of West Bath and portions of Woolwich and Brunswick. And said district respectfully prays that the appraisers be instructed.

Upon this statement of facts, the petitioner claims that the appraisers should be instructed that "they are not to regard the property taken under this proceeding as part of a greater system, but are to treat it as if no physical connection between the two old systems had been made; and that nothing should be allowed on the claim of the Maine Water Company for damages for severance." This instruction should not be given. As to whether the situation of the various parts of the company's property is such that ordinarily damages for severance should or should not be awarded is not even open to discussion here. The act providing for these proceedings, section 7, declares that the appraisers shall assess damages for the severance of the Brunswick plant, property and franchises from the company's entire water system and franchises. It also declares that it is the intent of the act that the amount of the valuation of the property taken, and of "the additional damages for severance, if any, taken together, shall be so fixed as to equal the difference between the valuation, before severance, of the entire plant, property and franchises of said company, in Brunswick, West Bath, Bath and Woolwich, and the valuation, after severance, of the plant, property and franchises of said company in the easterly part of Brunswick, and in West Bath, Bath and Woolwich, as aforesaid, both of the last

named valuations to be determined under the principles of eminent domain." It is objected that this provision in the legislative act creates a rule of damages different from what would otherwise obtain as the legal rule. It is claimed that it is for the court, and not for the legislature, to say what shall be the rules of damages, and of evidence to show or rebut damages, in cases of taking of property by the power of eminent domain, that the exercise of such a power is judicial in its character, and not legislative, and that the legislature is forbidden by the constitution, Art. III, sect. 2, from exercising judicial powers. To determine what is a lawful rule of damage is undoubtedly a judicial power, which the legislature is not constitutionally competent to exercise. But if the act in question does create a new rule and a different one from the judicial rule, the answer to the petitioner's objection is simple and complete. The act provides, section 13, that it shall take effect when approved by a majority vote by ballot of the inhabitants of each of the towns of Brunswick and Topsham, and that "the approval of this act in the manner provided by this section shall constitute an acceptance by said water district of the methods of appraisal prescribed by section seven hereof, and shall bind said water district and said water company thereto." The inhabitants of both of these towns constituted all of the inhabitants of the water district. And if the inhabitants of the two towns voted to approve the act, as they did, we see no reason to doubt the validity of their acceptance of the methods provided for an appraisal, and that it would bind them in their new corporate capacity. The act was tentative. It was a proposition. When the inhabitants approved it, the methods of appraisal, whatever they were, became effective, not because they were established by the legislature, but because they were agreed to by the inhabitants themselves. The water company consents to be bound by the act.

6. The petitioner claims that there is, not far from the old Pejepscot distribution system, above mentioned, "a source of supply of pure water from which an abundance may be easily taken for all present and prospective need of the system at Brunswick and of the system of the petitioner," and therefore it asks an instruction that, in such case, "the rule which forbids rates for water exceeding what

the service is worth to the consumers would not allow the Maine Water Company to charge rates to the customers on the Pejepscot system at Brunswick, or on the system of the petitioner, that would yield a net revenue exceeding a fair return on the capital which it would be necessary to employ to deliver to them water from the near source of supply above mentioned." We have already discussed in substance what is meant by "a fair return on the capital employed," and the relation which capital invested bears to present value of the property upon which the company may ask a return, and we will not repeat. The conclusions reached must be borne in mind whenever capital invested is sought to be made the basis of income.

We turn to the other question involved in this request. That relates to the assumed existence of a nearer and cheaper source of supply than the one now in use by the company, which is a part of its present entire plant, and which in part represents its actual investment. We do not doubt that when the worth of a public service of this kind to the public or the customers, is spoken of, necessarily one of the elements to be considered is the expense at which the public or customers, as a community, might serve themselves were they free to do so, and were it not for the existence of the practically exclusive franchises of the supplying company. When the worth of water to a consumer is to be estimated, we are not limited to the value of water in itself, for it is an absolute necessity. Its value has no limit. Water, speaking abstractly, is priceless, it is inestimable. To sustain life it must be had at any price. And in this respect a public water service differs from all other kinds of public service. In estimating what it is reasonable to charge for a water service, that is, not exceeding its worth to the consumers, water is to be regarded as a product, and the cost at which it can be produced or distributed is an important element of its worth. It is not the only element, however. The individuals of a community may with reason prefer to pay rates which yield a return to the money of other people, higher than the event shows they could serve themselves for, rather than make the venture themselves, and risk their own money to loss in an uncertain enterprise. It was said by us in the Waterville case that the investor is entitled to something for the risk he takes, and it is not unreasonable

for the consumer to be charged with something on that account. That is one of the things which make up the worth of the water to the customer. The same element enters always into the relations between producer and consumer. But such a consideration as this last one must always be treated with caution. The company is only entitled to fair returns, in any event, and "fair" to the customer as well as to itself.

In the aspect now being considered, the worth of a water service to its customers does not mean what it would cost some one individual, or some few individuals to supply themselves, for one may be blessed with a spring, and another may have a good well. It means the worth to the individuals in a community taken as a whole. It is the worth to the customers as individuals, but as individuals making up a community of water takers. In the very nature of things, a water system is usually intended to supply a somewhat compactly settled community, or a community whose geographical limits are somewhat restricted. As a matter of fact in this state such systems usually supply villages, or the more compact portions of cities. The necessity does not exist for extending such systems beyond these limits, and the expense would be practically prohibitive. Such a community must in general stand as a whole. The rates for such a system are generally and properly uniform, although the expense of supplying some, as those nearer the source of supply, is actually less than that of supplying those at the outermost limits. Still the benefits are uniform and uniform rates are reasonable. Now such a community is, we think, entitled to the benefit of such natural and sufficient facilities for procuring pure water as exist in its vicinity. Communities are in every respect entitled to the benefit of existing natural advantages.

It therefore seems to be reasonable that a public water service company undertaking to supply a community with water is bound to do so wisely and economically. It is bound to take advantage of practicable natural facilities. If there is more than one source of supply, other things being equal, the community is entitled to have the least expensive one used. So long as the company enjoys practically exclusive franchises, so long it must afford the community the

benefit of the conditions which nature has provided for them. For instance, if water can profitably be served from a nearer source of supply, at a certain rate, the company ought not to be permitted to charge a higher rate based upon the expense of bringing it from a farther and more expensive source. And this, even if in attempting to serve this and other communities together, it might be more profitable to the company to do so.

7. It is asked that the appraisers be instructed that "the value of a structure, whatever it cost or might cost, cannot exceed the amount upon which it would yield a fair net revenue at rates which the water takers might lawfully be required to pay; and that in the present case allowance should be made for the fact that a source of supply and pumping station, equipment and connection not taken in this proceeding, must contribute to the procurement of revenue." The general proposition which is stated first, we have already considered sufficiently. And, of course, it is true that when the rates which furnish a basis for estimating value are earned in part by property taken and in part by property not taken, the appraisers must discriminate, and so far as value may depend upon rates, they should charge the property taken for only its fair proportion of the earnings.

But in undertaking to separate the values of the different component parts of the company's entire system, so as to justly value only that which is taken, it must not be forgotten that the charter of the petitioner expressly gives the company the right to damages by severance, if any. The charter rule which expresses the final result which the appraisers are to reach is a very simple one. First find the value of the entire system, before severance, then the value of what is not taken, after severance, and the valuation of the property and franchises taken, and the damages for severance, if any, taken together, "shall be so fixed as to equal the difference." Section 7 of the charter. In finding the value of the entire system, the appraisers must consider the value of so much of the plant as lies within the district, for that is one of the parts which make up the whole. And in valuing that part they will observe the rules as to values, and reasonable rates and natural advantages which have been already stated in this opinion, for all these must affect the value of

the whole system. But when the value of the whole has been once ascertained the remaining procedure is simple.

8. The last request is that "by the terms of the charter and independently of it, the award of the appraisers must be made 'under the principles of eminent domain'; that those principles are to be determined by the court and not by the legislature, and that the charter does not require the district to pay to the company more than 'full compensation' for what is taken and damages, 'if any,' under the principles of eminent domain." We have already answered this question, in effect, in considering the fifth question. It seems to be aimed at the rule of "damages by severance." The request might be approved simply and without comment, for it is a correct statement of the rule to be followed in this case. The estimation of just compensation for what is taken and of damages "if any" is to be had upon the principles of eminent domain. The eminent domain rule gives damages for severances, in certain cases, just as it gives compensation, strictly so called, for property taken. The difficulty here might have been to determine whether by the principles of eminent domain, the doctrine of damages by severance should be applied. That would have been purely a judicial question, had not the charter stated a rule arbitrarily, and the voting constituents of the petitioner agreed to it. That agreement was that the damages by severance, if any, should be allowed, to be estimated, of course, upon the principles of eminent domain. That agreement binds the petitioner and the court.

The appraisers will be instructed in accordance with this opinion.

So ordered.

FRED J. DUNNING

vs.

THE MASSACHUSETTS MUTUAL ACCIDENT ASSOCIATION.

Sagadahoc. Opinion December 15, 1904.

Insurance. Health Policy. Construction.

Under a policy of insurance against accident and disease, where the conditions of the policy respecting "indemnity for sickness" were as follows, viz: "A disability resulting from sickness or disease in order to constitute a claim, must be continuous, complete and total, requiring absolute and necessary confinement to the house (except as provided under Benefit No. 15), and unless the period of total disability under the health provisions shall continue for four or more weeks, no claim shall be allowed for the first seven days' disability, and the sickness or disease shall be such as shall, independently of all other causes, continuously and wholly disable and prevent the insured from attending to any business or duties pertaining to his occupation, profession or other remunerative employment." *Held:*

1. "Absolute and necessary confinement to the house" is made by such a contract an indispensable criterion of the disability which will entitle the insured to the indemnity, and hence a condition precedent to the right to recover.
2. So in regard to "Convalescent indemnity", "if the insured has been confined to the house for seven consecutive days and is thereafter permitted to leave the house by the physician in charge", one half of the indemnity is recoverable. The defendant company had a right to frame its health policy upon the assumption that confinement to the house would be found so tedious and irksome that few would submit to it except under compulsion of a severe illness.
3. The defendant company had a right to make "absolute and necessary confinement to the house" a conclusive test of the disability, and a condition precedent to the right of recovery. It had inserted this condition in the contract in plain and unambiguous language, and no principle of public policy is thereby contravened. To hold that this requirement is not a condition precedent is to defeat the obvious intention disclosed by the terms employed, and to substitute for the plaintiff's policy a contract not made by the parties.

On report. Judgment for defendant.

Action of debt on a policy of insurance issued by defendant company against accident and disease. The case was reported from the Supreme Judicial Court, for Sagadahoc County.

The facts are stated in the opinion.

C. E. Sawyer, for plaintiff.

Franklin C. Payson and H. R. Virgin, for defendant.

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

WHITEHOUSE, J. This is an action of debt on a policy of insurance against accident and disease, in which the plaintiff seeks to recover the sum of $108, being an indemnity of $12 per week for nine weeks, on account of a disability resulting from iritis. The case comes to this court on report. The policy bears date October 8, 1902.

It is not in controversy that the plaintiff suffered from iritis, or inflammation of the membrane of the eye called the iris, but it is contended in behalf of the company that his illness was not such as to be comprised in the terms of the policy giving an indemnity for loss arising from disease.

Benefit numbered 13 under the "Health Provisions" of the policy promises a weekly indemnity of $12 for not exceeding twenty-six consecutive weeks for loss through any of the extended list of diseases there specified including "Iritis (primary)." But the insured expressly agreed in the application "to accept said policy subject to all of its conditions, agreements and provisions," and the conditions of the policy respecting the "indemnity for sickness" are as follows, viz: "A disability resulting from sickness or disease in order to constitute a claim, must be continuous, complete and total, requiring absolute and necessary confinement to the house (except as provided under Benefit No. 15), and unless the period of total disability under the health provisions shall continue for four or more weeks, no claim shall be allowed for the first seven days' disability, and the sickness or disease shall be such as shall, independently of all other causes, continuously and wholly disable and prevent the insured from attend-

ing to any business or duties pertaining to his occupation, profession or other remunerative employment." Benefit No. 15, under the title of "Convalescent indemnity," provides that "if the insured has been confined to the house for seven consecutive days and is thereafter permitted to leave the house by the physician in charge, the Association will pay one half of the weekly indemnity for sickness, for a period not exceeding two weeks."

It has been seen, however, that the plaintiff is not seeking to recover the convalescent indemnity provided by benefit 15, but the full indemnity provided in benefit 13, under which the "disability from sickness or disease in order to constitute a claim, must be continuous, complete and total, requiring absolute and necessary confinement to the house."

It is contended in behalf of the defense that "absolute and necessary confinement to the house" is made by the contract an indispensable criterion of the disability which will entitle the insured to the indemnity, and hence a condition precedent to the right of recovery in the action.

The plaintiff does not claim that his disability was such as to require "absolute and necessary confinement to the house," or that he was in fact confined to the house continuously during the time for which he asks the indemnity, or during the first seven days or any other seven consecutive days of his illness. But it is contended in his behalf that his affliction was such as to "disable and prevent him, continuously and wholly, from attending to any business or duties pertaining to his occupation, profession or other remunerative employment," and that such a disability entitles him to the indemnity promised in benefit 13, although not such as to "require absolute and necessary confinement to the house." It is furthermore insisted that there is no case of iritis which in any degree of severity or at any stage of its progress "requires absolute and necessary confinement to the house," and that if this requirement in the policy is to be construed as a condition precedent to the right of recovery, the promise of indemnity for that disease upon such a condition would be entirely nugatory and delusive.

It must be admitted that if confinement to the house would not be

proper treatment for any case of iritis, the two clauses in the policy providing an indemnity for that disease, and at the same time imposing a condition of absolute confinment to the house, would be mutually destructive and render the contract justly amenable to the plaintiff's criticism.

Upon this question there is an apparent conflict in the testimony of the two experts who appeared as witnesses in the case. The plaintiff's witness states that he doesn't recollect that he ever saw a case or read of a case of iritis where confinement to the house was absolutely necessary. On the other hand, the expert for the defense testifies that cases of iritis exist in different degrees of severity and may conveniently be classified as mild, severe, and very severe; that in the first, and sometimes in the second class of cases, the patient may protect the eye by the use of colored glasses and go into the open air without injury; but in the third degree he should never go out of the house for the reason that all attempts to exclude the light by the use of cotton under colored glasses, or other similar means, involve pressure upon the inflamed tissue and an injury to the lids which should simply lie by their own weight and wink as nature intended. He states that he has seen many cases of iritis that required absolute confinement to the house.

When, therefore, the proposition set up by the plaintiff, that there is no case of iritis requiring absolute confinement to the house, is examined in the light of the positive testimony and subjected to the test of sound reason, it cannot be regarded as established by the evidence in this case. But it is conceded, as before stated, that the plaintiff's case was not such as to require absolute confinement to the house, and he appears to have made a good recovery without it. This provision of the policy must therefore be accepted as a valid one.

In *Paper Co.* v. *Fidelity & Casualty Co.*, 92 Maine, 574, the court say: "It must be remembered, in the first place, that this policy of insurance is a contract of indemnity in which the parties have a legal right to insert any conditions and stipulations which they deem reasonable or necessary, provided no principle of public policy is thereby contravened. Like all other contracts it is to be

construed in accordance with its general scope and design and the real intention of the parties as disclosed by an examination of the whole instrument. *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 146; *Blinn* v. *Dresden Mut. Fire Ins. Co.*, 85 Maine, 390. In case of ambiguity, or inconsistency, it is often said that the court will give the policy a construction most favorable to the assured, for the reason that as the insurer makes the policy and selects his own language he is presumed to have employed terms which express his real intention. *Wood on Fire Ins.*, 128, and cases cited. But, as remarked by the court in *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S. 452, for the purpose of safeguarding this rule against abuse of its application, it should be considered in connection with another rule equally well settled, 'that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and if they are clear and unambiguous, these terms are to be taken and understood in their plain and ordinary sense.'"

At page 587 the court further says: "Whether the interests of the assured are in all respects sufficiently guarded by the stipulations in the contract, it is unnecessary to consider. These corporations had the same right that individuals have to make their own contract. The court has no power to add to it or take from it. The function of the court is to interpret it, not to make it."

An examination of the several clauses relating to "indemnity for sickness" in comparison with all the other provisions of the policy, leaves no room for doubt that "absolute and necessary confinement to the house" was intended to be a conclusive test of liability, and not merely an evidentiary fact bearing upon the question of sickness.

The second condition in the same clause has significance upon this question, viz: "Unless the period of total disability under the health provisions shall continue for four or more weeks, no claim shall be allowed for the first seven days' disability." So in regard to "Convalescent indemnity," "if the insured has been confined to the house for seven consecutive days and is thereafter permitted to leave the house by the physician in charge," one-half of the indemnity is recoverable. These several conditions recognize the fact that

the moral hazard is undoubtedly much greater in health insurance than in accident insurance, for the obvious reason that in a large proportion of cases of disease the symptoms are only subjective, while in cases of accident the evidence is more commonly objective. They recognize the fact that with unguarded health policies, slight illnesses may tempt the insured to seek relaxation from ordinary labor at the expense of the company. In order therefore that the premium rates may not be so high as to be essentially prohibitive, and as a matter of justice to all of the policy holders, a mutual association is compelled to safeguard its health policies against the danger of all such malingering by making the contract expressly subject to certain absolute requirements and conditions. The defendant company had a right to frame its health policy upon the assumption that confinement to the house would be found so tedious and irksome that few would submit to it except under compulsion of a severe illness. It had a right to make "absolute and necessary confinement to the house" a conclusive test of the disability, and a condition precedent to the right of recovery. It has inserted this condition in the contract in plain and unambiguous language, and it is not suggested that any principle of public policy is thereby contravened. To hold that this requirement is not a condition precedent is to defeat the obvious intention disclosed by the terms employed, and to substitute for the plaintiff's policy a contract not made by the parties.

It is accordingly the opinion of the court that the entry must be,

Judgment for the defendant.

LEON W. RANDALL AND IRVING L. RANDALL, Aplts.,
FROM DECREE OF PROBATE COURT.

Androscoggin. Opinion December 22, 1904.

Will. Testamentary Capacity. Evidence.

Intellectual feebleness, from age or other causes, or delusions about matters, not connected with property or its disposition, may exist, and notwithstanding the person may have a sound and disposing mind and memory, as the law understands that term relative to the making of a will. If the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes his bounty, it is sufficient.

A person may have delusions in believing that they have communications from and interviews with the spirits of deceased persons, but unless such supposed communications control the disposition of property, the believer in them is not thereby rendered incompetent to make a valid will.

When the evidence leads the court to the irresistible conclusion that the jury gave too great effect to the peculiarities and eccentricities of the testator, and failed to discriminate between them, and the legal significance of the term sound and disposing mind and memory, their finding that the testator was of unsound mind will be set aside.

On appeal and motion. Appeal dismissed.

This was an appeal from the Probate Court of Cumberland County approving, allowing and admitting to probate a certain instrument purporting to be the last will and testament of Foster Lee Randall, late of Lewiston, in the County of Androscoggin, deceased. After the will was sustained by the Probate Judge of Cumberland, the appellants took an appeal to the Supreme Judicial Court in Cumberland County, and it was removed from that court to the Supreme Judicial Court holden at Auburn in April, 1904. At the trial in the court below the jury found that the testator at the time of the execution of the will was not of sound mind. The appellants thereupon filed exceptions to the admission of certain evidence, and a motion to set aside the verdict as against evidence.

The case appears in the opinion.

Tascus Atwood, for appellants.

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

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

STROUT, J. This is an appeal from a decree of the Judge of Probate, allowing the will of Foster Lee Randall. The Court submitted to the jury two questions,—

First: At the time of the execution of the instrument purporting to be the last will and testament of Foster Lee Randall, was the said Foster Lee Randall of sound mind?

Second: Was the execution of said instrument procured by the undue and improper influence or fraud of any person or persons?

Both questions were answered by the jury in the negative. The proponents ask that the finding upon the first question, as to the soundness of mind, be set aside as against the evidence in the case.

A number of witnesses testified that Randall had peculiarities, eccentricities, and occasionally uncleanly habits,—that he at times talked to himself, as if addressing some person not present,—that he thought the spirits of some of his dead enemies troubled him at night,—that at one time he touched a match to a cow's tail and seared the hair,—that at another time he objected to the presence in his house of a man who had been his former friend,—that he thought apples disagreed with him, and that his son's wife persisted in giving him food containing apples to poison him, and that he disinherited his two sons, and was embittered against them. This feeling against his son Leon grew out of a previous arrangement with him for the support of the father, which Randall claimed was not performed by Leon, and a suit was brought against Leon for breach of his obligation, which was subsequently compromised by payment to Leon for his three years service of $1900 and reconveyance of the property to the father. It is in evidence that Randall said afterward that Leon should never have any more of his property. As to the other son, he took an appeal from the decree of the Judge of Probate awarding to

Randall a small amount of personal property belonging to his deceased wife, which was dismissed by the Supreme Court, and a second appeal was attempted, which was also dismissed by the Court.

These are the principal grounds upon which the contestants relied to establish unsoundness of mind. Separately or all together they are insufficient to show that Randall had not sufficient capacity to make a will. Intellectual feebleness, from age or other causes, or delusions about matters, not connected with property or its disposition, may exist, and notwithstanding the person may have a sound and disposing mind and memory, as the law understands that term relative to the making of a will. If the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes his bounty, it is sufficient. *Hall* v. *Perry*, 87 Maine, 572.

Some persons believe they have communications from and interviews with the spirits of deceased persons. This may be a delusion, and is so regarded by many, but unless such supposed communications control the disposition of property, the believer in them is not thereby rendered incompetent to make a valid will. It is familiar knowledge that many persons of sound judgment and great business capacity in all secular transactions, have vagaries and superstitions upon other matters, which to minds differently constituted appear utterly absurd and groundless.

The proponents introduced a large number of witnesses, one of whom had known Randall intimately from boyhood and been his family physician for fifty years,—others had almost daily familiar observation of and intercourse with him for many years,—had frequent business transactions of considerable importance with him. All of them say they never discovered any indication of mental unsoundness in him. It would be unprofitable to go over in detail the testimony of these witnesses. Suffice it, that from their opportunities of judging of his mental condition, it is impossible to believe that if Randall lacked sufficient mental capacity to make a valid will,

some indications of that condition would not have been apparent to them in the varied, important and multiplied transactions they had with him.

The conclusion is irresistible that the jury gave too great effect to the peculiarities and eccentricities of Randall, and failed to discriminate between them, and the legal significance of the term sound and disposing mind and memory. The finding that Randall was of unsound mind is set aside as against the evidence.

It is not necessary or desirable to again submit the question to a jury. The mandate to the Court below will be that the finding of the jury that Randall was of unsound mind is set aside.

Appeal dismissed. Decree of Probate Court allowing the will affirmed. Remanded to the Supreme Court of Probate for decree.

JOHN CASSIDY

vs.

THE ROYAL EXCHANGE ASSURANCE OF LONDON.

Penobscot. Opinion December 22, 1904.

Insurance. Policy. Construction. Award. Estoppel.

The plaintiff held an insurance contract in the form of the Maine Standard Policy, in the sum of $1000, upon certain lumber, situated in two or more piles more than 100 feet apart. A loss occurred and referees were appointed who found only the value of the lumber destroyed, without determining whether more than one pile of lumber was damaged and whether the damaged piles were more or less than 100 feet apart.

The policy contained this clause: "This policy to attach in each locality in proportion as the value in each bears to that of all, this clause to be inoperative when the lumber piles are less than 100 feet apart."

Held, in an action to recover upon the award, the above clause must be construed as a proviso, not as an exception, and that the burden of proof falls upon the defendant to show that the loss came within the proviso.

Held, further, the burden of proof being upon the defendant to establish the facts upon which the above apportionment clause would attach, it was its duty if it desired to establish them, to have done so before the referees and it is now estopped to require the plaintiff to submit to another reference to obtain them.

On report. Judgment for plaintiff.

Assumpsit on policy of fire insurance issued by defendant company to the plaintiff. In the court below, upon the completion of the evidence offered by the plaintiff, the defendant offering no evidence and by agreement of the parties, the case was "reported to the Law Court to order such judgment or further proceedings in the case as the rights of the parties may require."

The case appears in the opinion.

Matthew Laughlin, for plaintiff.

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

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

SPEAR, J. This case comes up on report. The plaintiff on the 25th day of August, 1902, effected a contract of insurance with the defendant company under a Maine standard policy in the sum of $1000 upon certain lumber situated at the Elbow Siding at Twin Dam, Maine. Upon the same lumber was other insurance to the amount of $1000, but under the facts it has no bearing upon the decision of this case.

Before the expiration of his policy a fire occurred by which the plaintiff's insured lumber was mostly destroyed. The plaintiff and the defendant could not adjust the loss between themselves and therefore the plaintiff was obliged by the terms of the defendant's policy to submit to a compulsory reference in order to obtain any recognition whatever from the insurance company. Referees were accordingly selected, a hearing had and an award made, fixing the amount of the plaintiff's loss and damage on his lumber in the sum of $2084.25.

The policy covering this lumber contained this clause. "This policy to attach in each locality in proportion as the value in each bears to that of all. This clause to be inoperative when the lumber piles are less than one hundred feet apart." This policy to attach, etc., is what may be termed the apportionment clause.

That is if there were piles of lumber in two localities, each valued at $1000, and together insured for $1000, and one should be consumed by fire, then the amount of insurance due would be $500, as the value of the lumber burned in this locality would be one half the value of all the lumber insured. The policy itself determines that piles of lumber shall not be regarded as situated in different localities when less than one hundred feet apart.

The defendant contends that the reference settled only the value of the lumber specified in the agreement of submission, and that the question of whether the lumber was situated in different localities so as to come within the terms of the apportionment clause is still open. On the other hand the plaintiff asserts that, conceding the lumber to have been so piled as to have come within the clause, yet the defendant is now estopped from making such claim, not having raised the point in any of the negotiations nor before the referees.

The validity of these contentions depends upon the construction to be placed upon the apportionment clause in the policy. If it is held to be an exception the defendant is right, as the burden of proof would rest upon the plaintiff to negative the exception. If it is construed as a proviso the plaintiff is right, as the burden would then be upon the defendant to show that the loss came within the proviso.

The evidence is conclusive that the agent representing the insurance company had examined the lumber in question, its quantity, its value, its location, the manner in which it was piled, the relation of the piles to each other and the distance they were apart. The knowledge of the agent was the knowledge of the company.

With this information the defendant did not insert, nor suggest the insertion, in the articles of submission, any request for a finding by the referees of the value of the different piles of lumber, destroyed or not destroyed, or of the distance between the different piles, destroyed or not destroyed, as the basis upon which an apportionment

could be made under the terms of its policy, nor did it offer any evidence as to these facts. Such a basis was required, however, if the apportionment clause was to be invoked, before the amount of insurance to which the plaintiff was entitled could be determined. The award therefore furnished no foundation, whatever, for an adjustment under the apportionment clause of the policy, because neither the number of piles, their distance apart, their value, nor whether destroyed or not destroyed, is specified in the award. But in order to enable an apportionment these facts must be found, as actually, the lumber insured was situated in several different piles more than one hundred feet apart.

If the burden of proof was upon the defendant and it desired to raise the question of apportionment, it should have submitted to the referees a request for a finding of the essential facts upon which to base it, or have presented evidence of these facts, and not have stood by with a full knowledge of all the requirements, and have allowed the plaintiff to go through the form of a nugatory reference.

We think the apportionment clause was a proviso and that the burden of proof rested upon the defendant to bring itself within its terms so that by the report of the referees the whole case could have been disposed of. We do not know precisely the purpose of our statute, enacting the standard policy of insurance and taking away the right of trial by jury from the insured and leaving it optional with the insurance corporation, as no individual under our statutes can do insurance business, but we do not think it should be construed, whatever was intended, to compel the insured to submit to a reference and having done so, be again compelled to bring an action at law to enable the company to make a defense which it could and should have raised before the referees.

The distinction as to which class, exceptions or provisos, a particular stipulation in a policy belongs is a very sharp one. In *Sohier* v. *Norwich Ins. Co.*, 11 Allen, 336, after the description in the policy of the property insured, this clause was inserted. "This policy not to cover any loss or damage by fire which may originate in the theater proper." It was held that the burden was upon the plaintiff to show a loss not originating in the theater proper.

The court said, "If that clause can be regarded as a proviso, that is, a stipulation added to the principal contract, to avoid the defendant's promise by way of defeasance or excuse, then it is for the defendants to plead it in defense and support it by evidence. But if, on the other hand, it is an exception so that their promise is only to perform what remains after the part excepted is taken away, then the plaintiff must negative the exception to establish a cause of action. It is not always easy to determine to which class, whether of provisos or exceptions, a particular stipulation belongs; and this one is certainly very near the line."

In *Kingsley* v. *New England Ins. Co.*, 8 Cush. 393, the court held that the stipulation in the policy, "on condition that the applicant take all risk from cotton wastes," was not an exception but a proviso and that the burden was not on the plaintiff to show that the loss occurred in some other way than from cotton waste, and that the defendant must set it up in defense and support it by evidence.

The essential part of the plaintiff's policy is as follows, "$1000 on lumber his own or consigned, or sold and not removed, lying alongside, or piled, or struck, or in cars, of the branch track, of the Twin Lakes Lumber Co., known as Elbow Siding, situated at Twin Dam, Maine. Other insurance permitted. This policy to attach in each locality in proportion as the value in each bears to that in all. This clause to be inoperative when the piles are less than one hundred feet apart." This clause cannot be construed as an exception.

Exception is defined by Anderson's Dic. as "something withheld, not granted or parted with; the exclusion of the thing, or the thing or matter itself as excluded." By the Century Dictionary as "the act of excepting or leaving out of account; exclusion or the act of excluding from some number designated, or from a statement or description."

An exception is a proviso that excludes something from a statement or description. Take the case above cited in which occurs the clause, "this policy not to cover any loss or damage by fire which may originate in the theater proper," and it will at once appear that if the fire originated in the theater the policy covered no loss whatever caused by that fire. That is, if the fire happened in a certain way

the policy excluded it. If it happened in any other way, remained in full force. And it was properly held, although a close question, that the burden was upon the plaintiff to show that his policy was operative as to the loss.

The other cases cited by the defendant are decided upon the same principle. In *Blake* v. *Manufacturers Ins. Co.*, 12 Gray, 603, the defendant insured certain goods to be conveyed by boat, against damage by being wet by salt water. The court held that the burden was on the plaintiff to show damage by salt water. Certainly. Otherwise the plaintiff proved no loss, whatever, under his policy. In *Paddock* v. *The Commercial Ins. Co.*, 104 Mass. 521, the policy did not attach, at all, unless the loss amounted to five per cent. Of course it was incumbent upon the plaintiff to prove such a loss, otherwise he presented no case under his contract. *Cory* v. *Boylston Ins. Co.*, 107 Mass. 140, is to the same effect. The policy provided that "the insurers shall not be liable for any partial loss unless it amounts to five per cent."

If the clause we are now considering had read, "this policy not to attach when piles of lumber are more than one hundred feet apart," it might be construed as an exception because the lumber so piled was absolutely excluded from the application of the policy, and no action would lie. Therefore the plaintiff to present any cause of action at all must negative the fact that the piles of lumber were more than one hundred feet apart. But the clause does not so read. Instead of excluding anything from the application of the policy it expressly declares that this policy shall attach in any event, but shall be modified in its application to the loss in accordance with the existence of certain facts at the time of the fire. The apportionment clause does not work a defeasance of the right of the policy to attach to the loss whether the piles of lumber be ten or ten hundred feet apart. The insurance clause is general and applies to all lumber insured. Under it, if property of the value of $1000 had been destroyed, whether in one pile or several piles, however far apart, the plaintiff would have been entitled to recover the full amount. The plaintiff could have stopped with the general insurance clause and presented a complete contract. The apportionment clause is but a

modification of this general contract. It does not except, it simply limits. It is not so connected with it as to form a necessary part of it; it only specifies a contingency upon the happening of which the policy may be modified, not to enlarge, but to diminish, the liability of the defendant.

Even the contingency specified may not happen at all. If the piles of lumber, one or more of which is destroyed by fire, are less than one hundred feet apart, it does not happen, and the general insurance contract is not affected in the least; if more than one hundred feet apart it does happen and the defendant's liability then attaches and this limiting proviso operates with full force and diminishes the liability of the defendant company.

But it is held that if a stipulation is added to the principal contract to avoid the defendant's promises by way of defeasance or excuse, it is for the defendant to plead it in defense and support it by evidence. *Sohier* v. *Norwich Ins. Co.*, 11 Allen, 338. And no reason is apparent why the same construction should not apply to a clause which operates as a partial defeasance or excuse.

The burden of proof being upon the defendant to establish the facts upon which the apportionment clause would attach, it was its duty, if it desired to establish them, to have done so before the referees and it is now estopped to require the plaintiff to submit to another reference to obtain them.

In accordance with the terms of the report the entry must be,

Judgment for the plaintiff in the sum of one thousand dollars, and interest from the date of the writ.

HENRY HUDSON *vs.* ALEXANDER MCNEAR.

Piscataquis. Opinion December 22, 1904.

Pleadings. Demurrer. Amendment. R. S. 1903, c. 84, § 10.

To a declaration containing three counts, one in assumpsit, one in debt on judgment and one in assumpsit on a promissory note, a special demurrer was filed, the demurrer sustained, and the plaintiff allowed to amend by striking out the first count in assumpsit and a portion of the third count.

Held: after a special demurrer is sustained no reason appears why the case does not then fall within R. S., c. 84, § 10, relating to amendments, the demurrer being disposed of, the case stands open for further disposition as if no demurrer had been filed.

Exceptions by defendant. Overruled.

The case is stated in the opinion.

Henry Hudson, pro se.

Joseph B. Peaks, for defendant.

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

SPEAR, J. This case comes up on exceptions to the allowance of an amendment to the plaintiff's declarations in his writ. The declaration contained three counts; one in assumpsit, one in debt on judgment and one in assumpsit on a promissory note. The defendant filed a special demurrer for misjoinder. The demurrer was sustained and the plaintiff allowed to amend; first, by striking out the first count in assumpsit; second, by striking out in the third count the words, "by reason and in consideration whereof the said defendant become liable and promised the plaintiff to pay him the contents of said note according to the tenor thereof." This amendment leaves the amended count in the ordinary form of assumpsit upon a promissory note. There is no doubt that the plaintiff could have declared upon the note in debt by using the words appropriate to that form of action. This has been the well settled law of pleading, at least

since the opinion by Story, J., in *Raborg et al.* v. *Peyton*, 2 Wheaton, 144; *Exchange Bank* v. *Abell*, 63 Maine, 346. But he did not use the appropriate words. The count contained no allegation per quod actic accrevit. The last case cited in 63 Maine, seems to be conclusive upon this point. In that case the declaration contained four counts in debts, one upon a note of hand, by the endorser against the maker, and a general count, and the court said, "The defendant demurred generally to the whole declaration. The count on the judgment is not questioned to be correct. The objection to the count is that they are not technical in form. They allege an existing liability on the part of the defendant and a promise to pay in consideration thereof." This case also shows that the first count was in a plea of debt and that no plea was stated in any count after the first, but otherwise the last two counts are in the usual form of declaring in assumpsit.

This is very similar to the way in which the plaintiff, in the case at bar, left his declaration after all his amendments had been allowed. He had in his third count declared in assumpsit upon a promissory note, and no plea was stated after the first count. In the case cited the plaintiff also declared on a promissory note, but the case held, page 350, "The counts on the notes are to be regarded as defective counts in debt." The plaintiff's writ still contains one count in debt and one in assumpsit. As the amendment striking out the first count in assumpsit was clearly allowable, and that striking out a part of the third count, whether allowable or not, did not in any way change the form of the count, the defendant therefore could not have been aggrieved by the allowance of the amendments. But the defendant goes further and claims that the court, after the filing of a special demurrer, did not have the power to allow any amendment. He says, "I find no authority either by statute or decision for an amendment after special demurrer," and cites Gould's Pleading, sections 101 and 102.

We do not think the citation sustains his position. Gould, in his fourth edition, section 101, says: "When a declaration is ill, for misjoinder of causes of action, the plaintiff may, with leave of the court, amend it on payment of costs, by striking out one or more of the

counts and thus leaving upon the record but one count, or such only as are rightly joined. And if the declaration has not been *demurred* to he may also cure the mistake by entering a *nolle prosequi* upon one or more of the counts." The words in italics are found in the text. A note states that a nol. pros. is precisely equivalent to withdrawing or abandoning one of two classes of action improperly joined in a complaint. Section 102 reads, "But it has been several times held that, after demurrer to a declaration, for such a misjoinder, the plaintiff cannot cure the mistake by entering a *nolle prosequi* upon any of the counts; since to permit this would enable him, by his own act, and without paying costs to defeat a demurrer well taken for sufficient and substantial cause." It should be here noted that a *nolle prosequi* is not a demurrer, general or special, nor is it an amendment, in the broadest sense of the term. It embraces only the withdrawal or abandonment of a count. An amendment not only does this but much more. The scope of the term amendment is too well established to require citation.

These sections therefore construed together, simply declare that, after demurrer, and the demurrer here referred to must be special, the plaintiff can amend, if the declaration is amendable, only upon the payment of costs, and state the reason why he cannot, at this stage of the proceedings, after the defendant has detected and taken advantage of his error in pleading, enter a nolle prosequi, that is withdraw or abandon any one of his causes of action, leaving the rest in proper form, without paying costs. Chitty, 16 Am. Ed. star page 228, states the same principle in this way. "The plaintiff cannot, if the declaration be demurred to, aid the mistake by entering a *nolle prosequi* so as to prevent the operation of the demurrer for misjoinder; though the Court will in general give the plaintiff leave to amend by striking out some of the counts upon the payment of costs."

To the same effect is *Fernald* v. *Garvin*, 55 Maine, 414. A general demurrer to a misjoinder will not be sustained if either count is good, hence in such a case a special demurrer becomes necessary in order to reach the defective pleading, but we are unable to discover any reason why, after a special demurrer has been sustained, an

amendment may not be allowed upon terms, as it would be under our statute, in case of a general demurrer. At common law the distinction between a general and special demurrer consisted in the mere form of demurring. Since the office and effect of both were the same, faults in mere form were reached at common law by a general as well as a special demurrer, the only exception being the case of a demurrer for duplicity.

After a special demurrer is sustained we see no reason why the the case will not fall within R. S. 1903, chapter 84, section 10, relating to amendments. The demurrer is then disposed of and the case stands open for further disposition as if no demurrer had been filed. The declaration may be amended, upon terms, if amendable, if not that is the end of it.

The third count in the plaintiff's writ was amendable after sustaining the special demurrer and the exceptions must be overruled on this account. And, as before stated, inasmuch as the amendment allowed did not change the form of the count, the defendant is not aggrieved and the exceptions must be overruled for this reason also.

Exceptions overruled.

EMERY, J. I concur. The only question presented by the exceptions is whether the amendments allowed were allowable. Whether the declaration is thereby made sufficient and good against demurrer is another question not decided nor presented.

JAMES E. CAMPION *vs.* ELLEN E. MARSTON, Admx.

Kennebec. Opinion December 23, 1904.

Contract. Sale. Warranty. Evidence. Merchantable Ice. Waiver.

1. Good faith, bona fides, is an element in every contract even though not expressed in terms.
2. A contract for the sale of ice for the market includes an assurance or warranty, that the ice is of merchantable quality, unless otherwise stipulated.
3. An acceptance of ice delivered under such contract of sale even after inspection may be evidence of the release or waiver of such warranty, but does not of itself necessarily constitute such release or waiver.
4. Given circumstances may have more weight upon a question of waiver of non-essentials, than upon a question of waiver of essentials in a contract.
5. In this case there was testimony, which if true warranted the verdict. It is not made clear that it was untrue, hence the verdict must stand.

On motion and exceptions by plaintiff. Overruled.

Action for money had and received, brought under the statute to prosecute an appeal from the report of commissioners appointed by the Judge of Probate for the County of Kennebec, to pass upon the plaintiff's claim. (R. S. 1883, c. 64, § 53.)

The commissioners returned an award for the plaintiff for the sum of $303.70. The plaintiff then appealed. The action was then tried in the court below and the plaintiff obtained a verdict for $260.94. The plaintiff asks to have this verdict set aside on both motion and exceptions.

The case is stated in the opinion.

Charles P. Mattocks and Heath & Andrews, for plaintiff.

L. C. Cornish and N. L. Bassett, for defendant.

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

EMERY, J. In the spring of 1890 Mr. Campion, the plaintiff, was the owner of a stack of ice at Sebago Lake, measuring about 1400 tons. Messrs. Jones & Marston were a firm of brokers and dealers

in ice having their office at Hallowell. On May 24, 1900, presumably after some prior conversation or correspondence, Mr. Marston for the firm wrote to the plaintiff as follows: "The ice you have we can give $3.75 for F. O. B. for June, July Shipment;—will take it as soon as we can. The ice to be weighed on the wharf by a sworn weigher." This offer was practically accepted. It was mutually understood that the price $3.75 was the price per ton, that the place of delivery was on board ship at Portland, and that the vessels were to be furnished by Jones & Marston, the purchasers. Nothing appears to have been said or written by either party about the quality of ice whether merchantable or not; nor does it appear that Jones & Marston inspected the ice before purchasing, though so far as appears they could have done so.

Under this contract of sale, the plaintiff delivered the ice on board ship at Portland to the amount of 1390 tons by weight, and Mr. Jones & Marston accepted it and carried it away to market. It was weighed by a sworn weigher as it went on board. The plaintiff now seeks to recover the full contract price of $3.75 per ton for the whole 1390 tons. The defendant claims a reduction in price on the ground that much of the ice was not merchantable when delivered. The pivotal question of law is whether this defense is admissible. Two subsidiary questions are presented by the exceptions, viz: (1) whether the contract of sale of the ice included by implication an assurance or warranty that the ice was merchantable;—(2) whether the acceptance of the ice at the place of delivery on board ship constituted a satisfaction, or waiver, of such warranty.

Ice of a certain degree of purity and hardness is a merchantable commodity and as such has a quotable market price. If of less than that degree of purity and hardness, it has no quotable market price and is not merchantable, is not sure of a sale. Ice is not graded like grain or cotton, each grade having its own market and price. If not merchantable its sale at any price is uncertain. Indeed the term "ice" in the trade means "merchantable ice." Hence, whenever a contract of sale of ice is made it is a contract of sale of merchantable ice unless otherwise stipulated. The purchaser becomes entitled to receive merchantable ice. Good faith requires the seller to furnish it. Good

faith, bona fides, should be as much an essential part of a contract now as it was in the time of Justinian.

Ice is homogeneous. A particular lot of ice has no individuality like a domestic animal, a building, a parcel of real estate, a factory, a machine or plant, or any other specific individual article where the purchaser ordinarily has a choice and makes an examination and selection. Of course if the purchaser of ice does in fact examine the ice before purchasing, and buys upon his own judgment, he may perhaps come under the rule of caveat emptor but this purchaser is not shown to have done so. The plaintiff was offered and accepted what is conceded to have been the price for merchantable ice. In law, as well as in morals and honor, he must be held to have promised that his ice to be delivered was of that quality.

Messrs. Jones & Marston received the ice into their vessels at Portland as delivered. While being taken from the cars, weighed and put on board ship, it was open to view and inspection, and was seen by their agents. These circumstances may be evidence, and even strong evidence, that they accepted the ice as the ice bargained for and in full satisfaction of the contract of sale including all that good faith demanded of the plaintiff; but the circumstances do not in themselves constitute, as matter of law, an acceptance in satisfaction or waiver of the plaintiff's promise that the ice was merchantable. Jones & Marston were not obliged to decide the matter then. They could lawfully have refused to receive the ice if not merchantable; or they could have taken it, leaving the question of rebate for unmerchantable ice to be determined afterward. It does not necessarily follow from their acceptance of the ice that they released the plaintiff from his promise or obligation that the ice was merchantable. Whether they did in fact take the ice as full satisfaction of the contract of sale, and thus release the plaintiff from that obligation, was a question of fact for the jury.

We think the foregoing propositions are correct and well founded in reason and authority. See *Warner* v. *Arctic Ice Co.*, 74 Maine, 475, and *Morse* v. *Moore*, 83 Maine, 473, where the subject matter and the authorities, including those cited by the plaintiff here, are fully considered. We think the above Maine cases are decisive of

the principle for this state, whatever the law of New York or other states.

We think this conclusion overrules all the plaintiff's contentions except one. He urges that the presiding justice by his qualification of a requested instruction weakened its force to his legal detriment, and deprived him of the proper full force of the facts assumed as evidence of waiver. His request was as follows:

"Seventh. That if they find that Jones & Marston had an opportunity to inspect the ice when loaded on the vessels or that Jones & Marston employed an inspector to examine the ice when loaded and such inspector did so examine it, such facts would be evidence tending to show a waiver of the implied warranty. Whether the proven facts constitute a waiver is for the jury. (Requested after giving of charge, without prejudice to requests refused)."

The presiding justice said (repeating the request).

"I give you that with certain qualifications, gentlemen. If Jones & Marston had such opportunity to inspect the ice as would afford them knowledge of its condition, or if through an inspector they inspected it, then that would be evidence tending to show a waiver on their part, but it does not necessarily prove a waiver of the full performance of the contract; inspection, knowledge particularly, is strong evidence of a waiver of exact compliance with the terms of the contract; it is not such strong evidence of a waiver of essential performance, but its force and weight is for you. A party when he has bought goods and comes to receive them, has a right to waive performance on the part of the other party, and if he does waive it he cannot afterwards call for the performance of it, but whether he does or not is a question of fact for you to determine from all the circumstances in the case bearing upon the surroundings, and his conduct, and opportunities and knowledge of the time."

The whole instruction is within the propositions laid down. The jury were distinctly instructed that the facts assumed were evidence of a waiver, but did not necessarily prove a waiver of full performance, that they were strong evidence of a waiver of exact compliance with the terms of the contract, but not so strong evidence of a waiver

of essentials in the contract. We think it evident that from given facts a waiver of non-essentials is more easily and safely inferred than is a waiver of essentials. Moreover the jury were further explicitly told that the force and weight of the facts (in other words the inference to be drawn from the facts) were for them. We cannot see in the instruction any prejudice to any legal right of the plaintiff.

As to the motion:—A study of the evidence discloses considerable conflict of testimony. There were numerous circumstances testified to from which different inferences might be drawn by different men. There was certainly testimony which if true was sufficient to prove that the ice was far from merchantable. The plaintiff earnestly contends that this testimony was untrue and even manifestly so. This is not so clear to us as to him and his counsel. Two commissioners have heard the case and found against the plaintiff. Upon his appeal to a jury that tribunal has also found against him. Whatever doubts he may have raised in our minds, he has not demonstrated to us that the commissioners and jury were undoubtedly wrong. Hence his motion must be overruled.

Exceptions and motion overruled.

THE INTERNATIONAL WOOD COMPANY

vs.

THE NATIONAL ASSURANCE COMPANY OF IRELAND.

Cumberland. Opinion December 24, 1904.

Insurance Policy. Judicial Sale. Decree of Annulment.

To avoid a policy of fire insurance that contains the provision that it shall be void "if without the consent in writing of in print of the company said property should be sold, or this policy assigned," etc., the sale must be such as passed title to the property.

In cases of sale of personal property between individuals where no question affecting the rights of other parties exists, the title may pass without delivery of the property, but the validity of judicial sales depends upon somewhat different rules. In judicial sales of personal property, the execution and delivery of instruments of conveyance are necessary as a part of the requisites of the sales.

The failure of the officer of the court to comply with statutory provisions or with the decree of an equity court ordering and confirming a sale, renders it non-judicial and void.

A decree of annulment of a judicial sale, based upon the finding as a matter of fact that the sale had not been completed and that the title had not passed determines the status of the title as between the parties to the sale and its validity cannot be impeached collaterally.

On report. Judgment for plaintiff.

Action of assumpsit to recover loss under a policy of fire insurance, issued by the defendant.

At the hearing in the Superior Court for Cumberland County, by agreement of the parties the evidence was reported to the Law Court to render such judgment upon so much of the evidence as is competent and legally admissible, as the rights of the parties may require.

The case is sufficiently stated in the opinion.

Benjamin Thompson, for plaintiff.

Leslie C. Cornish and Norman L. Bassett, for defendant.

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

PEABODY, J. This action is brought to recover the sum of $1000 the amount covered by policy of fire insurance issued by the defendant company upon the personal property of the plaintiff company, consisting of mill buildings and machinery on leased land located at Lakewood in the county of Aroostook, State of Maine. The case comes before this court on report.

The mill plant was installed for the manufacture of Veneer by the predecessor of the plaintiff, and extensive improvements were made after the purchase by the plaintiff so that it stood upon its books September 1, 1901, at $172,427.

On the 29th day of December, 1900, William W. Mitchell of Portland, Maine, was appointed receiver of the plaintiff under proceedings in suit instituted by the stockholders. The receiver through an agent of the defendant company placed the policy in suit and six others originally aggregating the sum of $30,000. On March 5th, 1901, he received authority by decree of the court to sell the property and assets and make report of the sale to the court for confirmation. On the 16th day of September, 1901, he sold the property insured at auction for $7000 to George F. Duncan of Portland, Maine, who deposited the sum of $1000 according to the conditions of the sale. On the 17th day of September, 1901, the sale was confirmed by the court. On the same date the receiver executed the bill of sale to Mr. Duncan. Duncan never went to the mill but the receiver continued in possession and operated the mill up to the first of November, 1901, when it was leased by him and operated by his tenants until the 9th day of November, 1901, when the mill building and contents were entirely destroyed by fire. The receiver furnished the defendant a proof of the loss December 13, 1901.

Previous to the loss by fire, at the request of the receiver made to the agent who negotiated the policies, the total insurance was reduced to $15,000 and the policy in suit was modified so as to cover $400 on the buildings, $466.67 on the machinery and $133.33 on lumber and material.

Upon his application to the equity court the receiver was given permission to bring suit against the several insurance companies, and the suit under consideration was commenced April 3, 1902.

On the 28th day of November, 1902, on the petition of Duncan, the order and decree confirming the sale to him were vacated and rescinded and the $1000 paid by him to the receiver was ordered to be repaid.

The policy is in the Maine Standard form and contains the provision that it shall be void, "If without the consent in writing or in print of the company, said property should be sold, or this policy assigned," etc. Our court has held that such a provision is valid, *Waterhouse* v. *Gloucester Fire Insurance Company*, 69 Maine, 409. So the case depends primarily upon the legal effect on the policy of the receiver's sale and its confirmation by the court.

To avoid the policy under this provision the sale must be such as passed title in the property insured, *Orrell* v. *Hampden Fire Insurance Company*, 13 Gray, 431; *Pitney* v. *Glen Falls Insurance Company*, 65 N. Y. 6; *Brabin* v. *Hyde*, 32 N. Y. 519; *Boston & Salem Ice Company* v. *Royal Insurance Company*, 12 Allen, 381. There was no actual delivery of possession by the receiver to Duncan. In cases of the sale of personal property between individuals where there is no question in relation to the statute of frauds or rights of subsequent bona fide purchasers, or of attaching creditors without notice, the title may pass without delivery of the property. *Dixon* v. *Yates*, 5 B. & Ad. 313; *Morse* v. *Sherman*, 106 Mass. 430; *Cummings* v. *Gilman*, 90 Maine 524. But the validity of judicial sales depends upon somewhat different rules. By decree of the court the receiver was authorized and empowered to proceed to sell all the assets of the International Wood Company at public auction to the highest bidder, giving such notice of the time and place of the sale as to the court should seem reasonable and proper. The decree gave specific directions as to the notice of sale, that the sale should be subject to the approval of the court, that the receiver should make report to the court for confirmation and hold the proceeds subject to the further order of court. The auction sale was held September 16, 1901, according to the required notice, and the sale was made to Duncan,

he being the highest and only bidder. The receiver filed his report of the sale and it was confirmed by a decree of the court which, after reciting facts upon which it was based concludes as follows: "Ordered, Adjudged and Decreed that said sale be approved and confirmed and that said William W. Mitchell, Receiver, is authorized and directed to make, execute and deliver to said George F. Duncan all necessary bills of sale and assignments to carry said sale into complete effect, upon the payment to him by said Duncan of the amount of the purchase price according to the terms of sale." A bill of sale was prepared and executed by the receiver to Duncan on the day of the confirmation, which the evidence shows may have been handed to Duncan, but if so it was not retained, and no further payment of the purchase price was made by him. It is claimed by the defendant that thus everything had been done to entitle the purchaser to the property and the receiver to the purchase price. But we do not think that this is the legal result of the transaction. The authorities hold that until there has been a delivery of a deed of real estate sold at a judicial sale the title did not pass. *Slowhidsky* v. *Insurance Company*, 53 Neb. 816; *Manhattan Insurance Company* v. *Stein*, 5 Bush. (Ky.) 652; *Haight* v. *Insurance Company*, 92 N. Y. 51; *Marts* v. *Insurance Company*, 44 N. Y. Law, 478. In these cases it may be assumed that the converse would be true, that the title would pass by the delivery of the deed and a compliance with the conditions of the sale. In judicial sales of personal property the execution of instruments of conveyance is a part of the requisites of the sales. The failure of the officer of the court to comply with statutory provisions or with the decree of an equity court ordering and confirming a sale would render it non-judicial. Freeman on Void Judicial Sales, Secs. 43, 44; *Mason* v. *Ham*, 36 Maine, 573.

There is some conflict of testimony relative to the fact of delivery of the bill of sale to Duncan. If made at all it must have been only provisional. It was not such a delivery as was contemplated and directed in the confirmatory order. It was to be made by the receiver simultaneously with the payment to him of the price which he was to hold for further order of the court. Such delivery only was authorized or could have any legal effect to pass the title. This

conclusion would negative a completed sale; and a mere executory contract or inchoate sale resulting from the auction and the deposit of money by the bidder would not make the policy void under the forfeiture clause. The effect of the decree of the court vacating and rescinding the order of sale may be briefly considered. In *Woodard* v. *Bullard*, 27 N. J. Eq. 508, the court say, "The right of the Court of Chancery to set aside sales made by its officers and restrain the delivery of the deeds to purchasers cannot be doubted upon a proper case made. *Campbell* v. *Gardner*, 11 N. J. Eq. 423. In *Collier* v. *Whipple*, 13 Wendell, 224, where the deed had been delivered by the receiver to the purchaser the order of the chancellor for a resale, on appeal to the court of errors, was affirmed. Mr. Justice Nelson in delivering the opinion of the court said: "As to the deed it was taken subject to the jurisdiction of the Chancellor over the sale."

The decree of annulment was based upon the finding as matter of fact, that the sale of Duncan had not been completed, that the title did not vest in him; and upon that ground the money paid by him at the time of making his bid was ordered returned to him. This certainly would determine the status of the title between the parties to the sale, and we think the validity of the decree cannot be impeached collaterally by the insurance company in this case. *Brande* v. *Bond*, 63 Wis. 140; *Libby* v. *Rosekrans*, 55 Barbour, 202.

The plaintiff is entitled to recover the proportion of the loss sustained which the sum insured by the policy in suit, $1000, bears to the whole amount insured thereon, $15,000. The evidence shows that the loss exceeded the whole amount insured.

Judgment for plaintiff for $1000 and interest thereon from February 11, 1902.

JOHN E. PERRY *vs.* RICHARD A. GRIEFEN.

York. Opinion December 24, 1904.

Non-resident. Jurisdiction. Attachment. Officer's Return. Conclusiveness of Return. R. S. 1903, c. 83, §§ 12, 21.

On a writ of attachment describing the defendant as a non-resident a deputy sheriff made return that he attached a lot of lumber and a lot of tools in the county, as the property of defendant, and that he made service on the defendant, by giving his agent in hand a summons for his appearance in court; and the defendant's counsel appearing specially for the purpose moved that the action be dismissed for want of jurisdiction: *Held;* that the officer's return must be taken as true for the determination of the question raised by the motion, leaving the parties to their action against the sheriff if the return be untrue.

Although the return is not definite as to quantity and location of the goods, if it shows that goods of the defendant were attached on the writ in this state, it is sufficient for jurisdictional purposes.

Errors made by the officer in his return to the town clerk's office will not dissolve the original attachment, as filing, a copy of the return in the statutory office is not a part of the process of attaching personal property, as it is in attaching real estate.

The officer must take actual possession of the goods on the writ of attachment, which is not required when the attachment is made by trustee process, and such taking possession by virtue of the writ would give the plaintiff a lien on them and the court jurisdiction over them.

When at any time or in any manner it is in good faith represented to the court, by a party or amicus curiae, that it has not jurisdiction, it will examine the grounds of its jurisdiction before proceeding further.

On exceptions by defendant.

Assumpsit to recover balance due on account annexed, and also to recover damages occasioned by the refusal of the defendant to accept certain brick, which, it was alleged, the defendant agreed to purchase of the plaintiff.

The case is stated in the opinion.

George F. Haley and Leroy Haley, for plaintiff.

Frink & Marvin and George C. Yeaton, for defendant.

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

PEABODY, J. The plaintiffs sued out of the clerk's office of this court in York county an original writ of attachment dated February 24, 1903, against the defendant, Richard A. Griefen, returnable at the May Term, 1903, in York county. In this writ the defendant was described as of Chicago in the state of Illinois. The declaration was for merchandise sold and delivered. The writ was placed in the hands of a deputy sheriff for York County, who made upon it the following returns, viz:

"State of Maine.

York ss. Kittery, Feb. 24, 1903 at three o'clock in the afternoon:

By virtue of the within writ I attached a lot of lumber valued at $200, a lot of brick valued at $100 and a lot of tools valued at $25, as the property of the within named defendant Richard A. Griefen, the value of all amounting to $325, now on the Navy Yard in Kittery in said county, and within five days of said attachment, to wit, on the 27th day of Feb. 1903, I filed in the office of the town of Kittery an attested copy of so much of my return on this writ as relates to the above named attachment with the value of the defendant's property which I am commanded to attach, the names of the parties, the date of the writ and the court to which the same is returnable.

J. T. LEWIS, Deputy Sheriff."

"York ss. On this 14th day of April, 1903, I made service on the within named defendant by giving in hand to Charles A. Noble, Richard A. Griefen's agent, a summons for his appearance at court.

J. T. LEWIS, Deputy Sheriff."

No other service was made on the defendant. It is not denied that the goods attached were the property of the defendant. The writ was returned to and entered in court, and counsel for defendant, appearing specially for that purpose, moved the court to dismiss the action for want of jurisdiction. The court overruled the motion and defendant's counsel excepted.

"In all actions commenced in any court proper to try them jurisdiction shall be sustained if goods, estate, effects or credits of any defendant are found within the state and attached on the original writ; and service shall be made as provided in section twenty-one." R. S. 1903, ch. 83, sec. 12. The officer having the writ for service returned that he had found goods of the defendant within the State, viz: a lot of timber, a lot of brick and a lot of tools on the Navy Yard in Kittery, and that he had attached them on the writ. This return must be taken as true in this action for the determination of the question raised, leaving the parties to their right of action against the sheriff if the return be untrue. *Craig* v. *Fessenden*, 21 Maine, 34.

The defendant insists, however, that the return is not sufficiently definite as to the description, quantity and location of the goods to constitute a valid attachment, and hence that according to the return itself the goods were not attached. Although the return is not so definite and explicit in these respects as may seem desirable, and might not be sufficient to protect the officer in proceedings against him, we think it sufficiently shows that goods of the defendant were actually attached on the writ in this State. That is enough for jurisdictional purposes at least. If more definiteness and detail are wanted for other purposes, the return is amendable to that extent. *Reed* v. *Howard*, 2 Met. 36; *Clement* v. *Little*, 42 N. H. 563.

The defendant again insists that, if ever made, the attachment was dissolved before entry of the action by errors of the officer in the return made by him to the town clerk, and that this dissolution of the attachment before entry deprived the court of jurisdiction. But the filing of a copy of the return in the statutory office is not a part of the process of attaching personal property, as it is in attaching real estate. Personal property can be attached and the attachment preserved without any such filing, and also if the copy filed be defective. The officer must take actual possession of personal property as he did in this case, and the statutory provision for his filing a copy of his return in the town clerk's office is for his relief as to keeping possession once taken, substituting public notice of the attachment in certain cases for visible retention of possession. His special property

in the goods attached still continues, with the right to resume actual possession at any time. *Wentworth* v. *Sawyer*, 76 Maine, 434. In this case the goods were attached when the officer took possession of them by virtue of the writ. The plaintiff thereby gained a lien on them and the court acquired jurisdiction over them. If the officer afterward lost possession of them, and thereby deprived the plaintiff of his lien, the plaintiff would have instead thereof a right of action against the officer. The question cannot be determined here since the officer is a party to it and is entitled to be heard upon it. He has made return upon the writ that he has attached thereon goods of the defendant found within the State. In this action it must be assumed that he still has them under attachment ready to respond to the judgment of the court. Hence this action must proceed to judgment if the statutory notice has been given. *Nelson* v. *Omaley*, 6 Maine, 218. If judgment be for the plaintiff and the goods are not forthcoming to be applied to the satisfaction of the judgment, the plaintiff will then have his action against the officer. If we dismiss this action without judgment on its merits, we deprive the plaintiff of all remedy against the officer, since a judgment in the plaintiff's favor in this action is a prerequisite to his maintenance of an action against the officer. Should he, in case of dismissal of this action because of attachment lost, bring an action against the officer, the latter would not be bound by that order of dismissal and might nevertheless successfully defend against that action. The result might be that the plaintiff would have a decision against him twice when he was certainly right once. Such a possible result demonstrates that this action should not be dismissed on that ground. Perhaps it should be noted that this case is distinguishable from those cases against non-resident defendants where the only attachment is by trustee process. In those cases the officer does not take possession of any goods, nor does he return that he has attached goods, but only that he summoned the alleged trustee. If it appears that the person so summoned had no goods, etc., of the defendant in his possession when summoned, then there was never anything attached, and never any foundation for jurisdiction.

The court having overruled the above motion to dismiss, the defendant's counsel declined to enter any general appearance or to file any other pleadings, and the court thereupon ordered a default to be entered, to which order the defendant excepted. Waiving all questions as to whether defendant can properly be heard on these exceptions, we proceed to inquire whether service of the writ has been made as required by the statute, § 21 of ch. 83, R. S., which was declared in § 12 above quoted from the same chapter to be sufficient for jurisdiction. We should make this inquiry even if only of our own motion, because if the statutory service of the writ has not been made and no appearance has been entered any entry of judgment on the default would be a nullity. *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456. Sec. 21 is as follows: "If any defendant is not an inhabitant of the State, the writ may be served on him by leaving a summons or copy as the case may be with his tenant, agent or attorney in the State." In this case the defendant was not an inhabitant of the State. The officer has made return that in York County he "made service on the defendant by giving in hand to Charles W. Noble, Richard A. Griefen's (the defendant) agent, a summons for his appearance at court." This seems to be a sufficient compliance with the statute, the writ being a writ of attachment requiring a separate summons. The return of the officer that Mr. Noble, with whom he left the summons, was the agent of the defendant is sufficient evidence of that fact, at least in the absence of any evidence or allegation to the contrary. *Bates* v. *Willard*, 10 Met. 62; *Craig* v. *Fessenden*, 21 Maine, 34.

It affirmatively appearing of record that goods of the defendant were found within this State and attached upon the original writ; that the defendant was not an inhabitant of this State and that service of the writ was made upon his agent in this State according to the statutory provisions; the court is authorized to take jurisdiction of the action, the subject matter being admittedly within its jurisdiction. The defendant not answering to the action, he was properly defaulted and judgment must go against him on his default.

The plaintiff not having asked for a special judgment against the property attached, the judgment will be general and in form against

the defendant personally. *Eastman* v. *Wadleigh*, 65 Maine, 251; *Parker* v. *Prescott*, 86 Maine, 241. Whether this judgment will be entitled to recognition beyond the boundaries of this State, or whether it will avail the plaintiff anything against the person of the defendant if found within this State, need not be considered here. Upon the record he is entitled to the judgment under our law whatever it may prove to be worth.

It was strenuously urged by the plaintiffs that the defendant should not be heard to question the court's jurisdiction because he had not taken the right course to raise that question, nor taken any course in reason, and also because he had waived it by an appearance in the action. When, however, it is at any time and in any manner in good faith represented to the court by a party or amicus curiae that the court is without jurisdiction of the action, the court will examine the grounds of its jurisdiction to see if any exist before proceeding further. *Cassity* v. *Cota*, 54 Maine, 380; *Powers* v. *Mitchell*, 75 Maine, 364. In this case we find sufficient grounds without considering the questions of procedure raised by the plaintiffs.

Exceptions overruled. Judgment on the default.

FRANK F. COOMBS et als. *vs.* JAMES H. HARFORD et als.

Cumberland. Opinion December 27, 1904.

Bond. Surety. Assignment. Voluntary Association. R. S. 1903, c. 84, § § 28, 146.

1. Where the by-laws of a lodge provided that the trustees before entering upon the duties of their office should give a joint or several bond to the lodge with three sureties to be approved by the lodge, the trustees might unite in a joint bond, or each trustee might give a several bond.
2. The acceptance of the bond by the lodge was a sufficient approval of it.
3. Though the by-laws required three sureties, yet a bond signed by the principal and two sureties only, is valid if accepted and approved by the lodge, and the two sureties cannot complain, if they signed without condition, or any understanding that a third surety was to sign.
4. A bond given to a lodge by one of its officers stands for the security of the lodge, whoever may be its members for the time being, and although the personnel of its membership may be constantly changing. Those who are members at any given time may enforce it.
5. The sureties on such a bond are not discharged by a change in the membership of the lodge, nor by the fact that increased duties and responsibilities are imposed upon the officer by increase in membership.
6. An officer's bond conditioned for the faithful performance by the principal of the duties of his office "during his continuance in, and so long as he shall hold said office by election, re-election or otherwise," and for his delivering up all funds in his possession "at the expiration of his said office, or whenever he may cease to hold the same" is a continuing bond, and is valid and enforceable according to its terms, though the lodge by-law provided for annual elections to the office in question.
7. Such bond, however, ceases to be in force if there is an interruption in the principal's holding the office.
8. It is not necessary to the validity of lodge proceedings that the record should show that a quorum was present. A quorum will be presumed to have been present, unless the contrary appears.
9. Regularity of procedure may properly be presumed as to details of lodge elections, if not shown to be otherwise.
10. The sureties on the several bond of one of the trustees may be holden for the personal default of their principal.
11. An assignment of a chose in action, made without consideration, and merely for the purpose of bringing suit for the benefit of the assignor, is

colorable only, and vests no title in the assignee. Such assignee cannot maintain suit thereon in his own name.

12. Lodges may maintain actions in the names of their trustees for the time being.

13. The sureties on a several continuing bond given by one of the lodge trustees, when the by-laws provided that the bonds of the trustees should be joint or several, are no longer holden after the lodge has changed its by-laws so as to require the trustees to give a joint and several bond. In giving and accepting the continuing bond, there was a neccessary implication that if the lodge should change the required form of bonds, so that a several bond would no longer be allowable, it would require the trustees next elected to conform to the new requirement.

14. In this case, the several bond given in 1889 ceased to be operative in 1893, when the lodge by-law was changed so as to require the trustees to give a joint and several bond; and the sureties, therefore, are not liable for a default which occurred in 1901.

On report. Judgment for defendants.

Action of debt on a bond given by the defendants to Elizabeth City Lodge, No. 114, Independent Order of Odd Fellows of Maine, located in South Portland, Cumberland County. In the court below, by consent of the parties, the evidence was reported to the Law Court to render such judgment as the rights of the parties require.

The case is sufficiently stated in the opinion.

W. R. Anthoine and Thomas L. Talbot, for plaintiffs.

F. H. Harford, E. E. Heckbert and A. F. Moulton, for defendants.

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

SAVAGE, J. Action of debt on bond. In December 1888, the defendant James H. Harford was elected one of the three trustees of Elizabeth City Lodge of the Independent Order of Odd Fellows for one year. The by-laws of the lodge at that time provided that the trustees should be elected annually and should have charge of all the stocks, securities, investments, properties and permanent funds of the lodge, and required that they should previous to entering upon the duties of their office give a joint or several bond to the lodge with three sureties to be approved by the lodge, for the faithful perform-

ance of their duties. As we construe this requirement, the trustees might unite in a joint bond, or each might give a several bond. Such was the construction placed upon the by-law by the lodge itself, and it seems clearly permissible. January 1, 1889, James H. Harford, with the other two defendants as sureties, executed the bond in suit, which was his several bond, and which was security for his personal default. The evidence satisfies us that the bond was delivered to and accepted by the lodge, but there is no evidence of a formal approval of the sureties by the lodge. The bond was conditioned for the faithful performance by the principal of the duties of his office "during his continuance in, and so long as he shall hold said office by election, re-election, or otherwise," and for his delivery to his successor in office, or to any person appointed by the lodge to receipt them, of all funds, securities and other property in his possession or under his control," at the expiration of his said office, or whenever he may cease to hold the same. The plaintiff claims that Harford continued in office by re-election or otherwise until the end of the year 1901, but there is no evidence that he gave any other bond. During the year 1901 he embezzled $578 of the funds of the lodge under his control. Subsequently by authority of a vote of the lodge, all the right, title and interest of the lodge in the bond was assigned to the plaintiffs, who were at that time, respectively, a member of the finance committee, one of the trustees, and the treasurer of the lodge. The assignment was without consideration, and was made solely for the purpose of enabling the assignees to bring suit on the bond in their own names for the benefit of the lodge. The reason for this lay in the fact that the lodge was an unincorporated association, of which the defendant Harford, and at least one of the sureties were members, and no action at law on the bond in the names of the members would lie because these defendants would be both plaintiffs and defendants.

1. Among the minor defenses set up are these. The defendants object that the bond had only two sureties, instead of three as required by the by-laws, and that there is no evidence of its formal approval by the lodge. We do not think either of these objections can avail. It does not appear that either of the sureties signed the bond on any

condition, or with any understanding that another surety was to sign. The bond was for the protection of the lodge. It might have required a bond with three sureties, but the fact that it accepted the bond with two sureties shows that it was satisfied with it, and if the lodge was satisfied it does not lie in the mouths of the sureties to complain. So, the acceptance of the bond was a sufficient approval of it.

2. Again, the defendants say that since the bond was given the membership of the lodge has not only changed, but has increased, that the persons composing the lodge to whom the bond was given are not the same persons composing the lodge for whose benefit this suit is brought, and that by the increase of membership increased duties and responsibilities were placed upon the trustees, and that by reason of both these facts, the sureties have been released from liability. As to these objections it is sufficient to say that the very nature of an unincorporated association like a lodge of Odd Fellows pre-supposes a change from time to time, and a hoped for growth, in its membership. All that must have been in contemplation at the time the bond was given. It must have been contemplated that members would die, or otherwise cease to be members, and that new members would be admitted. The bond was given for the security of the lodge, whoever might be its members for the time being, and although the personnel of the membership might be constantly changing. If a member dies, his interest lapses. So, if he goes out of the lodge in any other way. New members coming in thereby obtain the same rights as the original members. The association, protected by the bond, remains a unit and unchanged, and those who are its members at any given time may enforce it.

3. The defendants further object that the bond was security for only one year, because the election in consequence of which it was given was for one year only. The constitution of the lodge requires annual elections. But by the terms of the bond itself, it was to be in force so long as Harford held the office, whether by re-election, or otherwise. Such a continuing bond is valid according to its terms. *Amherst Bank* v. *Root*, 2 Met. 522; *Middlesex Co.* v. *Lawrence*, 1 Allen 339; *Railroad Co.* v. *Elwell*, 8 Allen 371. The obligors remain bound because as was intimated by Chief Justice Shaw in

Chelmsford Co. v. *Demarest*, 7 Gray, 1, they had anticipated future elections, and provisionally bound themselves accordingly.

4. But the defendants contend that, in any event, the bond would be good only until there was an interruption in Harford's holding the office, and such is conceded to be the law. It is claimed that an interruption must be held to have occurred for the year 1897, because the records fail to show that a quorum was present at the election, and because they do show that Harford did not receive a majority of the votes, for the year 1893, because the records fail to show that there was a balloting, and for the year 1894, because there is no record, or other proof, that Harford was elected for that year. As to 1897, it was not necessary that the record should show the presence of a quorum. A quorum will be presumed to have been present, unless the contrary appears. *Citizens' Mut. Fire Ins. Co.* v. *Shortwell*, 8 Allen, 217. The claim that Harford did not receive a majority of the ballots is based upon a misapprehension. Three trustees were balloted for, it seems, at once. The total number of ballots for all was 39. Harford had 13, Skinner 11, Spear 12, and Willard 3, making the total 39. Harford, Skinner and Spear were properly declared elected. As to 1893, the record simply says that Harford and two others were declared elected. The details of the election are not given. We think this is sufficient. Regularity of procedure may properly be presumed. The doctrine of omnia rite acta presumuntur applies with particular force to the proceedings of such bodies as this. *Sargent* v. *Webster*, 13 Met. 504. The same observation applies to the election of 1889, when the secretary was directed to cast the vote of the lodge for Harford, and the record does not show that there were no others in nomination. As to 1894, the difficulty is more serious. There is no record presented of any election whatever for that year, and our attention has been called to no law of the society, whereby an officer holds over until his successor is elected and qualified. But as the failure of proof is probably due to inadvertence, which might be corrected, by discharging the report, we prefer to rest our decision upon other grounds.

5. Another defense is that the sureties upon the individual bond of the trustee are not liable for a default occurring during a term of a

later and different board of trustees. It is said that legally speaking the lodge entrusted its funds to a board of trustees, and not to one of them, and further that the funds were intact at the beginning of the year 1901. It is accordingly argued that the entire board for 1901 are to be held responsible, and not the sureties of any one of them under an earlier bond. We do not think so. Notwithstanding the trustees were a board, and were to hold custody of the property as a board, it could not have been contemplated that the physical custody of the bonds and books and other property would always be in all three, at the same time. Such a thing would be impossible. Any trustee might for the time being have the sole physical custody of the property—and so any trustee might personally default. Harford defaulted personally. His co-trustees may have been negligent in the management of the funds, and so, at fault themselves, but that does not excuse Harford, or relieve the sureties who covenanted for his faithful performance of his duties.

6. It is insisted that these plaintiffs have no standing in court as assignees, and that therefore this action cannot be maintained. This objection must be sustained. The assignment was without consideration. It was given merely for the purpose of bringing suit for the benefit of the assignor. It was colorable, and not real. It was given to certain officers of the lodge. They are spoken of by one witness as a "committee" and we think that term fairly designated their relation to the lodge. They were the servants and agents of the lodge. Except as members of the lodge they had no interest in the claim. If they could be said to be trustees for the lodge, still the lodge had the entire beneficial interest. And such was the relation of the lodge to them and to the claim, that we think it could at any time have revoked and cancelled the assignment. The case is not like that of *Reed* v. *Nevins*, 38 Maine, 193, cited by the plaintiffs, in which the assignment recited a consideration and there was no proof to the contrary. The court treated it as an assignment for a consideration, and hence not revocable against the will of the assignee.

We are aware that some courts have held that it does not concern the defendant, and hence is immaterial, whether the assignment is

real or colorable, in that he loses no right to make a defense, and is protected by payment to the assignee. But the rule has been settled otherwise in this state. In *Waterman* v. *Merrow*, 94 Maine, 237, an assignment of an account without consideration, and made for the sole purpose of collecting it by suit in the name of the plaintiff, was under consideration. The court held that "such an assignment must be deemed colorable only and inoperative to transfer to the plaintiff the property in the account and the right to maintain an action on it in his own name." Upon further consideration we are satisfied with this rule. It is not a question as to whether a defendant has any interest in the reality of the assignment, but it is a question of statutory construction,—of legislative intent. At common law of course, the assignee of a chose in action, not negotiable, could not maintain an action in his own name. He must sue in the name of the assignor. But by statute in this state, R. S. ch. 84, sect. 146, such assignees may sue in their own names. We think this statute was intended to give the real owner of a chose in action the right to meet his adversary face to face upon the record, to enable the real party in fact to be such in the action, and in such case to relieve the assignor from any danger of liability for costs. We think it was not intended to give the real owner a right to sue in the name of someone else. In the sense in which we use the term here, the real owner need not be the sole beneficial owner. He may be the owner of part interest only and trustee for the balance, or he may be trustee for the whole. These considerations affect only the parties to the assignment. They arise in multitudinous forms in business transactions. They do not concern the debtor. But we use the term real owner as contra distinguished from colorable assignee, one who is made assignee solely for the purpose of bringing suit in his own name. The statute furnished a remedy for a real difficulty, and we do not think we are warranted in extending its provisions to such an assignee or to assignments which are fictitious or merely colorable. Hence we conclude that these plaintiffs cannot prevail, in this suit. The case of *Norris* v. *Hall*, 18 Maine, 332, cited by the plaintiffs is not in point, as in that case the action by an assignee in his own name, was based upon an express promise by the debtor to pay the

assignee, and it was held further that if proof of the consideration of the assignment was necessary, the deed reciting a consideration was sufficient, there being no proof to the contrary. The difficulty, or inconvenience, which this lodge would have had at common law in enforcing this bond by proceedings in court has been remedied by another statute, R. S., ch. 84, § 28, by the provisions of which it might have sued in the name of its trustees for the time being. It will be understood of course that indorsees of negotiable paper stand upon a different footing from assignees of other choses in action.

7. The case comes up on report, and as the ultimate question of liability will probably arise hereafter in a suit by the lodge in the name of its trustees, we think it advisable to consider whether the defendants are liable to the lodge upon this bond.

In 1893 the lodge amended its by-laws so as to require the trustees to give a joint and several bond instead of joint or several bonds as the by-laws before that time had provided. After the adoption of the amended by-law it was the duty of Harford and his co-trustees to unite in giving one bond, a joint and several bond. Before that time each trustee might give a several bond, subject to the approval of the lodge. We think that upon the adoption of the amended by-law, it became the duty of the lodge, as to these defendants, whose several bond it then held, to enforce the by-law and to require a new bond of the trustees. These defendants had tendered the old bond. It had been accepted. It had only two sureties, instead of three, but the defendants could not complain of that, and the lodge did not. It was a continuing bond, but there was the necessary implication, we think, that it was to continue in force only so long, in any event, as the lodge by-laws permitted the bonds to be joint or several. It must have been implied that if the lodge should change the required form of bonds, as it did, and should no longer permit each trustee to give a several bond, it would require the trustees next elected to conform to the new requirement. If that be so it seems to follow necessarily that it was also implied that in such case the obligors on the old bond should be no longer holden. Upon that implication, the old bond ceased to be operative after 1893, the year in which the amendment was made.

Judgment for the defendants.

WILLIAM CARRIGAN, Admr. *vs.* CLEVELAND S. STILLWELL.

Penobscot. Opinion January 3, 1905.

Death by Injury. Negligence. Fire Escapes. Statutes. Legislative Intention. Construction. Stat. 1881, c. 50; 1883, c. 121; 1891, c. 89, c. 124; R. S. 1903, c. 28, § 38, c. 89, §§ 9, 10.

To ascertain the true intention of the legislature in the enactment of a statute, it frequently becomes necessary to go much further than to ascertain the literal meaning of the language used. As has been frequently said by courts, a thing within the intention is as much within the statute as if it were within the letter, and a thing within the letter is not within the statute, if contrary to the intention of it.

By R. S. c. 28, sec. 38, "every building in which any trade, manufacture or business is carried on requiring the presence of workmen above the first floor," "is required to be provided at all times with suitable and sufficient fire escapes." *Held:* that although the literal meaning of the word "workmen" includes anyone who does manual labor, the word could not have been used by the legislature in this general sense, since a literal construction of the word would make the statute applicable to a great majority of the business buildings in any community, some business, requiring the presence of at least a few persons performing manual labor above the first floor, being carried on in the great majority of such buildings. And further, that the statute should be so construed as to make it applicable to a building in which any trade, manufacture or business is carried on requiring the presence of workmen in such a number, above the first floor, that because of their number, escape would be rendered difficult in the case of fire or of a panic caused by the alarm of fire.

Held: also, that this statute is not applicable to a building used as a restaurant on the first floor with a kitchen connected therewith on the third floor, the business requiring the presence in the kitchen on the third floor of only three persons, two cooks, and an assistant. There being no suggestion of any fault upon the part of the defendant, the owner of the building, other than the failure to provide fire escapes, and no claim that he would be liable for his failure in this respect, except for the statute referred to, it follows, that a verdict for the plaintiff was erroneous.

See *Same* v. *Same*, 97 Maine, 247.

Motion and exceptions by defendant. Motion sustained.

Statutory action by the administrator of the estate of Mary F. Carrigan, his intestate, to recover damages for the death of the said

Mary F. Carrigan, who was burned to death in a fire which destroyed a certain three story building, in Bangor, owned by the defendant, and in which said building the said deceased was employed at the time of her death. The plaintiff alleged that under the statute—now § 38 of chapter 28, R. S. 1903—it was the duty of the defendant to have provided said building with suitable and sufficient fire escapes, outside stairs or ladders, but had neglected and failed so to do. At the trial, the defendant requested certain instructions to be given to the jury, but the presiding justice declined to give the instructions asked for, and the defendant took exceptions. The verdict was for the plaintiff, and thereupon the defendant filed a general motion for a new trial. The motion only was considered by the Law Court.

The case fully appears in the opinion.

B. J. Dunn, Matthew McCarthy, Forrest J. Martin and H. M. Cook, for plaintiff.

C. H. Bartlett and C. F. Woodard, for defendant.

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

WISWELL, C. J. This case has before been to the law court, 97 Maine, 247; at that time upon the defendant's demurrer to the plaintiff's declaration, and the questions then presented and considered were as to the sufficiency of the allegations contained in the declaration. At that time the declaration was held sufficient and the case was sent back for trial. Now, after a trial resulting in a verdict for the plaintiff, the case again comes to the court, the question now presented being, whether the evidence of the plaintiff is sufficient to authorize the maintenance of the action, and to warrant the verdict for the plaintiff. Although the defendant has exceptions, as well as a motion, the case can be better considered upon the motion for a new trial.

On Oct. 16, 1901, the defendant was the owner of a four story business building in the city of Bangor; the first and third floors of this building were in the possession of a tenant who occupied the first floor as a public restaurant, and the third floor for a kitchen in

connection with the restaurant. There were three persons employed in the restaurant whose duties were generally performed in the kitchen on the third floor, the plaintiff's intestate, called "an order cook," a man cook, and another woman who rendered general assistance in washing dishes and in doing other work. The plaintiff's intestate also assisted in the general cooking, sometimes did ironing and other work about the building.

On that day at about the middle of the afternoon, an explosion of gasoline occurred in a room upon the second floor, not occupied as a part of the restaurant, and immediately after, the building took fire and became enveloped in flames and smoke. The plaintiff's intestate, at that time, was ironing at a table in the kitchen, and there were also present the two other employees, the man cook and the woman assistant. After the fire was extinguished, the plaintiff's intestate was found dead in the kitchen, near the place where she had been at work, and where she was last seen alive, her body being severely burned. This building was not provided with fire escapes, as, it is claimed by the plaintiff, it should have been under R. S., c. 28, sec. 38, the section in the present revision of the statutes being the same as it was at the time of the fire. There is no suggestion of any other fault upon the part of the defendant, the owner of the building, and no claim that he would be liable for his alleged failure in this respect, except for the statute referred to.

Under these circumstances, this action was brought by the personal representative of the deceased to recover, for the benefit of the beneficiaries named in the statute, the damages for the pecuniary injuries resulting to them from the death of the intestate, under the Act of 1891, now R. S., c. 89, sections 9 and 10. The defendant raises numerous objections to the sufficiency of the evidence introduced, in many respects, but, in view of our conclusion, it is only necessary to consider the one that goes to the maintenance of the action, viz: That the use of the building at the time of the death of the plaintiff's intestate was not such as to bring it within the application of the statute referred to. That statute is as follows, so far as applicable to the question involved: "Every public house where guests are lodged, and every building in which any trade,

manufacture or business is carried on requiring the presence of workmen above the first story, ... shall at all times be provided with suitable and sufficient fire escapes, outside stairs or ladders from each story or gallery above the level of the ground, easily accessible to all inmates in case of fire or of an alarm of fire." The contention of the defense being, that this building was not used for the purposes of any trade, manufacture or business, "requiring the presence of workmen above the first story," within the meaning of the statute just quoted.

To ascertain the true intention of the legislature in the enactment of any statute, it frequently becomes necessary to go much further than to merely ascertain the literal meaning of the language used. "A thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within the letter. The intention of the law maker is the law." *Smythe* v. *Fiske*, 23 Wall. 374. "It has been repeatedly asserted in both ancient and modern cases, that judges may in some cases decide upon a statute in direct contravention of its terms; that they may depart from the letter in order to reach the spirit and intent of the act. Frequently, it has been judicially said, that 'a thing within the intention is as much within the statute, as if it were within the letter, and a thing within the letter is not within the statute, if contrary to the intention of it'." Peters, C. J., in *Holmes* v. *Paris*, 75 Maine, 559. "The results of any particular construction are to be anticipated, and if such results will be anomalous, unjust or inconvenient, it is a legitimate and strong argument against the construction contended for. It will be presumed the legislature did not intend any such results. The language of a statute would need to be very strong and clear to cause the belief that such was the intent. The real meaning of the statute is to be ascertained and declared even though it seems to conflict with the words of the statute. Emery, J., in *Landers* v. *Smith*, 78 Maine, 212." All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence." *United States* v. *Kirby*, 7 Wall. 482.

Applying this familiar principle, so well illustrated by the few

preceding quotations, we come to the question of the construction of this particular statute, for the purpose of ascertaining the true intent and meaning of the legislature in its enactment. The words of the statute, "in which any trade, manufacture or business is carried on," are apparently as broad and inclusive as could have been adopted. They mean more than the language of some similar statutes in other states, "workshops or factories," and, so far as this portion of the statute is concerned, must include any business of any nature, but, of course, the other element, made necessary by the statute must exist, that is, it must be a business requiring the presence of workmen above the first floor. Apparently it did require the presence in the kitchen on the third floor of two cooks and a woman who did general work in washing dishes, and who rendered general assistance in other ways. So that the question is, are employees who are doing work of this nature and of this number, "workmen" within the meaning of the statute?

If the statute could be so construed as to apply to buildings used as this was, it would lead to anomalous and almost absurd consequences. If these employees, to the number of three only, doing this kind of work, are workmen within the meaning of the statute, we do not see why two or three barbers in a barber shop, or an equal number of typewriters in a lawyer's office, or dentists in a dentist's office, in any building above the first floor, or why even the same number of sewing women in a dressmaker's room on the second floor of a story and a half house in a country village, would not equally come within the meaning of this word in the statute. We think that it could not have been the intention of the legislature to have required fire escapes upon all buildings in which any of these various trades or occupations are carried on, irrespective of other qualification. If such is the true construction, it would include almost every building of every kind in any city, town or village, except private residences, because in a vast majority of business buildings, some trade, manufacture or business is carried on above the first floor requiring the presence of at least a few persons doing work of some nature. So that, although the literal and general meaning of the word "workmen" includes any one who does manual

work, we do not think that the word was used in the statute in this general sense, and that, while it does mean something more than the word "operatives", it was not intended to apply to a building used as this was where a very limited number only of persons were required to be engaged in work above the first floor.

In its most literal sense, even, the word used in the statute means more than one workman, and there can be no reason why the legislature should have intended to require this safeguard for two persons and not for one. We think, that the statute should be so construed as to be applicable to a building in which any trade, manufacture or business is carried on requiring the presence of employees in such a number, that, because of their number, escape would be rendered difficult in the case of fire or of a panic caused by the alarm of fire. The same section provides that the fire escapes shall be easily accessible in the case of fire or of an alarm of fire. While the absence of a fire escape might be the cause of the death of a person where only one person was engaged in work in the upper story of a building, in case of a fire, it would be quite as apt to be so in the case of a person on one of the upper floors of a private residence. But it does not seem to have been the purpose of the legislature to require this safeguard against danger in all cases, but only in those that were particularly dangerous by reason of the number of persons necessarily at work in the upper story of the building.

We appreciate that this construction may be subject to the criticism that it is indefinite, but it is a question as to which it is impossible to lay down in advance a general rule which will be applicable to all cases. The circumstances of a great majority of cases will, perhaps, clearly place them upon one side or the other of the line, while some may be so close as to make it exceedingly difficult to determine upon which side they fall. The question must be determined in each case as it arises. We can only say that in this case, in our opinion, the use of the building was not such as to bring it within the statute.

Our views are strengthened by the history of this legislation: The first act of the legislature requiring fire escapes upon private buildings used for certain purposes was Chap. 50 of the Public Laws of 1881, the language of that act, so far as applicable to buildings of

this character, was, "and all shops, mills, factories and other buildings, more than two stories in height, in which any trade, manufacture or business is carried on which requires the presence of workmen *or other persons*, in any part of the building above the first story," etc. In Public Laws of 1883, Chap. 121, the statute was somewhat modified, but not at all so far as it related to buildings of this character, the words "or other persons" being retained. In the Revision of 1883, these words were still retained, but in 1891, Public Laws, Chap. 89, this section was again modified, and, although changed in no other respect as to such buildings, the words "and other persons" were omitted.

We regard this amendment as of considerable significance. Before, fire-escapes were required upon all buildings used for the purposes of trade, manufacture or business, which required the presence of workmen above the first floor, or which required the presence of persons other than workmen. As the statute then existed, it was as broad and inclusive as it could well be made, except that it was only applicable where the presence of workmen or others, was required by the business carried on. The statute as it existed prior to the amendment of 1891, would have been applicable to this building, since the plaintiff's intestate, although not included within the meaning of the word "workmen" as used in the statute, was a person whose duty required her presence in the kitchen on the third floor; and we are unable to see why the statute prior to that amendment would not have been applicable to the numerous cases suggested as illustrative of the consequences that would follow from a literal construction of the statute. Perhaps this very result may have been the reason why, in modifying the statute, the legislature left out these words. At any rate, the omission is of such significance, as we have already said as to strengthen us in our belief as to the true construction of the statute as it exists at the present time, and as it did at the time of the death of the plaintiff's intestate.

We are therefore, of the opinion that the action is not maintainable, and that the verdict, as a matter of law, was clearly wrong.

Motion sustained.

STATE OF MAINE *vs.* FRANK W. SANDFORD.

Franklin. Opinion January 3, 1905.

Manslaughter. Evidence. Basis of Verdict. Instructions. Belief of Jury.

The respondent was tried and convicted upon an indictment charging him with manslaughter in causing the death of one Leander Bartlett, a young man of about fifteen years of age.

The contention of the government was that Bartlett, as a member of a community or religious sect at Shiloh in the town of Durham, was under the control and dominion of the respondent; that the situation was such that the respondent owed him the duty of supplying him with proper and sufficient food, and with proper medical attendance and medical remedies when sick; that Bartlett became seriously sick with diptheria and was in great need of medical attendance and medicine, but that the respondent, although having full knowledge of the facts wilfully neglected to provide, or to allow others to provide for him medical attendance or medical remedies of any kind, and thereby caused or accelerated his death. It was also contended by the state that Bartlett, while in the condition of extreme exhaustion by reason of his sickness, was obliged to submit to an absolute fast for a long period of time before his death, by reason of the general or specific directions of the respondent.

As to the contention of the state that the respondent failed to perform a known duty owed by him to Bartlett, by not providing medical attendance and medical remedies for the latter in the serious condition in which he then was, there was no dispute whatever as to the facts, the respondent relying, as an answer to this contention, upon an alleged conscientious disbelief in the efficacy of medical remedies, and upon a belief that the proper treatment of the sick was by prayer. In relation to this position of the defense the following instruction was requested by the respondent "Failure to provide medical aid or the attendance of a physician, with resulting death, in the absence of a statute requiring medical aid or the attendance of a physician, if the action is under the bona fide belief that medical aid is not required, and that the proper method of healing is by prayer, is not manslaughter." The court had already given this instruction in substance, but had added the following qualifications: "That is, it must be a conscientious disbelief in medicine, a bona fide disbelief, a real disbelief. And if a person having that disbelief in medicine had some other belief or some other practice, or some other way to help cure the sick which he honestly believed, it would then be his duty to apply that other

method, and so, if he believed in the prayer of faith, he ought to apply that. But if he failed to use the prayer of faith, unless you believe that the lack of it hastened the death, or caused the death of the patient, the omission to use the prayer of faith would not be criminal negligence, because it did not produce any results. On the other hand, if you believe that the omission to use the prayer of faith did hasten the death of Leander Bartlett, and if that was the honest belief of the defendant and he failed, knowing the circumstances, knowing his duty, why it would constitute a basis for manslaughter, would be evidence of negligence." When the requested instruction was presented to the presiding justice, he remarked: "I have already given instructions, with some qualifications which I think must stand." These qualifications, therefore, must be considered as subject to the respondent's exception to the refusal to give the instruction without qualification.

Held: that the instructions given as qualifications to the instructions requested by the respondent, were erroneous. That under these instructions the conviction or acquittal of the respondent would depend, not upon the jury's finding as to the truth of some controverted fact about which there was evidence for and against, not as to the truth of some scientific theory, as to which those specially qualified by study and experience had testified, questions which of course must be submitted to the determination of the jury, but upon the belief of the individual members of the jury upon the question of the efficacy of prayer as a means of cure for the sick. Tried before one jury, a respondent would be convicted, while before another, he would be acquitted, upon precisely the same state of facts, the result depending entirely upon whether the jury, before which a respondent happened to be tried, entertained one belief or the other upon this question concerning which the testimony of no witness can be offered and the determination of which is outside of the domain of the law.

The guilt or innocence of any person accused of crime, whatever his belief may be in this respect, and the result of a criminal trial, should not depend upon the beliefs of the members of a jury on the question of the efficacy of prayer as a means of cure for the sick, or upon their religious belief in any other respect. A contrary doctrine would be in direct opposition to our theory that this is a government of laws and not of men. Questions of fact, and even questions as to the truth of scientific theories must be submitted to the determination of juries, but questions as to the nature of one's legal duties, and the extent of his legal responsibilities, both civil and criminal, must be governed by general rules of law which will apply to all alike, and which will control the action of juries, so that one result only can follow from their findings of fact upon the issues of fact involved.

On exceptions by defendant. Sustained.

Indictment for manslaughter wherein the defendant was charged with causing the death of one Leander Bartlett, who died of diptheria

at the community known as Shiloh, located at Durham, in the County of Androscoggin, on the twenty-fifth day of January, 1903.

The jury rendered a verdict of guilty.

The case is sufficiently stated in the opinion.

W. B. Skelton, County Attorney, for the state.

H. E. Coolidge and H. W. Oakes, for defendant.

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

WISWELL, C. J. The respondent was tried and convicted upon an indictment charging him with manslaughter in causing the death of one Leander Bartlett, a young man of about 15 years of age, on January 25, 1903. To understand the bearing of the questions raised by the exceptions upon which the case comes to the law court, it is necessary to state, to some extent, the contentions of the State and of the defense as shown by the indictment and the evidence, a full report of which accompanies the case and is made a part of the exceptions.

The indictment charges with great particularity the manner in which it was claimed the death of Bartlett was caused by the respondent. It is therein alleged that in January, 1903, and for a long time before, there was within the town of Durham in Androscoggin County, a community or association or aggregation of men, women and children, or, as it is called by counsel for the respondent, "a religious sect," under the control, government, supervision, management and dominion," of the respondent; that at the time of his death Leander Bartlett was one of the members of this association, and as one of such members was under the control, supervision and dominion of the respondent; that it was the duty of the respondent to provide for the inmates and members of such association, including Bartlett, "reasonable, sufficient and proper food, clothing, shelter, medicines and medical supplies and attendance in sickness and in health, according to the needs of each of them;" and that it was "the duty of said Frank W. Sandford to refrain from doing, and to prevent the doing of, any act that should detract from, interfere with, or

imperil the comfort, health, and welfare of any inmate or member thereof;" that these duties the respondent owed to the deceased as one of the inmates or members of such association; that the deceased, during the time mentioned in the indictment was sick and in great need of medicine and of medical attendance, and that his condition was well known to the respondent; "that the said Frank W. Sandford, well knowing the premises, did then and during all of said time last mentioned there wilfully, knowingly and feloniously fail, neglect and refuse to furnish, or cause to be furnished, unto said Leander Bartlett, alias Leander A. Bartlett, reasonable, sufficient and proper food, clothing, shelter, medicines, medical supplies and attendance, and did then and during all of said time last mentioned there wilfully, knowingly, and feloniously fail, neglect and refuse to do, or cause to be done, any acts or things conducive to the health, comfort, and welfare of said Leander Bartlett, alias Leander A. Bartlett, that on the contrary the said Frank W. Sandford did then, and during all of said time last mentioned there, wilfully, knowingly and feloniously, cause the said Leander Bartlett, alias Leander A. Bartlett, to be deprived of, and kept without, all reasonable, sufficient and proper food, clothing, shelter, medicines, medical supplies and attendance," etc., whereby, it is alleged in the indictment, that the respondent, "him, the said Leander Bartlett, alias Leander A. Bartlett, in manner and form aforesaid feloniously did kill and slay," etc.

As to existence of this community at Shiloh, so called, in the town of Durham, and that Bartlett, at the time of his sickness and death, was a member thereof, there was no controversy at the trial. Neither was it disputed that the community was under the leadership of the respondent, but there was considerable controversy as to the nature and extent of his control and authority over its individual members. It appears from the evidence that Bartlett was taken sick about two weeks prior to the time of his death on January 25; that he continued to grow worse from day to day until about a week before his death, when he was removed from the main building, where he had been living with his mother until that time, to the building used as a hospital, his mother going with him there, and continuing to have, as before, his immediate care, with the assistance of others; he continued

to grow worse until on the Friday before his death, which occurred early Sunday morning, he was found to have diptheria in an advanced state, and on Sunday morning died. During all of this time no physician was called to see him, and even after the very serious nature and state of his disease was discovered, no physician was called and no medicines or medical remedies whatever were prescribed or used, but he was allowed to remain in this condition without medicine, medical care or attendance until he died. There was a woman in the institution who had, according to her testimony, formerly been a physician belonging to the school of osteopathy. She had the general superintendence of all of the sick in this institution, and was the one who made the diagnosis of diptheria in Bartlett's case, on Friday. But whatever medical skill or knowledge she may have possessed, was not exerted in relieving Bartlett's condition; it being the belief of the community, as shown by the evidence upon both sides, that the proper treatment of the sick was not by the use of medical remedies, but by prayer for recovery, after a confession of sin.

Evidence upon the part of the state was introduced for the purpose of showing the extent of the control that the respondents possessed and exercised over all of the members of the association, the government claiming that his control over all of his affairs of the institution and over the conduct of all of the members, in all respects and as to all details, was absolute. And the claim of the government was and is that having such absolute control, the respondent caused or accelerated the death of Bartlett by a failure to perform a known duty in two particulars, one, by the failure to provide medical attendance and the neglect to use certain specific and well recognized remedies for the disease with which Bartlett was suffering, and the other because of the neglect to provide suitable, or any, food for the deceased from some time on Friday before his death until the time of his death on Sunday morning. As to the last particular, it was contended by the government that on that Friday a general and absolute fast was ordered by or with the knowledge of the respondent, which was made applicable to every person in the community, old and young, sick and well, that this fast was applicable to the deceased, in his precarious condition, so that he did not have any food of any

kind during this period, and that those who had the immediate charge and care of the deceased were prohibited, either by the general or specific orders of respondent, from supplying him with any food, although he was entirely conversant with the deceased's condition at that time.

In regard to the allegation and contention of the state that the respondent failed to perform a known duty in not providing medical attendance and remedies for the young man in his extremity, there was no dispute whatever as to the facts, the respondent relying as an answer to this contention upon his alleged belief, he did not himself testify, and that of all members of the community, that such treatment was not efficacious; but as to the existence of an absolute and general fast immediately prior to Bartlett's death, and as to the claim that Bartlett himself was not allowed to have any food during the period of time referred to, there was much controversy in the evidence.

With this general statement we will come to a consideration of the exceptions, which may be classified into three groups, the exclusion of certain evidence offered by the respondent; the admission, against objection, of certain evidence offered by the respondent; the admission, against objection, of certain testimony offered by the government; and the refusal to give certain requested instructions except as already given in the charge and subject to certain qualifications. As to the first exception; the government introduced the testimony of a number of witnesses who testified that Sandford, at a meeting in the chapel, attended by a large number of the members of the community, made statements to the effect that Bartlett was "in rebellion," and that he would be glad to see his dead body stretched out before him. It is said in the bill of exceptions: "In connection with the testimony regarding the statement of the defendant at the chapel, one Nellie Smith, a member of the school, was called by the defendant, and was interrogated as follows with respect to Mr. Sandford's statement in the chapel with reference to Bartlett:

Q. Do you know as a matter of fact, whether or not Mr. Sandford prayed for Mr. Bartlett's recovery from sickness?

A. I do not.

Q. Hear Mr. Sandford say anything about it—whether he did or didn't?"

This question was objected to and excluded, and it is now claimed that the question had reference to a further statement claimed to have been made by the respondent at the same time and as a part of the same remarks that were referred to by the witnesses called for the government. The statement quoted from the bill of exceptions substantiates to some extent this claim made by counsel for the respondent. It is of course true that if the presiding judge understood, or should have understood, that the question referred to the same occasion that the government witnesses had testified in relation to, the exclusion of this question was erroneous, because if the respondent, during his remarks upon that occasion and in connection with the previous statement which the witnesses testified to, had said that he had prayed for the recovery of Bartlett, it would have had some tendency to explain or modify this statement testified to by the government witnesses, or even to contradict their testimony in this respect, and it certainly would have a bearing as showing the respondent's motives and disposition towards Bartlett. Under these circumstances the question and answer would have been admissible under the general rule, that where a portion of a statement is testified to by one side, the other side is entitled to have the whole of the statement, upon that subject matter, admitted. But the question itself does not show that it had reference to this occasion, and an examination of the testimony, made a part of the bill of exceptions, shows, not only that there was nothing to give the presiding justice any intimation that the question referred to the occasion already testified to, but, also, that it did not refer to the particular occasion testified to by the government witnesses. When a report of the testimony is made a part of the bill of exceptions, it must control the allegations in the bill as to matters of fact, if there is any conflict between them. *Harmon* v. *Harmon*, 63 Maine, 437; *Tower* v. *Haslam*, 84 Maine, 86. As to what did occur, and as to what the respondent did say upon the particular occasion in the chapel, numerous witnesses called by the defense were allowed to testify without objection. The question excluded merely called for a self

serving statement, claimed to have been made by the accused, and was properly excluded.

As to the next class of exceptions; a witness called by the state was allowed to testify with considerable detail as to particular instances and cases which had a tendency to show the nature and extent of the authority that the respondent exercised over different members of the community, this evidence was admitted subject to the respondent's objections and exceptions. It must be remembered that it was not claimed by the state that the respondent had the immediate care of Bartlett during his last sickness, nor that it was his personal duty to attend to his wants, either as to medical remedies or to the supply of necessary and proper food. Bartlett was under the immediate care of his mother and of other members of the community whose duty it was to attend to the sick. But the contention of the government was that the respondent exercised such control over those who were in attendance upon and caring for Bartlett, and that he dominated their wills to such an extent, that his orders were carried out in the treatment of Bartlett by those who were subservient to his will, and whose conduct in this respect, as well as in all others, was subject to his control and authority, and that the neglect complained of in these respects, by those who were in attendance upon, and who did have the care of Bartlett, was the result of the respondent's general or specific directions. It was necessary for the government to prove its contention in this respect, and for this purpose, we think that it was entirely competent to introduce evidence of specific instances showing the manner and extent that authority was exercised by the respondent in these instances. This testimony was not in relation to other criminal acts, or criminal negligence of the respondent, introduced for the purpose of showing some probability of the respondent's guilt in this case, it was offered and admitted simply for the purpose of showing, so far as it had that effect, the nature and extent of the authority which the respondent possessed and exercised over the individual members of this community. It is urged that this testimony, in some instances, had a tendency to hold the defendant up to ridicule. But this is no objection to the admissibility of the testimony if it

were otherwise competent for the purpose for which it was admitted.

The other exceptions are to the refusal of the presiding justice to give certain requested instructions, only one of which, in our opinion, need be considered. The respondent requested this instruction: "Failure to provide medical aid or the attendance of a physician, with resulting death, in the absence of a statute requiring medical aid or the attendance of a physician, if the action is under the bona fide belief that medical aid is not required, and that the proper method of healing is by prayer, is not manslaughter." The court had already given this instruction in substance as follows: "When the death of a human being from disease is caused or hastened by reason of the omission to call in a physician, or to provide medicine, when such omission proceeds not from any criminal indifference to the needs of the person, but from a conscientious disbelief as to the efficacy of medicine or medical attendance, it is not criminal negligence, and does not constitute a basis for conviction for manslaughter." To which instruction the following qualifications were added. "That is, it must be conscientious disbelief in medicine—a bona fide disbelief —a real disbelief. And if a person having that disbelief in medicine had some other belief, or some other practice, or some other way to help cure the sick, which he honestly believed, it would then be his duty to apply that other method. And so, if he believed in the prayer of faith, he ought to apply that. But if he failed to use the prayer of faith, unless you believe that the lack of it hastened the death, or caused the death of the patient, the omission to use the prayer of faith would not be criminal negligence, because it did not produce any results. On the other hand, if you believe that the omission to use the prayer of faith did hasten the death of Leander Bartlett, and if that was the honest belief of the defendant and he failed, knowing the circumstances, knowing his duty, why it would constitute a basis for manslaughter, would be evidence of negligence."

When the requested instruction above quoted was presented to the presiding justice, he remarked: "I have already given instructions which cover that, with some qualifications which I think must stand." We think, therefore, that this qualification which we have quoted must be considered as subject to the respondent's exceptions. It is

undoubtedly true that the question whether or not the respondent resorted to the so called "prayer of faith" for the purpose of effecting the cure of Bartlett, was a proper one for the jury to consider in determining whether or not the failure to resort to medical remedies and to employ the assistance of a physician, was based upon the conscientious disbelief in the efficiency of such remedies. But this instruction, or qualification of the general rule given by the presiding justice, went much further than this. It was in effect, that if the respondent conscientiously believed in the efficacy of prayer for the cure of the sick, rather than in the use of medicine and in the employment of physicians, and failed to resort to this method of cure believed in by him, that this failure would constitute a basis for a conviction for manslaughter, provided the jury believed that it caused or hastened the death of Bartlett.

Thus, the conviction or acquittal of the respondent would depend not upon the jury's finding as to the truth of some controverted fact, about which there was evidence for and against, not even as to the truth of some scientific theory, as to which those specially qualified by study and experience had testified and given their opinion, questions which of course must be submitted to the determination of the jury, but upon the belief of the individual members of a jury upon the efficacy of prayer as a means of cure for the sick, a question about which there is undoubtedly a considerable difference of opinion. Tried before one jury, a respondent would be convicted, while before another, he would be acquitted, upon precisely the same state of facts and the same findings of facts, the result depending entirely upon whether the jury, before which a respondent happened to be tried, entertained one belief or the other upon this question concerning which the testimony of no witnesses can be offered, and the determination of which is outside of the domain of the law.

We do not think the guilt or innocence of any person accused of crime, whatever his belief may be in this respect, or that the result of a criminal trial should depend upon the beliefs of the members of a jury on the question of the efficacy of prayer as a means of cure for the sick, or upon their religious beliefs in any other respect. If a person charged with crime were to be convicted or acquitted

according to the belief of a jury upon such questions, it would be in direct opposition to our theory that our government is one of laws and not of men. Questions of fact, and even questions as to the truth of scientific theories must be submitted to the determination of juries, but questions as to the nature of one's legal duties, and the extent of his legal responsibilities, both civil and criminal, must be governed by general rules of law which will apply to all alike, and which, theoretically at least, will control the action of juries, so that one result only can follow from the findings of fact upon the issues of fact involved.

It may be true that where a person is charged with responsibility of the death of another, because of his failure and neglect to procure medical attendance, or to allow the use of medical remedies, and such person has a conscientious disbelief in the efficacy of such treatment and the use of such remedies, but does believe in the value of some other form of treatment, if any there be, which is recognized by some school of science as proper under the circumstances of the case, that it would be his duty to resort to this recognized form of treatment believed in by him, and that a failure to do so might be evidence of neglect upon his part sufficient to hold him criminally liable for the death of a person which resulted from such failure. But such a doctrine, it is plain, is entirely different from the one under consideration, and would not warrant giving to the jury the latitude that was given in this case.

A suggestion made by the court in *Reg* v. *Wagstaffe*, 10 Cox, C. C. 530, aptly illustrates our views in regard to the responsibility of a person who entertained a particular belief as to the proper method for the treatment of the sick. Suppose a person charged with a neglect of duty in the respect which we have been considering, believed conscientiously, that the only efficient remedy for a person afflicted with disease was to take the person to a particular shrine, could it be that a failure to do this would sustain a charge of manslaughter, even if the jury believed that this failure either caused or accelerated the death of the one diseased. But a person may as conscientiously believe in this remedy as in the efficacy of prayer for the sick, and while both beliefs may be equally entitled to respect, the

conviction of a person in any case should not depend upon whether the jury, before which he is tried, entertains the one belief or the other, or neither.

Although the case was tried with great care by the presiding justice, and although the instructions to the jury, in all other respects, were correct, in our opinion, and were especially clear and full, we feel that this qualification of the rule as given by the court, and as requested by the respondent, left an opportunity to the jury to convict the respondent upon their belief as to a matter which the court cannot determine and of which it cannot take cognizance, and that therefore the exceptions must be sustained.

Exceptions sustained.

In Equity.

PENOBSCOT LOG DRIVING COMPANY

vs.

WEST BRANCH DRIVING & RESERVOIR DAM COMPANY.

Penobscot. Opinion January 11, 1905.

Eminent Domain. Title and "Taking." Appraisal. Chap. 174, Private and Special Laws 1903, R. S. 1821, c. 45, § 3; P. L. 1824, c. 261.

The defendant's charter conferred upon it the right of eminent domain, and provided that, upon filing in the Registry of Deeds a written statement of its election to exercise the power so granted, all the property of the plaintiff at the date of the approval of the charter of certain enumerated kinds should be and become the property of the defendant, the value of the property so taken to be determined in case the parties did not agree by a commission of three persons to be appointed by this court on petition of either party or any person interested, and their report to be made to the court who might confirm, reject or recommit the report or submit the subject matter thereof to a new commission.

Held: It is not necessary to the validity of the taking that such written statement should contain any description of the property taken. The charter itself fixes the extent of the taking.

The language of the defendant's charter shows that it was the legislative intention to provide a method of procedure which would enable the plaintiff to obtain speedy compensation for the property taken from it, and a construction which admits of divided and protracted litigation is not to be favored.

The legislature having created one tribunal to settle issues of fact arising between the parties and having made no mention of any other, the appointment and action of the commission is not to be held in abeyance while the question of the plaintiff's title to certain property of the kinds enumerated is tried out at the bar of the court in this or any other proceeding.

The title and the taking are inseparable; and the power given and duty imposed upon the commission to determine the value of the property so taken, clothed it with authority, as a necessary part of that determination to decide what property was taken.

On exceptions by defendant. Overruled.

Petition by plaintiff company for the appointment of commissioners pursuant to provisions of chapter 174, Private & Special laws of 1903, to determine the value of certain property alleged to have been owned by said company, and to have been taken by the defendant company by virtue of the right of eminent domain conferred on said defendant company by said act.

The defendant company seasonably filed its answer to the petition and denied that it had taken certain of the property specifically enumerated as alleged by the petitioner in its petition, and also denied that certain of the property alleged to have been taken is or was ever the property of the petitioner; and that inasmuch as the commissioners under said act were not authorized to determine the title to said property in dispute and were not authorized to determine as to whether the same had or had not been taken by said defendant company under said act, but were only authorized to determine the value of such property belonging to said petitioner as had been taken by defendant company under the act, commissioners should not be appointed until the disputed questions of title and of the "taking" by the defendant company should first be legally determined, for which said reasons the defendant company moved that the prayer of the

petitioner asking for the appointment of commissioners be denied.

In the court below, the motion to dismiss was overruled, and commissioners were appointed, and to this ruling the defendant company took exceptions.

The case fully appears in the opinion.

P. H. Gillin and J. F. Gould, for plaintiff.

F. H. Appleton and Hugh R. Chaplin, for defendant.

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

POWERS, J. Exceptions by the defendant to the appointment of commissioners, under the defendant's charter, c. 174 of the Private and Special laws of 1903, by the justice hearing the case.

The provisions of that act so far as material to the question involved are these. The right of eminent domain is conferred upon the defendant to the extent that it may "take and hold all the dams, real estate, piers, booms, wing dams, side dams, and steamboats," except the dam at the outlet of Millinocket lake, owned by the plaintiff at the date of the approval of the act, March 23, 1903. The defendant may file in the registries of deeds in Penobscot and Piscataquis Counties a written statement of its determination to exercise said power of eminent domain "and thereupon said dams, real estate, etc., shall be and become the property" of the defendant together with certain powers, rights and privileges of the plaintiff which it is unnecessary to enumerate. The value of said dams, real estate, etc., "so taken shall be determined," in case the parties shall fail to agree, by a commission of three disinterested persons to be appointed as follows: "Either of said corporations or any person interested, may file in the Clerk's office of the Supreme Judicial Court in and for the County of Penobscot, either in term time or vacation, a petition to said court for the appointment of such commission, to consist of three disinterested persons, and upon such petition, said court after such notice as said court may deem proper, shall appoint such commission. Such commission shall as soon as may be, but after reasonable notice, hear the parties, their proofs and arguments and determine the value of

said dams, real estate, etc." The commission is to report to the court what in its judgment is a fair and just value of the dams, real estate, etc., which it is directed to appraise, and the court may confirm, reject or recommit the report or submit the subject matter thereof to a new commission. All proceedings of the court in reference to any matter raising a question of law shall be subject to exceptions.

On April 28, 1903, the defendant filed in the registry of deeds a written statement of its determination to exercise said power of eminent domain. This writing contained no description of the property taken. Neither was it necessary that it should describe it, because its charter gave the defendant no election as to what it would take. It could elect to take or not to take, but, if it took any, it must by the express terms of the act take all the property of the various kinds enumerated in the act, owned by the defendant on March 12, 1903. It is evident that no attempted description which fell short of the entire property so owned by the plaintiff could bind the plaintiff. No more specific notice of the property taken could be required by the plaintiff for its information or protection, as the plaintiff might well be presumed to know what property it owned. The act itself fixed the extent of the taking, and the defendant could take neither more nor less than all the property of the kinds named in the act owned by the plaintiff at the date of its approval.

Thereafter, the parties failing to agree upon the value of the property so taken, the plaintiff duly filed in court its petition for the appointment of a commission for that purpose, annexing thereto a schedule of the property which it claimed the defendant had taken. Plainly the plaintiff's enumeration of the property taken could not bind the defendant. It had a right to take all which the plaintiff owned at the date of the approval of the charter; it could be compelled to take no more. Accordingly, on the ground that they were not the plaintiff's property at the date of the approval of the charter, the defendant denied in its answer that it had taken certain items contained in the plaintiff's schedule, and claimed that it had taken one stone dam not therein named. Thereupon the justice hearing the cause appointed the commission against the defendant's objection, who claimed that the commission was only authorized to determine

the value of the property owned by the plaintiff and taken by the defendant, but had no power to pass upon questions involving the title of said property, or whether the same had or had not been taken by the defendant, and that its determination of those questions and all other questions of law that might arise relative to said subject matter was necessarily preliminary to an appraisal.

The legislature evidently intended that the plaintiff should have a speedy remedy to recover compensation for its property taken by the power of eminent domain. The property passed to the plaintiff by the recording, ipso facto, of its written statement of its determination. Either party or any person interested might file the petition asking for the appointment of a commission if the parties failed to agree as to the value of the property taken. After such notice as it deems proper, the court "shall appoint the commission" says the charter. The commission is to proceed "as soon as may be" to determine the value of the property taken. It is to be noted that every step, preliminary to the appointment of a commission, required by the express words of the charter has been taken. The legislature must have known that questions were likely to arise as to what property the plaintiff owned and consequently as to what the defendant had taken. When it declared that all the property of the plaintiff of certain descriptions should be taken by merely recording a statement of defendant's election to exercise the power of eminent domain, and so carefully created and minutely provided for the speedy appointment and prompt action of a tribunal to determine the value of the property so taken, did it intend that all this should be held in abeyance until another tribunal, unnamed and unknown, should try out the question of title with its possible attendant exceptions and delays? Did it intend to point out and provide for only a part, and that the last part, of the procedure necessary for the plaintiff to obtain compensation? For illustration, the plaintiff charges that the defendant took 2078 boom sticks in the lower lakes; the defendant says that he took only 510. Is it conceivable that it was the legislative intention that no commission should be appointed to determine the value of the property taken, until the title to one or more boom sticks had been litigated and the exceptions which might be taken determined

by the law court? We think not. We think that when the legislature expressly pointed out the manner, in which the plaintiff should proceed to obtain compensation for the property taken from it, it provided a full course of procedure and effectual remedy. All the plaintiff's property of the kinds named having been taken by the defendant's election, the express power given and duty imposed upon the commission, to determine the value of the property "so taken," clothed it with authority, as a necessary part of that determination, to decide what was so taken. Were it otherwise it is inconceivable that it should be left to inference and that the charter should contain no word indicating it. The charter carefully provides that the report of the commission may be confirmed, rejected or recommitted or even a new commission appointed. It contains no word as to what may be done with the findings of any other tribunal. A study of the language of the charter satisfies us that the legislature intended to create and did create one tribunal to settle the issues of fact between the parties growing out of the defendant's exercise of its right of eminent domain. In short, if the plaintiff owned the property in dispute the defendant must have taken it. The charter so provides. Or to put it the other way, if the defendant took it the plaintiff must have owned it, for it does not claim to have taken it as the property of any other person. The title and the taking are therefore inseparable. The commission which is ordered to determine the value of the property "so taken" must necessarily determine what was taken and in so doing determine the question of title. The defendant is doubtless as willing to give, as the plaintiff is anxious to receive, speedy compensation for the property taken. No one can be harmed by a construction which requires all the issues to be settled by one tribunal at one time, instead of pursuing one course of litigation to its perhaps far distant close and then beginning afresh upon another. A construction which admits of divided and protracted litigation is not to be favored, and we find nothing in the language of the act under consideration to suggest that such was the legislature's intention.

A case somewhat analogous to the present one is *Schoff* v. *Improvement Co.*, 57 N. H. 110. Plaintiff claimed that his lands had been

submerged by the defendant's dam. Defendant's charter provided that the court upon petition should cause the damages to be estimated by a committee of three disinterested persons, giving to each party a right, if dissatisfied with the report, to apply for a trial by jury. Defendant asked leave to file a plea in bar alleging that the plaintiff was not the owner of the land described in the petition. It was held that this was discretionary with the court, that it could not be claimed as a matter of right, and that, if the legislature had so intended it, it would not have left it to be inferred. The defendant's request was denied and the petition was sent directly to the committee to assess the damages "according to the state of the title found before them."

In the case at bar if the defendant is dissatisfied with the report of the commissioners, it may, for sufficient cause shown to the court, be rejected, recommitted, or a new commission appointed.

The cases cited by the defendant do not militate against the decision we have reached. *Axtell* v. *Coombs*, 4 Green. 322, was a complaint for flowage. The defendant plead in bar that the lands had not been flowed. R. S. 1821, c. 45, § 3, under which the proceedings were had, made provision, before the appointment of appraisers under Public laws 1824, c. 261, for the trial by a jury at the bar of the court of issues raised by the respondent upon a plea denying the title of the complainant to the lands, or claiming a right to flow them without payment of damages or for an agreed compensation. It was held that the defendant might plead any matter showing sufficient cause why further proceedings should not be had, although not enumerated in said section three. There the statute provided for two distinct tribunals, one to try certain preliminary questions, the other to make the appraisal. *Hubbard* v. *Mfg. Co.*, 80 Maine, 40, was another complaint for flowage under R. S. 1883, c. 92. Section seven of that chapter provides that the respondent may plead in bar that the complainant has no title to the lands or any other matter which shows that he cannot maintain the suit, and the next section directs that such issues shall be tried by a jury before the appointment of commissioners under section nine. Again we have express provision made for two separate tribunals, one to try the question of title and the other to assess damages. *Howard & al.* v. *Proprietors*,

12 Cush. 259, was also a complaint for flowage under a statute which directed that matters in bar should be tried at the bar of the court as other issues are tried at common law, before a warrant issued to a sheriff's jury to assess the damages. When, however, the statute directed that damages for land taken under the power of eminent domain should be assessed by the county commissioners, the court said: "The damages will be assessed according to the title proved at the hearing." *Grand Junction R. & D. Co.* v. *Co. Coms.*, 14 Grey, 553.

We are referred to *Port Huron & S. W. Ry. Co.* v. *Vorheis*, 50 Mich. 506, a petition seeking to condemn land for railway purposes in which the court say, the defendant's "title could not be litigated in this proceeding before the commissioners appointed by the probate court to determine the compensation to be made for the taking." In that state however, it is settled law that the party seeking condemnation must in his petition distinctly describe the land sought to be taken and designate the owner thereof. *Chicago M. L. S. Ry. Co.* v. *Sanford*, 23 Mich. 417. In such case questions of title to the land appropriated may come up in a subsequent proceeding to settle the right to the money awarded. *Mansfield C. & L. Ry. Co.* v. *Clark*, 23 Mich. 519. It is true that in *Peoria, P. & J. R. R. Co.* v. *Laurie*, 63 Ill. 264, it was decided that upon a petition for the condemnation of land for railroad purposes the commissioners could not consider the question of title, but only of the extent of the damages; and this for the very good reason that the statute of Illinois required the railway company to allege the ownership in its petition and it was estopped to deny the allegation.

Ross & al. v. *Elizabethtown & S. R. R. Co.*, 20 N. J. L. 235, is cited. The special statute under which the commissioners were appointed in that case provided that the railway company should file in court a description of the land required and that the court should appoint commissioners to appraise the land described. The court held that the commissioners could not determine questions of title, but if the several owners could not agree upon their respective interests in the sum awarded, they could resort after the award to a court either of law or equity to have them defined.

The bare statement of the facts of these cases without further comment sufficiently distinguishes them from the case at bar.

Exceptions overruled.

In Equity.

HARRY MERRILL, Executor and Trustee,

vs.

FRED V. WOOSTER, Executor and Trustee, et al.

Penobscot. Opinion January 12, 1905.

Will. Annuity. Fund Set Apart to Meet Annuity. Distribution of Residuum of Fund at Cessation of Annuity.

Where an annuity is given by will the executor is authorized to set apart from the residue of the estate a sufficient sum to meet it, and the fund is subject to distribution, according to the will, when the annuity ceases.

As it is part of the residuum the executor never parts with the title, and even if treated as a trust fund for the benefit of the annuitant, it must be returned to the executor for administration and distribution when the quasi trust terminates.

A will which among other bequests gives a legatee "one hundred dollars, each year, for her own personal use as long as she may live," and provides that "the residue of my property after the above amounts have been paid and provided for to be divided equally between my heirs" is to be construed as giving the residuum to those who were the heirs of the testator at the time of his death in the absence of words indicating a clear intention that it should go to those who might be the heirs at the time of the happening of the contingency upon which the estate is to be distributed.

On report. Bill in Equity. Sustained. Decree according to opinion.

The case fully appears in the opinion.

F. H. Appleton and Hugh R. Chaplin, for plaintiffs.

Matthew Laughlin, for Fred V. Wooster.
Albert L. Blanchard, for Frank L. Marston. } Defendants.

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

PEABODY, J. Bill in Equity for the construction of the will of Charles L. Marston, deceased. On report.

The will, among other bequests, provides, in the fourth paragraph, as follows:

"To my daughter, Ada C. Wooster, I give and bequeath a note I hold against her husband F. V. Wooster for seven thousand dollars, together with whatever interest may be due on it, also three thousand dollars in cash to make up ten thousand dollars in all, also one hundred dollars each year for her own personal use as long as she may live."

The sixth paragraph of the will reads as follows:

"And the residue of my property after all the above amounts have been paid and provided for to be divided equally between my heirs."

It appears that the executors qualified as trustees and that the sum of $3200 was set apart as a trust fund and invested by them and $100 paid annually to the said Ada C. Wooster. Ada C. Wooster a few years later died. Thereupon her brother, Frank L. Marston, claimed the whole of said fund remaining, as surviving heir at law, and the executor of the will of Ada C. Wooster claimed that the fund should be divided between her estate and her brother. The bill is brought by one of the executors and trustees of the will of Charles L. Marston to determine "to whom the funds in the trust created for the benefit of said Ada C. Wooster during her life shall be paid."

The other executor and trustee, being also the executor of the will of Ada C. Wooster, is joined as defendant.

Whatever confusion has arisen as to the construction of this will seems to be due to the attempt made to treat this fund of $3200 as a trust fund distinct from the residue of the estate. There is no trust created by this clause of the will. An annuity of $100 is given to Ada C. Wooster for life; and, as this annuity is payable out of the residuary estate, it was proper for the executors as such to set apart a sum sufficient to provide for the annuity. *Treadwell* v. *Cordis*, 5 Gray, 341; *Cummings* v. *Cummings*, 146 Mass. 501, 2 Cyc. 467.

Even if the legal title to this fund had been held by trustees expressly appointed in trust for the life of the annuitant, it is clear that the gift of the residuum, including the trust fund, was to those who were the heirs of the testator at the time of his death. Such would be the construction of the will in the absence of words indicating a clear intention that it should go to those who might be in that relation at the time of the happening of the contingency upon which the estate is to be distributed. *Cummings* v. *Cummings*, supra. In the case however of this fund set apart, with the consent of the heirs, to answer the annuity, and much larger than was required therefor, the title has never passed from the executors, and the heirs at law have always had a vested interest in it. It has remained a part of the residue and subject to another distribution when the annuity ceased.

If the fund had been retained by the executors, as it should have been, they would have experienced no difficulty, upon the settlement of their final account, in obtaining an order for its distribution from the Probate Court. There is apparently nothing to hinder them from taking this course at the present time upon accounting for the fund as returned to them for administration according to the will of the deceased. And we answer that the fund is to be repaid to the executors of the will of Charles L. Marston, deceased, to be charged in their administration account and distributed, according to the will, by payment of one-half to said Frank L. Marston and the other half to the legal representative of Ada C. Wooster, deceased.

Decree according to this opinion.

DAVID SCHWARTZ *vs.* PATRICK J. FLAHERTY, Appl't.

Cumberland. Opinion February 3, 1905.

Appeal. Trustee Disclosure. Practice. R. S. 1903, c. 88, § 30.

After a default, an appeal does not lie and should not be allowed.

An appeal does not lie from a judgment charging a trustee, unless the case discloses that an issue was joined upon the disclosure of the trustee.

A trustee disclosure is taken to be true with respect to the amount with which the trustee should be charged and judgment upon it is conclusive upon the plaintiff and the defendant. If either of the parties desire to contest the truth of the disclosure, they should do so at the proper time by alleging and proving facts to the contrary.

Exceptions by defendant. Overruled.

Assumpsit.

The case sufficiently appears in the opinion.

Samuel L. Bates, for plaintiff.

Dennis E. Meaher, for defendant.

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

SPEAR, J. This was an action of assumpsit for rent, entered in the Municipal Court for the City of Portland, December 29th, 1903. The plaintiff and the defendant both entered an appearance. January 5th, 1904, the trustee named in the writ was charged and the case continued one week by consent of counsel. January 12th the defendant was defaulted, and judgment for debt and costs entered against him. After these proceedings the defendant claimed an appeal from the judgment to the February term of the Superior Court, and the appeal was allowed and duly entered. The plaintiff's attorney filed a motion to dismiss the appeal from the docket of the Superior Court and the judge sustained the motion and ordered the case dismissed. To this ruling the defendant duly excepted.

The ruling was correct. After default an appeal does not lie and should not have been allowed. *Harris* v. *Hutchins*, 28 Maine, 102; *Thompson* v. *Perkins*, 57 Maine, 290.

But the defendant claims that he had the right of appeal from the judgment charging the trustee. The case does not disclose that any issue was joined upon the disclosure of the trustee. The record shows that the "trustee files a written disclosure and presents itself in court for further examination. Trustee charged for $29.25 less its costs, taxed at $3.75." R. S. 1903, chapter 88, sec. 30, provides, "the answers and statements sworn to by a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved, but the plaintiff, defendant and trustee may allege and prove any facts material in deciding that question." In this case no allegations were filed, and consequently no issue whatever was raised. The disclosure under the pleadings is taken to be true with respect to the amount for which the trustee should be charged, and judgment upon it is conclusive upon the plaintiff and defendant.

If either of the parties desired to contest the truth of the disclosure they should have done so at the proper time by alleging and proving facts to the contrary.

Had they done so an issue might have been joined upon which an appeal would lie from a judgment charging the trustee as in *Richards* v. *Allen & Russell*, Trustee, 8 Pickering, 405. In this case, after the trustee had answered he was adjudged trustee by the court, and by agreement an auditor was appointed to ascertain and report the amount with which the trustee should be charged. At a subsequent term of court, the auditor having made no report, the trustee by leave of court made an additional answer, and was then adjudged to be trustee. From this judgment the trustee appealed. Upon this state of facts the court said, "it is moved to dismiss this appeal on the ground that no issue was joined at the Court of Common Pleas; but we are of the opinion that the allegations of the plaintiff that there were goods, effects, etc., deposited with the respondent and his denial constitute an issue within the intent of the legislature."

In the case at bar however the trustee was charged with having in his custody goods, effects, etc., of the defendant to the amount of

$29.25 upon a disclosure which the statute says shall be deemed to be true, and the defendant made no objection whatever and must be held to have consented to its truth.

Exceptions overruled.

BENJAMIN F. YOUNG, et al. *vs.* HORATIO N. HATCH.

Penobscot. Opinion February 17, 1905.

Fixtures. Intention. Mortgagor and Mortgagee. Hot Water Heating Apparatus.

1. As between mortgagor and mortgagee, annexations affixed to an estate by the owner, before mortgage, of such a character as are apparently calculated to be for the permanent use and enjoyment of the realty, are presumed to be intended to form a part of the realty, and pass with it by a mortgage.
2. Accordingly a hot water heating apparatus and copper hot water tank and fixtures, set up by the owner of the premises in his dwelling house, is held, between him and one to whom he afterwards mortgaged the premises, to have merged in the realty, and to have passed by the mortgage to the mortgagee.

On report. Judgment for plaintiffs.

The case sufficiently appears in the opinion.

W. B. Pierce and L. C. Stearns, for plaintiffs.

H. H. Patten, for defendant.

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

SAVAGE, J. Trespass by mortgagees against mortgagor for taking and removing from the mortgaged premises a hot water heating apparatus consisting of a heater, radiators and piping, and a copper hot water tank and fixtures. The defendant mortgaged his dwelling house and the land on which it stood to the plaintiffs, April 8, 1902. At that time all the property mentioned had been set up by the owner and was in use in the house. The heater was set on the cellar

bottom, and was connected by pipes running through the floor with radiators on the first floor, and by pipes running up in the partitions with the radiators on the second floor. The radiators were not fastened to the floors. The hot water tank was connected with the stove in the kitchen. It stood on an iron stand. The tank was connected by pipes with the sink on the same floor, and through the ceiling and floor overhead, with a bath tub and lavatory. These pipes were not attached to the wall of the room, except in one place. The tank was suitable to be used in connection with any stove. After foreclosure proceedings were commenced by the plaintiffs, but while the defendant remained in possession, he removed the property which has been described from the premises without doing material injury, and this is the trespass complained of. The only question argued is whether these articles were a part of the realty, and so covered by the plaintiffs' mortgage.

It was said in *Hayford* v. *Wentworth*, 97 Maine, 347, a case between landlord and tenant, that a chattel is not merged in the realty unless there be physical annexation, at least by juxtaposition, adaptability, and an intention on the part of the person making the annexation, to make it a permanent accession to the realty. The rule thus stated is in accord with the general run of authorities. And it cannot be questioned, we think, that a steam heating apparatus and a hot water boiler connected with sink and bath room in the dwelling house, as in this case, are clearly within the rule, as to annexation and adaptation. It only remains to speak of intention.

In *Readfield Tel. & Tel. Co.* v. *Cyr*, 95 Maine, 287, it was declared that while it was impossible to reconcile all the cases upon this subject, "the most modern and approved rule appears to be to give special prominence to the intention of the party making the annexation." Then after noticing some apparent exceptions to the rule the court said, "they will be found to involve no real conflict with the rule above stated, when we remember that the intention which is material is not the hidden, secret intention of the party making the annexation, but the intention which the law deduces from such external facts, as the structure and mode of attachment, the purpose and use for which the annexation has been made and the relation and

situation of the party making it." And out of the relation and situation of the party making the annexation arises the distinction in the application of the rule as between cases between vendor and vendee, or mortgagor and mortgagee, on the one hand, and cases between landlord and tenant, or tenant for life and remainder man, on the other. The presumptions of intention arising in the two classes of cases differ. Annexations which are apparently calculated to increase the permanent value and usefulness of the realty, might be regarded as merged in the realty, in the former class, when the same annexations might remain personalty, in the latter class.

The reason for distinction is well stated in Cooley on Torts, 2nd Ed. pp. 499, 500, 501, and we adopt the language of the learned author of that work, who says, "The actual or presumed intent on the part of a party attaching a chattel to the realty that it shall constitute a part of the realty, or on the other hand that it shall remain a chattel, is usually the most important circumstance to be considered in determining the fact; and if no one were concerned with the question but the party by whom the annexation was made it might well be suffered to be controlling in all cases. But as the question of ownership often depends upon the question whether a fixture is removable or not, and men make purchases and accept liens upon property, supposing it to be of that nature, either real or personal, that appearances would indicate, it would be not only impolitic, but in many cases unjust, to suffer a secret intent to control where appearances would indicate the existence of an intent of a different nature. The law, therefore, usually acts upon the presumed rather than upon any actual intent. . . . . If a building is erected by the owner of a freehold by way of improvement thereof, and apparently for permanent use and enjoyment with it . . . . or any erection whatsoever made which apparently is calculated to increase the permanent value of the estate for use and enjoyment, a reasonable presumption arises that the owner intended to make them a part of the realty, and the law accepts this intent as conclusive, and considers them real estate from the time they are constructed or affixed. The owner's deed, mortgage or lease of the land will convey them as a part of it, and when he dies they pass with the land to his devisee or heir at law. . . . . On the other hand,

a similar erection or attachment by one not the owner of the freehold might well be presumed to be made with the intent of removing it as a chattel. This presumption would be reasonable in most cases, because if he intended it as a permanent annexation, he would lose title to it immediately, since if he made it a part of the realty, the ownership must pass to the owner of the realty." The distinction alluded to is pointed out by Chief Justice Shaw in *Winslow* v. *Merchants Insurance Co.*, 4 Met. 306, a case between mortgagor and mortgagee, wherein he also speaks of the "presumed intention" with which improvements were made after a mortgage of the realty. "A presumption arises," he said, "from the relation to which they stand, that such improvements are intended to be permanent and not temporary."

In *Teaff* v. *Hewitt*, 1 Ohio St., Rep. 511, a frequently cited case, the court, after saying that intention of the party annexing is one of the requisities for determining whether a chattel had become merged in the realty, added: — "This intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made." *Parsons* v. *Copeland*, 38 Maine, 537.

As between mortgagor and mortgagee, then, it is clear from the authorities that annexations affixed to an estate by the owner before mortgage, of such character as are apparently calculated to be for the permanent use and enjoyment of the realty, are presumed to be intended to form a part of the realty, and pass with it by mortgage. And such a description certainly includes the heating apparatus and boiler in controversy here. It was covered by the mortgage, and it was a trespass for the mortgagor to remove it. *Linscott* v. *Weeks*, 72 Maine, 506.

The only evidence relating to value is found in the testimony respecting the original cost, the length of time used, and the apparent condition at the time of removal. After making all proper allowances for depreciation, we think the plaintiffs are entitled to recover three hundred dollars.

Judgment for plaintiffs for $300.

DANIEL H. HERLIHY, In Equity,

vs.

JOHN J. CONEY AND CATHERINE A. CONEY.

Hancock. Opinion February 17, 1905.

Equity. Resulting Trust. Decree of Single Justice.

1. A resulting trust arises by implication of law when the purchase money is paid by one person out of his own money, and the land conveyed to another. It may be paid by the cestui que trust himself. It may be paid by another for him. It may be paid for him by the trustee. But the money must belong to the cestui que trust in specie, or by its payment by the hands of another he must incur an obligation to repay, so that the consideration actually moves from him at the time.
2. The trust arises from the circumstance that the money of the real purchaser, and not that of the grantee in the deed, formed the consideration of the purchase. In this case the evidence warrants the finding that the transaction between the alleged trustee and cestui que trust was a loan and that the cestui que trust was bound to repay the trustee for the money loaned on his account.
3. On an appeal in equity, unless the decision of the presiding justice as to the facts is clearly wrong, it must be affirmed.

Equity. Appeal by defendants. Decree below affirmed.

The case sufficiently appears in the opinion.

E. S. Clark, for plaintiff.

L. B. Deasy, for defendants.

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

SAVAGE, J. Bill in equity to enforce a resulting trust in an undivided half interest in the Hotel Brewer property at Bar Harbor. The case comes here on the defendants' appeal. The plaintiff claims that as the result of certain negotiations to which he was a party, the Hotel Brewer was purchased for $9,000; that $6,000 of the purchase money was raised on the notes of the defendants secured by a mortgage of the property; that of the remaining $3,000, he and John

J. Coney each paid one-half, and that in accordance with an arrangement between himself and John J. Coney the deed was taken in the name of defendant Catherine Coney, wife of John J. Coney, and sister of the plaintiff. From all this the plaintiff claims that an implied trust arose for his benefit in one-half of the property subject to the mortgage. He claims indeed that it was expressly agreed that he should have half of the property. But the express agreement was not in writing and so not enforceable. The testimony of the plaintiff in one aspect is to the effect that when they were arranging for the payment of the $3,000 in addition to the amount to be raised by the notes and mortgage, the plaintiff informed John J. Coney that he had only $400, that the latter offered to loan him the balance to make their contributions equal, and the offer was accepted. The plaintiff put in his $400 and John J. Coney put in $2600, but $1100 of this the plaintiff claims was advanced on his account, and was in fact a loan to him by Coney, although the money did not pass through the plaintiff's hands. According to plaintiff's evidence it was agreed that Coney should have the entire management of the property.

The defendants deny that plaintiff had anything to do with the negotiations leading up to the purchase. They deny all except that the plaintiff did contribute $400 of the purchase money under such circumstances as to raise a resulting trust in the property to that extent. And the defendants further say that the plaintiff's own evidence shows that even if the $1100 was advanced for the plaintiff, no indebtedness was thereby created, that the plaintiff did not become debtor and Coney creditor, as to the $1100, that the plaintiff in no way became obligated to repay it to Coney, but that Coney was to repay himself out of the rents when received by him, and that he was to look not to the plaintiff for repayment, but to the property only. And, hence it is claimed that the $1100 was not the plaintiff's, was not loaned to him, was not paid by him or for him, and that under such circumstances a resulting trust would not arise. This presents the one important question of fact argued before us. There is no dispute or uncertainty about the law.

A resulting trust arises by implication of law when the purchase money is paid by one person out of his own money, and the land is conveyed to another. *Baker* v. *Vining*, 30 Maine, 121; *Stevens* v. *Stevens*, 70 Maine, 92. It may be paid by the cestui que trust himself. It may be paid by another for him. It may be paid for him by the trustee. *Page* v. *Page*, 8 N. H. 187; *Boyd* v. *McLean*, 1 Johns. Ch. 542; *Kendall* v. *Mann*, 11 Allen, 15. But the money must belong to the cestui que trust in specie, or by its payment by the hands of another he must incur an obligation to repay, so that the consideration actually moves from him at the time. He may take money from his purse, or he may borrow it, and he may borrow it from the trustee. And if the lender pays the money borrowed for the borrower, the borrower pays it. The test is whose money pays the consideration for the purchase. The trust arises from the circumstance that the money of the real purchaser and not that of the grantee in the deed formed the consideration of the purchase. The plaintiff says the money was a loan to him. If by force of the loan the borrower became bound by law to repay, then a resulting trust arose, even if the money did not pass through the plaintiff's hands. And from the use of the term "loan," in its ordinary signification, the law implies a promise to repay. And if the cestui que trust is bound to repay, it matters not whether it is by implied or by express promise.

If, on the other hand, as the defendants claim, it appears, assuming the evidence of the plaintiff as a whole to be true, that John J. Coney advanced the $1100 for the plaintiff, with the understanding that it should be paid back out of the rents, and without any obligation on the part of the plaintiff to repay, and with the agreement that one-half of the property should belong to the plaintiff when the advance was repaid, no trust of any kind arose. No express trust, because not in writing. No implied trust, because the plaintiff paid nothing.

Now what was the fact? The question was submitted to a jury who found for the plaintiff. The presiding justice found and decreed for the plaintiff. All this gives the plaintiff a strong advantage. The question now is,—Is the decision of the presiding justice as to the facts clearly wrong? If not it must be affirmed. *Young* v.

Witham, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26; *Gilpatrick* v. *Glidden*, 81 Maine, 137. There was sufficient evidence to support the finding that the transaction was a loan, and that the plaintiff was bound to repay, unless its effect is destroyed by the evidence given by plaintiff and one or more witnesses that Coney said "he would take it (the $1100) out of the rents." Whether, in view of this and the other language used by the parties, it was mutually understood by the parties that Coney was to take the money out of the rents alone, without any obligation of the plaintiff to pay, or whether it was understood that it was a loan and the plaintiff was bound to pay, and the words used were simply expressive of the expectation that plaintiff's part of the rents which would be received by Coney would be enough to pay the plaintiff's debt to him, is the question here. The language is susceptible of either construction. The mutual understanding of the parties at the time must control.

It would serve no useful purpose to comment at length upon the evidence. But after a careful examination of the whole record, we are of opinion that the evidence warrants the conclusion that the decree should be sustained.

Decree below affirmed, with additional costs.

MAINE WATER COMPANY

vs.

KNICKERBOCKER STEAM TOWAGE COMPANY.

SAME *vs.* C. W. CRANE, et als.

Cumberland. Opinion February 17, 1905.

Negligence. Legislative Powers. Statutory Construction. 27 U. S. Stat. at Large, 1890, c. 907, §§ 4, 6, 7, 10. U. S. River and Harbor Act, approved March 3, 1899, §§ 9, 10.

1. A water pipe, laid across the Kennebec River at Bath, by authority of an act of the legislature, and in accordance with plans recommended by the Chief of Engineers and authorized by the Secretary of War, is not an unlawful obstruction to the river.
2. Under section 10 of the River and Harbor Bill of Congress, approved March 3, 1899, a water pipe across the Kennebec River at Bath, if built according to plans recommended by the Chief of Engineers and authorized by the Secretary of War, is deemed to be affirmatively authorized by Congress, and is a lawful structure without any further action by Congress, although the affirmative authority arises by implication.
3. When only one inference touching negligence can reasonably be drawn from undisputed facts, negligence is a question of law.
4. When the captain of a schooner which has been taken in tow by a tug boat from its place of anchorage in a river, knew that a water pipe across the river was in his path, and knew where it was, and did not know how much anchor chain he had out when the tug commenced to tow his schooner down river, and took no precaution not to foul the pipe, whether his vessel be towed over it by the tug, or being cast off, drifted over it, and, without protest or notice to the captain of the tug, permitted his vessel to be taken 1500 feet from its anchorage nearly down to the pipe, where the hawser was cast off, the anchor being then at or near the bottom of the river,—*Held*, that the inference of negligence is so unmistakable that no reasonable inference can be drawn to the contrary.
5. In such case it is no defense that the tugboat was also negligently managed. When an injury is the result of concurring negligent acts of two parties, one is not exempt from full liability, although the other was equally culpable.

On exceptions by defendant in first case. Overruled.

On exceptions by plaintiff in second case. Sustained.

Actions on the case for negligence.

The cases are sufficiently stated in the opinion.

Symonds, Snow, Cook & Hutchinson, and Benjamin Thompson, for plaintiff.

Eugene P. Carver, Edward E. Blodgett, and G. Philip Wardner, (of Boston, Mass. bar), for defendant, Knickerbocker Steam Towage Company.

George E. Bird and William M. Bradley, for defendants, C. W. Crane, et als.

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

SAVAGE, J. Actions on the case for negligence. These actions were heard together before the court below, without the intervention of a jury, but with the right of exceptions. The court found for the plaintiff in the action against the Knickerbocker Towage Co., and for the defendants in the other action. The defendant took exceptions in the first case, and the plaintiffs in the second. Both sets of exceptions have been heard together.

The plaintiff's causes of action are based upon the claim that on June 10, 1902, the plaintiff's water pipe, crossing from Bath to Woolwich, upon a structure in the bed of the Kennebec River, was fouled and injured by the anchor of the Jessie Lena, a schooner belonging to the defendants in the second action, which had been taken in tow by the tug boat Seguin, owned and managed by the defendants in the first action, that the conduct of the captain in charge of the Seguin in managing the tow, was negligent, as well as was that of the master of the schooner, and that the negligence of each contributed as a proximate cause to the injury to the water pipe.

1. The case against the Knickerbocker Towage Co.

The court below found that the Towage Company was guilty of negligence and liable for the injury. So far as this conclusion rests upon facts, the finding is conclusive, *Treat* v. *Gilmore,* 49 Maine,

34; *Shrimpton* v. *Pendexter*, 88 Maine, 556; *Laroche* v. *Despeaux*, 90 Maine, 178; unless the only inference to be drawn from the evidence is a contrary one, *Morey* v. *Milliken*, 86 Maine, 464. This defendant does not, however, seek a review of the facts, but in argument bases its objection to the conclusion of the court upon a single legal proposition, namely, that the plaintiff had no authority to lay its pipe across the Kennebec River, that the pipe was consequently an unlawful obstruction to navigation, and a nuisance, and hence that the plaintiff as matter of law cannot recover. The conclusion is correct if the premises are sound.

The Kennebec River at Bath is a tidal, navigable river, wholly within this state. It is too well settled to require discussion that in the absence of the exercise by Congress of authority to the contrary, full power resides in the states as to the erection of bridges and other works over or in navigable streams, wholly within their jurisdiction, *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Withers* v. *Buckley*, 20 How. 84; *Lake Shore & Mich. Southern Ry.* v. *Ohio*, 165 U. S. 365; and under existing legislation by Congress, that no one can lawfully place an obstruction such as this pipe was across such a river, without the concurrent authority of the state and of the United States government, *Cummings* v. *Chicago*, 188 U. S. 410. It is not questioned but that the pipe was laid by authority of the legislature of this state, and the only remaining question is, did the plaintiff before laying the pipe obtain the requisite authority from the national government? The plaintiff says, yes; the defendant says, no. The true answer depends upon the proper construction of sections 9 and 10 and more particularly of section 10 of the River and Harbor bill enacted by Congress and approved March 3, 1899, which are as follows:—

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States, until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided,

That such structures may be built under authority of the legislature of a state across rivers and other water ways, the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War, before construction is commenced: And provided further, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable water or other water of the United States, outside established harbor lines or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

The case shows that before the pipe line in question was laid the plaintiff submitted its plans and proposed work to the Secretary of War, and asked for authority to lay the pipe. It further appears that the plans and work were recommended by the Chief of Engineers, and authorized by the Secretary of War, and it is not questioned but that the pipe was laid in accordance with the authorized plans.

But the defendant says that is not enough. It contends that the

Secretary of War, under the Act of Congress referred to, had no power to authorize the laying of the pipe. It bases its contention upon the first clause of the first sentence of section 10 of the Act of 1899, which prohibits the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the navigable waters of the United States, and says that this pipe line has not been affirmatively authorized by Congress. It argues that to have been "affirmatively authorized by Congress," there must have been some Act of Congress, general or special, which in terms or by construction was applicable to this pipe line and authorized its construction. The power of the Secretary of War, it is claimed, is limited to the approval of the form of the structure to be built according to plans recommended by the Chief of Engineers, after authority has been obtained by Act of Congress. The defendant asserts that there is no Act of Congress which affirmatively authorizes the laying of this pipe. And our attention has been called to none, unless the very section in question, section 10 of the Act of 1899, is such affirmative authority.

We cannot help remarking, in passing, that if the defendant's interpretation of the Act of 1899 is the correct one, it leads to a rather surprising condition. It would seem that not a wharf or pier, outside established harbor lines, or where no harbor lines have been established, can now be built, in the navigable waters of the United States, not a dolphin can be anchored for mooring vessels, not a boom can be stretched, nor a weir erected for any purpose, until hereafter authorized by Act of Congress. We think it cannot be assumed that Congress intended any such result unless the Act in question is so expressed as not to admit of any other reasonable interpretation.

But the defendant argues not only that the language of prohibition in the clause quoted leads clearly to the conclusion, but that by a contrary construction, it would be plain that the Act of 1899 effected no substantial change in the law as it then existed, applicable to obstructions in navigable waters wholly within the limits of a state, and that it is not to be assumed that Congress intended such a super-

fluity. A brief examination of the prior legislation by Congress will, we think, throw some light upon this question.

Prior to 1890, Congress had exercised its constitutional powers over the navigable waters of the United States, only in special instances, and with relation to special matters. But in 1890, by Chap. 907, 27 U. S. Stat. at large, Congress assumed general control over such waters, for the first time. That Act in section 4 amended a previous provision of law directed against the unreasonable obstruction to free navigation by improperly built draws in bridges. In section 6 it was made unlawful to throw ballast, stone, rubbish and waste of many specified kinds into any of the navigable waters of the United States, "which shall tend to impede or obstruct navigation." In section 7 it was made unlawful "to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind in any navigable waters of the United States, where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, navigable river or other waters of the United States, in such manner as shall obstruct navigation, commerce or anchorage of said waters." The same section made it unlawful "to commence the construction of any bridge, bridge draw, bridge piers and abutments over or in any navigable river or navigable waters of the United States, under any act of the legislative assembly, of any state, until the location and plan of such bridge or other works shall have been submitted to and approved by the Secretary of War, or to excavate and fill, or in any other manner to alter or modify the course, location, condition or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War."

There does not seem to be any difficulty in the construction of the Act of 1890, so far. In relation to so much of the Act as relates to bridges over navigable waters, wholly within the limits of a state, Congress did not assume exclusive jurisdiction. States were not forbidden to authorize the erection of bridges, but such bridges were not to be erected until the location and plan were approved by the Secretary of War. It was a limitation upon the power of the states, not a denial of it. And it seems to be necessarily implied that a

bridge erected under the authority of a state, the location and plans of which had been approved by the Secretary of War, would be a lawful structure, and not an unlawful obstruction to navigable waters. So, if wharves, piers and other structures named in the same connection in the section were erected by permission of the Secretary of War, they could not be said to be unlawful. The declaration of unlawfulness extended only to such as were built without such permission.

Then having impliedly affirmed that the structures named with great particularity would be lawful, if built by the permission or authority of the Secretary of War, as they would have been lawful, under state authority alone, except for this Act, the Act provided in section 10 "that the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction," was thereby prohibited, and was declared to be a criminal offense, for which appropriate penalties were provided. This general prohibition was comprehensive, but by no sensible construction could it be applied to any of the structures named in section five, if built by the permission or authority of the Secretary of War, which would include a pipe line like that under consideration.

The general purpose of the Act of 1890 is stated by Mr. Justice Brewer in *U. S.* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, in these words:—"Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question." And we may add that the only explicit assent of the National Government provided for in the Act for the construction of an obstruction like this pipe line was the "permission" to be given by the Secretary of War.

The Act of 1890 remained unchanged so far as relates to anything which concerns this case until 1899, when Congress enacted the Act containing the two sections, 9 and 10, which we have already quoted in full, and about the construction of which this controversy has

arisen. The changes from the Act of 1890, so far as necessary to notice are these. The subject matter of former section 7 is divided into two classes. That relating to bridges and erections of that character is put into the present section 9, and that relating to wharves and similar erections, except dams, which are now classified with bridges in section 9, is found in present section 10. The Act of 1890, as touching bridges, had reference only to those built under the legislative authority of a state, and simply required in addition the approval of location and plans by the Secretary of War. The Act of 1899 relates to bridges, dams, dikes and so forth, outside of state jurisdiction, as well as to those within, and it prescribes distinct requirements for each class. As to the former, it is made unlawful to construct such structures *until the consent of Congress to the building of such structures* is obtained, and until the plans have been approved by the Chief of Engineers and the Secretary of War. While this provision for unlawfulness is general in its terms, and applicable to structures over any navigable water of the United States, it is immediately qualified by the provision that such structures may be built by authority of a state legislature across navigable rivers wholly within the limits of a state by merely securing the approval of the location and plans by the Chief of Engineers and the Secretary of War. Although it is provided in the first part of the section comprehensively that no bridge structure can lawfully be erected until the consent of Congress to such structure shall have been obtained, can there be any doubt that under this section taken as a whole, the proviso takes effect, and that a bridge across a navigable river wholly within a state, if authorized by the state legislature, and the location and plans properly approved by the Chief of Engineers and the Secretary of War, would be a lawful structure, without the consent of Congress to the structure first obtained, or any other affirmative authorization of Congress except what is contained in the proviso itself? We think not.

And yet in section 10 the clause in controversy declares that the creation of any obstruction not affirmatively authorized by Congress is prohibited. Does this prohibition extend to bridges over navigable waters wholly within the state, if authorized by the state, and

if the location and plans are authorized by the Chief of Engineers and the Secretary of War? Clearly not. And yet such a bridge would not be affirmatively authorized by Congress except in the proviso in the section.

The general prohibition in section 10 is brought with only one substantial change from section 10 of the Act of 1890. The Act of 1890 said "not affirmatively authorized by law," which was held in *U. S.* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, to mean not only by a law of Congress, but even by a law of the state in which the river is situated. The Act of 1899 says "not affirmatively authorized by Congress." Following this general prohibition, and immediately connected with it, is the remainder of section 7 of the Act of 1890, which relates to wharves and other structures, which would include this pipe line. The only important change is this. The Act of 1890 made unlawful the erection of such structures without the permission of the Secretary of War, in the waters of the United States, outside established harbor lines, or where no harbor lines have been established, in such manner as shall obstruct or impair navigation. The Act of 1899 makes unlawful such erections, except they are built on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

Although in the arrangement of parts, the general prohibition now is found at the beginning of a section which also relates to the specific regulation of the building of wharves and so forth, instead of being in a section by itself as before, we are not persuaded that Congress, by changing its position, intended to change its effect. It is still general as before. And though general in terms before, we think, as we have stated, that structures impliedly authorized by Congress in the preceding sections were not prohibited. And in its new position we think that the general prohibition is likewise qualified by the sentences which follow. It cannot make any substantial difference whether the general prohibition is at the beginning of a section, or at the end, or in a section by itself, if it clearly appears from the language used and from the context, all taken together, that the legislative intention was that the general prohibition was to be regarded as subject to specified qualifications. When the language,

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited" is followed with, "and it shall not be lawful to build . . . . any wharf . . . . or other structures in any . . . navigable river . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of War," the implication seems clear to us that such structures, if built according to plans recommended and authorized as provided in the section, are authorized by Congress, — that they are affirmatively authorized, — though the affirmative authority arises by implication, — and that they are lawful without any further action by Congress.

It is noticeable that when Congress divided the various kinds of obstructions into two classes, it said that bridges and dams, in general, across navigable waters could not be built "until the consent of Congress to the building of such structures" had been obtained, while as to wharves and obstructions of that class, they are lawful if the plans have been recommended by the Chief of Engineers and authorized by the Secretary of War. It seems to us that it may fairly be inferred from the omission of the words in section 10, that it was not intended "that the consent of Congress" by express Act should be a prerequisite to the building of structures named in that section. We think therefore that the objections of the defendant are not tenable.

Our conclusion is much strengthened by the language of the Supreme Court of the United States in *Cummings* v. *Chicago*, 188 U. S. supra. In that case, which related to the building of a dock, the question decided was that the Act of 1899, now under consideration, did not invest a private person, acting under the authority of the national government, with power to erect a dock within the navigable waters of the United States, wholly within the territorial limits of a state, without regard to the wishes of the State upon the subject, but that the right depends upon the concurrent or joint assent of both the national government and the state government. The question involved here was not in issue there. But the court in discussing the Act of 1899 said: "The Secretary of War, acting under the authority conferred by Congress, may consent to the erection of such a structure." This language was subsequently quoted in *Montgomery*

v. *Portland*, 190 U. S. 89. Though a dictum undoubtedly, it is all we have as yet from the federal Supreme Court, which throws any light upon the question, and it is of value as indicating the trend of judicial thought.

Exceptions overruled.

II. The case against the owners of the "Jessie Lena."

The court below found that the "Jessie Lena" was anchored the night previous to the accident, in the Kennebec River about fifteen hundred feet above the plaintiff's water pipe, in about five fathoms of water and had out about fifteen fathoms of chain. On the morning of June 10, 1902, she commenced to go down river in tow of the steam tug, Seguin, belonging to the Knickerbocker Towage Co.; that the anchor of the "Jessie Lena" was on or near the river bottom when it reached the pipe, and that the pipe which lay in about forty feet of water was broken by the anchor being hauled up when in that position by the crew of the schooner. The court further found that the mate of the "Jessie Lena," after the tug's hawser had been made fast to the schooner, "looked over the bow and saw that the schooner had three or four fathoms of scope out on the port bow, and said, 'anchor is not short yet.' He called to the tug to slack up; that they had not got the anchor off the bottom of the river. This call was heard by the master of the tug, who understood what it meant. Capt. Devereaux, of the schooner "Jessie Lena," judged that he had left out ten fathoms of chain when the crew got through heaving the anchor before the tug came off. Capt. Colby, of the tug Seguin, noticed that the chain was right up and down when he made fast to the the schooner. This fact, observed by him and the answer of Capt. Devereaux to his inquiry as to the condition of the anchor that it was "short," or as Capt. Devereaux says "not much scope out," were acted upon by him, and he turned down the river with the schooner in tow. The tug steamed up the river a little, and the crew of the schooner commenced to heave the anchor away from the river bottom and continued their work until the schooner passed over

the water pipe. The captain of the Seguin was familiar with the location of the water pipe and the notice warning against anchoring in the locality of the pipe. He cast off the hawser when near the pipes and left the schooner adrift, so that when it passed over the pipe it was not 'under command of either sail or steam or in tow.'" "The captain heard the inquiry of the captain of the steam tug Seguin in regard to the anchor and replied either that it was 'short' or that 'we had not got much scope out.'" When the tug had made fast its hawser and swung down the river, the crew commenced to heave on the anchor, and when it was found breaking out of the mud on the bottom of the river, they continued to heave on it until it passed over the water pipe. The captain knew about where the pipes were located and also what notice was printed on the signs each side of the river. He could not have failed to foresee danger to the pipes from the anchor dragging on the bottom of the river and that the danger would be increased by hauling on the anchor should it foul the pipes. But his statement and that of his crew is, that they noticed no stopping of the schooner or that it had met with any obstruction. The current was running down at three or four knots and a stiff breeze was blowing up river at the time. This may account for the failure of the captain to know that his anchor had caught on the pipe. After the tug had cast off the hawser there was no time for him to take unusual precautions. He had the right to assume that the towboat after attaching its hawser was in general charge of the schooner. He received no instructions from the master of the tug, but he kept on hauling up the anchor. The time proved insufficient to raise it so as to clear the pipe. And the court concluded that the accident "cannot under the circumstances be attributed to his negligence. It was the fault of the tug leaving the schooner to drift with the current."

The plaintiff claims that upon the facts thus found by the court, and which for the present purpose must be deemed to be true, the court erred in ruling that the accident cannot under the circumstances be attributed to the negligence of the schooner. The first question is, does this present a question of law or of fact. For if it is a question of fact it is not open on exceptions, even, though as in this case, the evidence is made a part of the bill of exceptions, unless the

only inference to be drawn from the evidence is contrary to the finding. Ordinarily care and negligence are questions of fact, and this is so, even if the circumstances attending it are agreed to or admitted, or are undisputed, when reasonable and fair minded men may arrive at different conclusions. *Grows* v. *Maine Central R. R. Co.*, 67 Maine, 100; *Elwell* v. *Hacker*, 86 Maine, 416; *Romeo* v. *B. M. & R. R.*, 87 Maine, 540. But when only one inference can reasonably be drawn from undisputed facts, or as here, from facts which must be deemed true, negligence is a question of law. *Elwell* v. *Hacker*, 86 Maine, 416; *Blumenthal* v. *B. & M. R. R.*, 97 Maine, 255; and exceptions lie to a ruling thereon.

The court below seems to have concluded that the accident was due solely to the fault of the tug in leaving the schooner to drift with the current. But we think the justice below erred in so concluding. We think that in one respect at least the negligence of the captain of the "Jessie Lena" contributed to the injury, and that the inference of negligence is so unmistakable that no reasonable inference can be drawn to the contrary. He evidently did not know how much anchor chain he had out when the tug commenced to tow his schooner down river. He knew that the water pipe was in his path and he knew where it was. Under these conditions it was his duty to know how much chain he had out, and to take precautions not to foul the pipe, whether his vessel be towed over it by the tug, or being cast off, drifted over it. Without protest or notice to the captain of the tug that he had too much chain out to pass over the pipe safely, he permitted his vessel to be taken fifteen hundred feet from its anchorage, nearly down to the pipe, where the hawser was cast off, and even then the anchor was at or near the bottom of the river. This was negligence beyond a question.

It is no defense to these defendants that the tugboat was also at fault. When the injury is the result of concurring acts of negligence of two parties, one is not exempt from full liability, although the other was equally culpable. *Lake* v. *Milliken*, 62 Maine, 240. Each may be sued separately, and the pendency of a suit against one does not bar or abate the suit against the other. *Cumberland Co.* v. *Central Wharf Tow-Boat Co.*, 90 Maine, 95; *Cleveland* v. *Bangor*,

87 Maine, 259. But though there may be two judgments, there can be only one satisfaction, *Cleveland* v. *Bangor*, supra.

Exceptions sustained.

A. H. LANG, et als., In Equity, *vs.* HOWARD P. MERWIN.

Somerset. Opinion February 21, 1905.

Gambling. Slot Machine. Statutory Nuisance. R. S., c. 22, § 1. R. S., c. 126, § 1. R. S., c. 129, § 20.

1. To constitute gambling in the statutory sense of the term it is not necessary that both parties should stand to lose as well as to win by the chance invoked. It is enough that one party stands to win only or to lose only.
2. A slot machine, so operated that the operator putting into it a nickel coin receives in any event a cigar of the value of his coin, and also stands to win by chance additional cigars without further payment, is a gambling device.
3. A cigar store where such a machine is set up for the use of customers and is used by them, becomes thereby a statutory nuisance and may be enjoined as such.

In Equity. On appeal by plaintiffs. Sustained.

Petition of twenty legal voters of the town of Skowhegan under R. S. 1883, chapter 17, section 1, as amended by statute of 1891, chapter 98,—now R. S. 1903, chapter 22, section 1,—against the tenant or occupant of a certain room in a certain building, in said town, praying for injunctions, both temporary and perpetual, to restrain the defendant from using or allowing said room to be used as a place of resort for gambling.

The Justice of the first instance found the facts to be as follows:

"The defendant was possessor of a nickel-in-the-slot machine which he operated in his cigar store. The machine, so far as necessary

to describe it, consisted of a cylinder, in five sections, made so as to revolve on a shaft. Upon the outer surfaces of the sections were representations of playing cards. When the sections were at rest five cards would be in sight. By pressing a lever the sections were made to revolve, and the mechanism of the machine was such that the sections revolved at different rates of speed, no two alike. The points at which the sections would severally stop and the combinations of cards which would thereby be left exposed to view was purely a matter of chance. The machine was played by those who resorted to the defendant's store according to the following scheme. The player deposited a "nickel" in the slot of the machine and pressed the lever. The player in any event was entitled to a five cent cigar, and the defendant testified, and I find, that he might select any five cent cigar in the store. If three cards of a kind were exposed after the sections ceased to revolve, the player was entitled to two additional cigars; if a "straight," four additional cigars; if a "flush," six additional cigars; if a "full hand," eight additional cigars; if "four of a kind," ten additional cigars; if a "straight flush," twenty-five additional cigars; if a "royal flush," fifty additional cigars. The player had the right to exchange two five cent cigars for a ten cent cigar. By this arrangement, the player for five cents placed in the machine received the same returns that he would if he had paid five cents on the counter. And he might receive more. If he received more at any play, it follows that the defendant lost on that play, which loss he could only recoup by the profit on the cigars sold thereby when the player won no extra ones. And the defendant expected to make such profit by an increased sale of cigars through the use of the machine. The machine was in operation on this plan three weeks, and the defendant estimated the results as amounting on the average to the sale of six five cent cigars for twenty-five cents."

Upon this finding of facts, the Justice of the first instance dismissed the petition, and thereupon the plaintiffs appealed.

Butler & Butler, for plaintiffs.

Forrest Goodwin, for defendant.

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

EMERY, J. The defendant had in his cigar store a slot machine of the kind, and operated in the manner, described in the finding of facts by the justice of the first instance. It is agreed by the parties that if using the machine in the manner described constituted "gambling" in the statutory sense of the word, then the defendant's cigar store was resorted to for "gambling" within the purview of the statute upon which this petition in equity is based, (R. S., ch. 22, § 1.)

The word "gambling" as a legal term has been variously defined by courts and legal authors. By some of these definitions both parties to the transaction in question must stand to lose by chance as well as to win. Judged by these definitions the transaction in this case does not constitute gambling, since the operator does not stand to lose anything by chance but only to win. By other definitions, however, it is not essential that both parties should stand to lose by chance; it is enough if one party stands to lose, or to win by chance. If such be the statutory meaning of the term then the transaction described does constitute gambling since the operator stands to win something by chance, and the cigar dealer to lose by chance. In view of the conflict of authority the justice of the first instance dismissed the petition, practically pro forma, that the case might have upon appeal an authoritative determination. Our task now is to ascertain in what sense, the narrow or the broad, the word "gambling" was used by the legislature in enacting this statute.

Aid in determining the sense in which the legislature used a given term in one chapter or section of its statutes may often be obtained by considering the language of other chapters and sections upon the same or kindred subjects. Referring to the Chapter entitled "Gambling," (R. S., 126, § 1), we find that every person is forbidden to "permit any person to gamble *in any way* in any house, shop or place under his care or control." Referring to the Chapter entitled "Offenses against the public health, safety and policy," (R. S., ch. 129), we find in § 20 that "every lottery, policy, policy lottery, policy

shop, *scheme or device of chance of whatever name or description*, whether at fairs or public gatherings or elsewhere, and whether in the interests of churches, benevolent objects or otherwise is prohibited." It would seem from these to have been the intention of the legislature to prohibit every pecuniary transaction in which pure chance has any place. There are no words of limitation or exception. To give effect to this intention it would seem necessary to hold that the legislature has used the term "gambling" in its broadest, most generic sense, as comprehending every species of game or device of chance.

In the case before us it is idle to assume, or concede, that the person putting his five cents into the machine may be doing so merely as a means or mode of buying a five cent cigar. It is idle to deny that the impelling motive is the hope of getting other cigars for nothing. If the machine did not afford that chance it would not be used. True, the cigar dealer sets up the machine to increase his trade and is recouped by that increase for any losses, so that in the end he loses nothing, but he does so by arousing and stimulating the gambling propensity, the very propensity the legislature evidently seeks to repress. The element of chance is the soul of the transaction. The operator hopes by chance to get something for nothing. The dealer hopes chance will save him from giving something for nothing. Each is pecuniarily interested adverse to the other in a result to be determined solely by chance. To use the language of the street "it is a gamble" which will win, and we have no doubt the transaction is "gambling" in the statutory sense of the word.

If authority for this conclusion is needed, it is not wanting. In *State* v. *Willis*, 78 Maine, 70, in speaking of an advertisement alleged to be of a lottery, this court said: "However disguised by indirect or deceptive expression, the paper as a whole discloses a lottery. If it were not so readers would not become buyers." So in the case at bar, however disguised the scheme or device, its essential element is that of affording a chance to get something for nothing. If it were not so visitors to the store would not use it. A like case in principle is *Horner* v. *United States*, 147 U. S. 449. The Austrian government issued bonds and to induce purchase of them by the

public it obligated itself to pay not only the principal and interest of each bond but also such additional sum, if any, as the number of the bond might draw in a lottery established for that purpose. The fact that the purchaser of the bond presumably got full value for his money in the bond itself and did not stand to lose anything by chance, was held by the court not to save the transaction from being a lottery. The element of lot or chance was in it and that was enough. The two cases seem alike in principle. The opinion of the court is elaborate and exhaustive, citing many cases. We deem a reference to that opinion and the cases cited therein all that is necessary by way of citation.

Decree below reversed. Petition sustained with costs. Injunction granted.

EUGENE A. SNOWMAN *vs.* GEORGE E. MASON.

Knox. Opinion February 21, 1905.

Criminal Conversation. Proof of Marriage. Exceptions.

In an action in which the plaintiff charges the defendant with criminal conversation with his wife, and thereby alienating and destroying her affection for him and depriving him of her society and assistance, a certificate of marriage offered to prove the legal marriage of Eugene A. Snowman, the plaintiff, and Emma M. Freeman, his wife, is not sufficient evidence of such marriage, without proof aliunde of the identity of the parties. And it must be proof of identity or person and not of name merely. In this form of action positive proof of a legal marriage is required.

In making up exceptions without a copy of the evidence showing just what was done, the statement that the defendant did except must be held to relate to the time when the objection was made.

The refusal of the presiding justice at the close of the evidence to order a nonsuit, for any cause, is not exceptionable, the exercise of such power being discretionary.

The plaintiff is not excused from producing evidence of identification, although not requested by the defendant so to do, inasmuch as the plaintiff is bound to prove his case, and one of the elements of proof in this class of cases is that of identity.

Exceptions by defendant. Sustained.

The case is stated in the opinion.

L. R. Campbell, for plaintiff.

L. M. Staples and Philip Howard, for defendant.

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

SPEAR, J. This is an action in which the plaintiff charges the defendant with criminal conversation with his wife, and thereby alienating and destroying her affection for him, and depriving him of her society and assistance. The plaintiff recovered a verdict for $375. The case comes up on exceptions. The writ, pleadings and a copy of one Exhibit, No. 2, Plaintiff, are made a part of the exceptions.

The exceptions, in full, are as follows: "On the trial the plaintiff offered a certified copy of the record of the town clerk of the town of South Thomaston, Me., marked Exhibit No. 2, Plaintiff, to prove the marriage of the plaintiff, Eugene A. Snowman to Emma M. Freeman, or to prove that the clergyman was legally qualified to officiate without offering any evidence to identify the parties. To the admission of this copy of record the counsel for the defendant seasonably objected as insufficient to prove the marriage of the plaintiff to the person named in the writ as his wife. The said copy of record, Exhibit No. 2, Plaintiff, was admitted against the defendant's objection.

"At the conclusion of the evidence, counsel for the defendant requested the Court to direct the jury to return a verdict for the defendant upon the ground that the plaintiff had failed to produce or offer any evidence to identify the said Eugene A. Snowman and Emma M. Snowman named in the writ, with the Eugene A. Snowman and Emma M. Freeman named in said copy of record, Exhibit No. 2, Plaintiff. This request to direct the jury to return a verdict for the defendant the Court refused.

"To which rulings, admitting said copy of record, Exhibit No. 2, Plaintiff, and refusing to direct a verdict for the defendant as requested, the defendant excepts and prays that his exceptions may be allowed."

EXHIBIT NO. 2, PLAINTIFF.

STATE OF MAINE.

County of Knox.

Town of So. Thomaston, Jan. 21, 1904.

I, C. Richard Ward, the subscriber, do hereby certify that it appears by the Record of Marriages of said So. Thomaston that Eugene A. Snowman and Emma M. Freeman were married in Rockland, on the 18th day of November, 1893. The record is in words and figures following, to wit:

Date of Marriage	By Whom Married.	Names of Parties.	Residence.
Nov. 18, 1893.	Rev. J. H. Parshley	Eugene A. Snowman,	So. Thomaston, Me.
Nov. 18, 1893.	Rev. J. H. Parshley	Emma M. Freeman,	So. Thomaston, Me.

The above copy was properly authenticated.

At the outset the plaintiff asserts that the defendant's exceptions do not present a case that should be considered. He invokes the record to show that the defendant only seasonably objected to the admissibility of the certified copy of the marriage certificate as alone sufficient to prove identity, without reserving any exceptions. But we find at the bottom of the record the usual clause that to the ruling admitting the copy of the record the defendant excepts. In making up exceptions without a copy of the evidence showing just what was done, the statement that the defendant did except, must be held to relate to the time when the objection was made.

The only exception which admits of consideration, however, is that relating to the efficiency of Exhibit No. 2, to prove the identity of the parties named in the certificate of marriage; the other, with respect to the authorization of the officiating clergyman, being too indefinite to enable us to know just what it means.

The refusal of the presiding justice at the close of the evidence to

order a nonsuit, for any cause, is not exceptionable, the exercise of such power being discretionary. *Bragdon* v. *Insurance Co.*, 42 Maine, 259; *Webber* v. *School District*, 45 Maine, 299.

The plaintiff contends that the exceptions fail to show that the defendant at the trial required any evidence of identification and, in the absence of any such requirement, the plaintiff was not bound to identify. The answer to this is, that the plaintiff is bound to prove his case, and one of the elements of proof in this class of cases is that of identity.

It is clear that such proof was suggested, and may, perhaps, be reasonably inferred to have been required, from the fact that the defendant seasonably objected to the certificate offered "as insufficient to prove the marriage of the plaintiff to the person named in the writ as his wife." While the exceptions do not affirmatively state, yet, as the plaintiff does not controvert it in the exceptions, it may be fairly assumed that the certificate was the only evidence offered to prove the identity of the plaintiff and his alleged wife, with that of Eugene A. Snowman and Emma M. Freeman, named in the certificate. The certificate was undoubtedly admissible as a piece of evidence tending to show the identity of the parties, and in civil cases would be regarded as prima facie evidence of that fact, but a different rule obtains in criminal cases and in the case at bar.

"It seems to be a general rule that in all civil actions, except those for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage." *Taylor* v. *Robinson*, 29 Maine, 323. Again the court say on the same page, quoting from Greenleaf's Evidence "the proof of marriage, as of other issues is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances, from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon indictments for polygamy and adultery, and in actions for criminal conversations; but in all other cases any other satisfactory evidence is sufficient."

"Positive proof of a legal marriage is required upon the trial of persons indicted for polygamy and adultery and in actions for criminal conversation." *Pratt* v. *Pierce*, 36 Maine, 454.

While the certificate of marriage was admissible as collateral evidence, was it sufficient, in this case, without any evidence *aliunde* to prove the identity of the parties, and consequently a legal marriage? Our court in a case on all fours with this one have decided that it was not. In Wedgwood's case, 8 Maine, 75, the defendant was on trial upon an indictment for adultery and, in proof of marriage a certificate of the following tenor was admitted: "Mr. Isaac Wedgwood and Miss Judith Kelly, both of Lewiston, were joined in marriage July 15, 1821, Dan. Reed, Justice of the Peace." The certificate was in due form and properly authenticated. In effect it was precisely like the certificate under consideration. But the court say, 76, "the certificate in the case before us is only proof of a marriage between Isaac Wedgwood and Judith Kelley of Lewiston, in July, 1821, but it does not prove that the defendant is the same person named in the certificate. And, as we now establish the rule that proof of identity must be produced in such cases, it must be proof of identity of person, and not of name merely. It may serve as a guard against fraud and deception." To the same effect is *Mooers* v. *Bunker*, 29 N. H. 420. "But if a question is made a jury is not at liberty to presume that a person even of so peculiar a name as Timothy Mooers is the same person as the man of the same name who is shown to be entitled to a particular estate."

Exceptions sustained.

In Equity.

CATHERINE F. HASELTINE,

vs.

ALVAH J. SHEPHERD, et als.

Penobscot. Opinion February 22, 1905.

Equity. Jurisdiction. Construction of Wills. Life Estate. R. S. 1857, c. 77, § 8, par. 7. R. S. 1903, c. 77, § 5, c. 79, § 6, par. 8.

Where a testator devised to his wife his estate to hold to her sole use and benefit during her natural life, and the will provided that in the event she married again, her rights in the property should cease and determine the same as if she were dead; and further provided that until said widow so remarried she should have full power to control and dispose of said property, or any part thereof, if needed for her support and benefit; and the remainder over was given to the testator's children,— *Held:*

1. The widow can convey the real estate devised to her in fee simple in her lifetime, before remarriage, if needed for her support and benefit.
2. The rights and interests of the widow in the property devised to her will terminate should she marry again.
3. The Supreme Judicial Court has jurisdiction in equity under R. S., c. 79, § 6, paragraph VIII to construe a will upon the bill of a devisee, and to determine the character of the estate received by him under the devise, and the extent of his powers thereunder, as between himself and other devisees who claim, or may claim, adversely to him. It is not necessary that the claim should be controversial and litigious. It is sufficient if doubts exist out of which litigious claims may arise between the devisees.
4. The court will not assume jurisdiction to construe a will unless its language is such that the parties interested may reasonably have doubts concerning its true meaning, nor unless the party asking the questions has an interest in having the questions answered.

Equity. On report. Decree in accordance with the opinion.

Bill in equity to obtain the construction of the will of Joseph M. Haseltine, late of Dexter, Maine. After demurrer by defendants the parties agreed to report the same to the law court for determination.

All questions of law and fact to be open upon this report as fully as upon appeal and exceptions.

The opinion states the facts.

F. D. Dearth, Forrest J. Martin and Howard M. Cook, for plaintiff.

D. D. Stewart, for defendants.

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

SAVAGE, J. This bill in equity is to obtain a construction of the will of Joseph M. Haseltine, brought by the widow who is a devisee. The bill alleges, and hence the demurrer admits, that all persons interested are parties to the proceeding. The part of the will which is said to be of doubtful construction is as follows:

"To my beloved wife, Catherine F. Haseltine, I give, bequeath and devise all the rest and residue of my estate both real, personal and mixed, and all rights and credits thereunto belonging, to have and to hold to her sole use and benefit during the full term of her natural life, unless she shall marry again, in which event her rights in said property shall cease and determine the same as if she were dead. But until said death or remarriage she shall have full power to control and dispose of said property or any part thereof if needed for her support and benefit.

To the children of my daughters, Mary and Elizabeth before named, I give, bequeath and devise whatever may remain of said property, above described, at the decease or remarriage of my said wife, Catherine F. Haseltine, the same to be equally divided among them."

The complainant asks whether she can sell and convey the real estate devised to her in fee simple, in her lifetime, before remarriage, and whether her rights and interests in all of the property bequeathed and devised will terminate, should she marry again.

In *Burgess* v. *Shepherd*, 97 Maine, 522, a construction of the same will was sought by the executor, but we dismissed the bill, on the ground that, as executor, he had no interest in the residuary estate,

after he had turned it over to the widow, as it was plainly his duty to do, and that in the administration of the estate, it did not concern him to know whether the widow could sell in fee simple, or whether her rights would terminate upon remarriage. These were questions, it was held, which concerned only the life tenant or her assigns, and the reversioners or remainder men.

Now, again, these same defendants resist stoutly any interpretation of the will by the court, even upon the bill of the devisee, who certainly is interested in the estate. It is contended that the court has no jurisdiction to answer questions like these, not to aid adminstration, but to inform the devisee what are her rights. It is said that as between the devisees under a will, the court ought not and cannot pass upon titles to property devised, at least until controversies arise, and that when controversies are ripe for litigation, the parties should be remitted to their remedies at law. And it has been suggested that even if the court has jurisdiction, in a case like this, it ought not to be exercised until an exigency has arisen which requires a construction of the will. The learned solicitor for the defendants, however, denies that we have any jurisdiction in this case, and says that in all the history of litigation in this state since the statute for the construction of wills on bill in equity, R. S. 1857, c. 77, § 8, par. 7, was enacted, the court has never assumed jurisdiction over "questions between legatees or devisees depending upon the legal titles of the parties under a will, as between themselves, in which the executor had no interest," except in the case of *Baldwin* v. *Bean*, 59 Maine, 481, which case we shall refer to hereafter. If there is any question concerning the scope of a jurisdiction which has been invoked in several score of cases within the last fifty years, it is time that it was settled.

The phraseology of the statute of 1857 has remained unchanged to the present time, R. S. 1903, c. 79, § 6, par. VIII. It confers jurisdiction upon the court in equity "to determine the construction of wills and whether an executor, not expressly appointed a trustee becomes such from the provisions of a will; and in cases of doubt, the mode of executing a trust, and the expediency of making changes and investments of property held in trust." It is evident that this

case does not fall within any of the provisions relating to trusts, or trustees. No trust is involved here. No question is asked respecting the mode of executing any trust. The complainant does not appear here as a trustee. She only seeks information as to her personal rights. In *Merrill* v. *Hayden*, 86 Maine, 133, a case in some aspects very much like this, the court said, of a devise to one for life, with power to spend the income and so much of the principal as the devisee should need;—"There is nothing in the will creating a trust fund. . . . All the property was given directly to Maria to hold for life and to be spent by her, income and principal, so much as she should need. Only the excess at her death over her needs during life, was to go over to anyone. The control was given to her. There is no suggestion of any guardian or testamentary trustee." *Richardson* v. *Richardson*, 80 Maine, 585.

The jurisdiction of the court must be found, if at all, in the clause, "to determine the construction of wills." And here our attention is called to the fact that there is no punctuation mark whatever separating the phrase just quoted from the remainder of the sentence. If this has any significance it would seem to be that the power to construe wills exists only in connection with the provisions which relate to trusts. It is enough, however, at this time, to say that the court has never considered itself so limited. It has answered hundreds of questions having no reference to trusts. Punctuation is an uncertain guide. It may aid, and frequently does aid, the court in construing contracts, wills and statutes. But in many cases the meaning is so evident, notwithstanding the punctuation, that the court feels compelled to disregard it. *State* v. *McNally*, 34 Maine, 210; *Palmyra* v. *Nichols*, 91 Maine, 17.

Much light may be gathered by examination of the decided cases, where the court has either discussed its jurisdiction, or has assumed or declined to assume jurisdiction in cases analagous to the one now under consideration. The question of jurisdiction seems to have been first raised in *Baldwin* v. *Bean*, 59 Maine, 481. In that case the bill was brought by the executrix who was also devisee. See *Burgess* v. *Shepherd*, 97 Maine, 522. The only question asked was whether the complainant as devisee took an estate in fee simple, or

an estate for life only. It does not appear that any question of administration was involved. It was a question which concerned only the devisee and the heirs among themselves. The jurisdiction of the court was questioned by the defendants. "They say," said Walton, J. "they have never in any way interfered with the lands devised, and they deny the authority of the court to determine the rights of the parties in advance of any actual controversy." The right of the devisee, in case of actual controversy, to ask for a construction of the will, was not raised, but was necessarily assumed by the court when it answered the questions. With respect to the point which was raised the court said: "We have had grave doubts whether this objection is not well taken. But the statutes of this state, R. S., c. 77, § 5, provide that this court shall have jurisdiction as a court of equity, to determine the construction of wills; and we are inclined to think it was the intention of the legislature to secure to the parties in interest the right, in all cases of doubt, to have the opinion of the court as to the legal effect of a will even in advance of any actual controversy.

"It is an old maxim that an ounce of prevention is worth a pound of cure; and this is as true in law as in medicine. To prevent litigation is better than to end it. If by a bill in equity the parties in interest can all be brought before the court at one time, not only may a multiplicity of suits be avoided, but a just result much more certainly obtained. And by removing any cloud that may rest upon their titles, the owners will be enabled to deal with the property more understandingly; and if need be sell it for its true value; for purchasers will not then be deterred from buying it for fear they may buy a lawsuit with it. Influenced by these considerations, we think the statute, conferring upon this court jurisdiction in equity to determine the construction of wills, ought to be liberally interpreted; and that in all cases of doubt the parties should be allowed to have the opinion of the court, whether any actual controversies have arisen or not." This was not dictum. It was a judicial decision of the objection made to jurisdiction. The bill was sustained.

In *Baxter* v. *Baxter*, 62 Maine, 540, the court determined the nature of the devised estate, as between the devisee for life and the

heirs, and advised the devisee for life how, and under what conditions, he and the guardian of the heirs could convey the entire estate. In this case the necessity for such a sale was alleged.

In *Verrill* v. *Weymouth*, 68 Maine, 318, the disposition by will of the reversion of a house was determined, the court holding that an after born child took a vested remainder in fee simple, as devisee, which on his death descended to his mother.

In *Sampson* v. *Randall*, 72 Maine, 109, a bill brought by executors, the court was apparently asked to say what would become of the testator's property after certain life estates should end. But the court declined to answer, on the ground that it was a question "which in no way affects the executors." The court did however determine that certain devises created estates in fee, and certain others, life estates.

Garland v. *Garland*, 73 Maine, 97, was a bill brought by heirs against a devisee to determine the latter's interest under a devise. The bill was sustained, Barrows, J. saying, "It is apparent that the heirs of James Garland had an interest in having it judicially determined whether his [the devisee's] interest in the estate extended beyond the term of his own life."

Mansfield v. *Mansfield*, 75 Maine, 509, was a bill brought by the widow who was a devisee against the residuary devisee, to determine the character of the estate which she took in the realty, the complainant charging "that she is unable to make sale of the real estate because the respondent claims that she has not a fee, but only a life estate therein." She also alleged, in effect, that she needed the proceeds for her support. The court answered her question, unfavorably to her, however.

In *Nash* v. *Simpson*, 78 Maine, 142, a will had devised to the testator's widow "all my real and personal estate . . . . as long as she shall remain unmarried and my widow." The doubt stated in the bill was concerning the title to the reversion. The bill was brought by the devisee of one reversioner, who claimed an undivided half, against the devisee of another reversioner, who claimed the whole. The bill prayed for construction of the will and for partition, and was sustained so far as the prayer for

construction was concerned, no judgment being entered on the prayer for partition.

In *Richardson* v. *Richardson*, 80 Maine, 585, the will gave the residuum of the estate to the testator's widow "to her use and behoof and dispose of for maintenance during her natural life." The remainder over was devised equally to a daughter and a granddaughter with some provisions respecting death of these devisees without children and survivorship. The widow conveyed the property to her daughter. After the death of the widow, the granddaughter brought a bill to have the will construed, in order to determine the rights of the respective remainder men. The court answered the questions, and, in conclusion, Peters, C. J., said:

"There can be no doubt that we have jurisdiction to determine these questions. All persons in the world who can by any possibility be interested are parties to the proceeding. The statute benignantly accords to the court jurisdiction to determine the construction of wills, and, in cases of doubt, the mode of executing a trust. Being a privileged suit the ear of the court should be open to it to relieve parties from tedious and expensive family litigation."

Whittemore v. *Russell*, 80 Maine, 297, was a bill by the widow who was a residuary devisee, with remainder over. The court answered her questions, held that her interest was a life estate only, and further advised her that she had no power of sale.

In *Morse* v. *Hayden*, 82 Maine, 227, a part of the questions asked and answered related to duties of administration. But the court also advised the executrix as to whether her own devise was absolute or conditional, a matter which did not pertain to administration.

Mann v. *Jackson*, 84 Maine, 400, was a bill by the devisees of the reversion against a devisee of a life estate. To the latter had been given the homestead, house and lot for life, "unless she shall be married, in which case her life estate shall cease." The life tenant afterwards married. The court sustained the bill, and held that the testamentary provision in restraint of marriage was valid, and that the life estate was terminated by the marriage.

Jackson v. *Thompson*, 84 Maine, 44, cited by defendant's solicitor, was a bill to ascertain whether a trust had been created, and of

course was clearly within the equity statute. The court answered the questions generally, but declined to say whether the trustees should give bond or not, or to pass upon the validity of an assignment by a legatee.

Loring v. *Hayes*, 86 Maine, 351, was a bill by the devisee for life against remainder men, to determine their respective rights under the will and it was sustained.

Taylor v. *Brown*, 88 Maine, 56, was a bill by an executrix, who, as was decided, was a devisee in fee against one who claimed to be a devisee of a reversion. The only question was whether the complainant took an estate in fee, or one for life. The question was answered.

Hamlin v. *Mansfield*, 88 Maine, 131, related in part to administrative questions. But the court, besides answering these questions, answered questions asked in the answers of the defendants who were devisees, as to the effect of their devises, and whether a devisee could convey.

In *Hersey* v. *Purington*, 96 Maine, 166, the court construed a trust arising under a will. It determined the character of the estate which a devisee took, it passed upon the power of the guardian of the devisee to make future sales, but declined, on the authority of *Jackson* v. *Thompson*, 84 Maine, 44, to express any opinion as to the validity of past sales.

In *Burgess* v. *Shepherd*, 97 Maine, 522, when this will was before us on another occasion, the executor's bill, as we have already stated, was dismissed, because it did not appear that he had any interest in having the will construed. The court, however, did intimate that the devisee, this plaintiff, might obtain a construction of the will, if she desired.

In *Burroughs* v. *Cutter*, 98 Maine, 178, the bill was by the grantee of the guardian of a trust beneficiary against heirs or representatives, and was brought virtually to determine the validity of a guardian's sale. The court dismissed the bill. After noticing the fact that the will in question had been once fully construed at the suit of the administrator de bonis non with the will annexed, Mr. Justice Emery used the following significant language: "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."

These are all the cases in this state which throw any light upon the question. While most of them are barren of any statement of facts tending to show that any exigency existed which made the interpretation by the court to be immediately useful to the parties, they do show the character of the interest in the construction of a will which a party must have in order to invoke the jurisdiction of the court. We have examined all the cases cited by the defendants from other courts. None of them give us any aid, for none of them invoke the construction of a statute like ours. The case of *Bangor* v. *Beal*, 85 Maine, 129, also cited, is not applicable. It was a bill by a trustee, asking for instructions.

In the light of the many decisions cited, we think there can no longer be any doubt but that the court has jurisdiction to construe a will upon the bill of a devisee, and to determine the character of the estate received by him under a devise, and the extent of his powers thereunder, as between himself and other devisees who claim, or may claim, adversely to him. It is not necessary that the claim should be controversial and litigious. It is sufficient, if doubts exist, out of which litigious claims may arise between devisees. Many of the bills referred to have been styled "amicable bills." They were cases where doubts existed as to the relative rights of the devisees under a will, as between themselves, and where an adjudication in advance would tend to prevent controversy.

The benign purpose of the statute, as expressed by Judge Walton in *Baldwin* v. *Bean*, is to prevent litigation, to avoid a multiplicity of suits, or to remove clouds that may rest upon titles, that their owners may be enabled to deal with the property more understandingly, and if need be to sell it for its true value. Chief Justice Peters in *Richardson* v. *Richardson*, 80 Maine, 585, said that a bill under this statute is a privileged suit, and that the ear of the court should

be open to it. The purpose of the statute thus happily stated has seemed to guide the court in all of its adjudications from *Baldwin* v. *Bean* until the present time.

It should be said however that the court will not feel itself bound to answer all questions which can possibly be asked by a devisee. It must appear that the language of the will is such that the parties may reasonably have doubts concerning its true construction. Other parties should not be subjected to the trouble and expense of appearing in court, or the possible hazard of not appearing, in cases where there is no doubt. Again the party asking the questions must have interest in having the questions answered.

In this case, we do not think it can well be said that the complainant has no interest in the construction of this will, in knowing the character of her estate and the extent of her power of disposal. It may not be that the time has arrived, or that it ever will arrive, when she will need to sell the estate or her interest in it. But to know whether she can sell it when needed may, and we think naturally will, affect her plans of living. It will enable her to deal with the property more advantageously. It would not accord with the spirit of the statute as it has been construed to deny her the knowledge until the moment of need has arrived, and then subject her, while in need, to the delays incidental to proceedings of this character.

We have more doubt as to whether, in the light of the recorded decisions of this court, accessible to the complainant or her advisers, there is any real doubt as to the construction of this will, and for that reason, whether the plaintiff is entitled to have this bill sustained. But as this objection has now been raised for the first time, and as we are satisfied from the history of the attempts to get this will construed, that doubts do exist, reasonable or otherwise, we are inclined, having uttered this caveat, to answer the questions.

We answer the questions as follows:—

1st. Catherine F. Hazeltine, the devisee named in the will, can convey the real estate devised to her and described in the bill, in fee simple, in her lifetime before remarriage, if needed for her support and benefit.

2nd. The rights and interests of Catherine F. Haseltine in the property bequeathed and devised to her will terminate, should she marry again.

Decree accordingly.

MARK MCPHETERS *vs.* WILLIAM A. KIMBALL.

Piscataquis. Opinion February 27, 1905.

Replevin. Contract. Rescission. Tender.

The plaintiff exchanged a cow with the defendant, receiving of him a heifer and $8.00 in money. After examining the heifer, the plaintiff claimed that the defendant had misrepresented as to her size and qualities, and undertook to rescind the trade by restoring to the defendant the heifer and the money. The plaintiff returned the heifer and left her in the defendant's barn and offered to repay the identical money which he had received of the defendant with the heifer in exchange for the cow, but the defendant refused to accept the money. The plaintiff did not bring this money into court with his writ nor produce the same at the trial.

A party rescinding a contract must do all that is practicable to place the other party in statu quo. What he cannot restore on account of opposition he must put in custodia legis, so that it can be had upon request at least before verdict.

A tender must be kept good so that the other party shall know that he can at any time get his money or goods back without being put to an action to recover the same.

Held: That the plaintiff, after having made a tender and done all that was necessary to affect a rescission of the contract and authorize an action, failed to keep his tender good by bringing it into court with his writ, or at least at the trial, and that by reason of this failure he cannot maintain his action.

On exceptions by defendant. Sustained.

Replevin for a cow. Plea, general issue and a brief statement alleging that the cow was the property of the defendant and not of the plaintiff. Verdict for plaintiff.

The case is sufficiently stated in the opinion.

Henry Hudson, for plaintiff.

J. S. Williams, for defendant.

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

SPEAR, J. This is an action of replevin involving the title to a cow and comes up on exceptions. The plaintiff exchanged a cow with the defendant, receiving of him a heifer and eight dollars in money. After examining the heifer, the plaintiff claimed that the defendant had misrepresented as to her size and qualities, and undertook to rescind the trade by restoring to the defendant the heifer and the money.

After the plaintiff had put in his case, the defendant moved for a nonsuit, on the ground that the tender, if made, was not kept good by producing the money in court, and also excepted to the charge of the justice, who did not give an instruction to this effect. It appears that the plaintiff received the heifer about seven o'clock in the evening and, after discovering the deception as to her qualities, on the same evening took a deputy sheriff with a replevin writ, found the defendant and then and there told him that he had misrepresented the heifer and that he had come "to shift with him, to get his cow and settle the matter, and tendered him the eight dollars that he paid to boot." He said it was the same money he had received from the defendant and that the defendant took it, and "in the course of five minutes, we were talking the matter over, he come and laid it on the buffalo in my lap in the sleigh and said he wouldn't take it." The plaintiff also says that, at the same time, he told the defendant he was going to return the heifer. That night, or rather, shortly after midnight the next morning, the plaintiff took the heifer back to the defendant's barn and left her there and at the same time saw his cow in the barn, locked to a stanchion, so he could not take her. If the defendant's contention is correct that the plaintiff should have tendered to the defendant the money and heifer at the same time, yet if

the defendant, by any act or declaration of his, precluded the offer of tender as a useless form, the plaintiff would, thereafter, be required to make restitution only so far as practicable in view of the attitude of the defendant. If the defendant would not take the money the plaintiff could not compel him to. The only other thing the plaintiff could do was to return the heifer and this he did do before taking his cow.

If the defendant refused to rescind, the plaintiff had a right, upon restoring or tendering to the defendant the heifer and money, to replevy his cow without demand or notice. As the possession of the cow was obtained by unlawful means, namely, by fraudulent misrepresentation, he might treat the possession of the cow by the defendant as tortious, by relation, from the time of the first taking.

If the case stopped here and involved only the conduct of the parties, with respect to the acts necessary to constitute a rescission of the contract and authorize an action by the plaintiff, the result might be different, but, unfortunately for the plaintiff, something more was required of him.

It is a well settled rule of law that the party rescinding must do all that is practicable to place the other party in statu quo. What he cannot restore on account of opposition he must put in custodia legis, so that it can be had upon request, at least before verdict, otherwise he can not maintain his action.

Therefore in this case we find that the plaintiff, after having made a tender and done all that was necessary to effect a rescission of the contract and authorize an action, failed to keep his tender good by bringing it into court with his writ, or at least at the trial.

A tender must be kept good so that the other party shall know that he can at any time get his money or goods back without being put to an action to recover them. In *Thayer* v. *Turner*, 8 Met. 550, Chief Justice Shaw says, "The plaintiff as far as it is in his power shall put the defendant in statu quo by restoring and revesting his former property in him, without putting him to an action to recover it, before he can exercise his own right to take back the property sold or bring an action for it." While there need not be any plea of tender filed in this case, as in an action of debt, yet it would seem that

the tender itself should be kept good, the money be always ready and brought into court with the writ, or at least, at the trial. In New York it is held "if a tender was necessary in this case to effectuate a rescission of the contract, I cannot see upon what principle it can be maintained that the plaintiff need not keep the tender good, and was not obliged to produce the money received on the trial." *Stevens* v. *Hyde*, 32 Barbour, 183.

For the failure of the plaintiff to keep his tender good, the entry must be,

Exceptions sustained. New trial granted.

ANDREW J. MOULTON

vs.

SANFORD & CAPE PORPOISE RAILWAY COMPANY.

York. Opinion February 27, 1905.

Contributory Negligence. Conflicting Testimony. Verdict Set Aside.

No rule of law is better settled in this state than the one which declares, if a person, by his own negligent acts, contributes to the accident in which he is injured he cannot recover for the injuries so received.

The general rule is that when the testimony is conflicting the verdict must stand but a conflict of testimony cannot be said to arise simply because one witness testifies contrary to another.

The rule cannot be so construed. It means that there must be substantial evidence in support of the verdict. Evidence that is reasonable and coherent and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against opposing evidence.

On motion for a new trial by defendant. Sustained.

Case to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. Verdict for plaintiff for $1644. Defendant filed a general motion for a new

trial, and also a motion for a new trial on the ground of newly discovered evidence. The latter motion was not considered.

The case is stated in the opinion.

E. P. Spinney, for plaintiff.

Allen & Abbott, for defendant.

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

SPEAR, J. This is an action on the case to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant in running its electric car at an unreasonable rate of speed, in approaching, in the opposite direction, the plaintiff with his team, thereby frightening the plaintiff's horse and causing the injuries of which he complains.

No rule of law is better settled in this state than the one which declares that, if a person, by his own negligent acts, contributes to the accident in which he is injured, he cannot recover for the injuries so received. We think the plaintiff's case comes clearly within this rule.

Admitting the negligence of the defendant, which we doubt, the evidence shows that the negligence of the plaintiff clearly contributed to the accident causing his injuries. The verdict of a jury is, of course, a very strong barrier to overcome. The general rule is that when the testimony is conflicting the verdict must stand. But a conflict of testimony cannot be said to arise simply because one witness testifies contrary to another. If it was so held hardly a verdict could ever be set aside. It would be difficult to imagine a case that had been dignified with the verdict of a jury that would not present some conflict of testimony. Besides if such were the rule it would only be necessary to secure the evidence of a witness, however false, to hold a verdict once obtained.

The rule cannot be so construed. It means that there must be substantial evidence in support of the verdict,—evidence that is reasonable and coherent and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth

when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence a verdict cannot stand. *Roberts* v. *Boston & Maine R. R.*, 83 Maine, 298.

If the verdict is regarded as clearly and manifestly against the evidence it will be set aside. *Gilmore* v. *Bradford*, 82 Maine, 547; *Cosgrove* v. *Kennebec Light & Heat Co.*, 98 Maine, 473. When the evidence viewed in the light of the circumstances surrounding the whole transaction so strongly preponderates against the plaintiff upon points vital to the result as to amount to a moral certainty that the jury erred in the conclusion reached by them, the verdict should be set aside. *Smith* v. *Ins. Co.*, 85 Maine, 348.

In *Cawley* v. *La Crosse R. R.*, 101 Wis. 150, the court say: "If there was anything in plaintiff's evidence, standing alone, tending to show that she had passed two or three teams before, and we say there is not, the rule of law often announced, that the testimony of an interested party contrary to the facts otherwise conclusively established in the case and all reasonable inference from the situation disclosed by the evidence, does not raise a conflict requiring a finding by the jury." *Flaherty* v. *Harrison*, 98 Wis. 559; *Badger* v. *Janesville Cotton Mills*, 95 Wis. 599.

The plaintiff's contention in this case is that on the 16th day of March, 1903, he was driving along a public street in Kennebunk Village on his way from the Boston & Maine freight depot towards his home, with a barrel of coal in his wagon; that his horse had always been perfectly kind around the electric cars; that when he had arrived at a point opposite the house of Mr. James Stone, and crossed the railroad track to the northerly side of the road, the defendant's electric car, which is alleged to have caused the accident, was coming from Kennebunkport and was just below and beyond the curve at the foot of the hill; that the plaintiff and the defendant's car continued to approach each other until about 400 feet apart when the car swung around the curve at the foot of the hill, which gave the car the appearance, at this point, of coming head on to the plaintiff's team.

The plaintiff at this time was more than an hundred and thirty yards distant from the car, yet he says his horse, hitherto safe and

used to the cars, displayed great fear, pranced and stood up, and that he waved his hand to the conductor to stop, but that the conductor paid no attention; that he tried to control his horse and did until the car was passing him, when his horse swung from the road and in so doing the hub of the nigh hind wheel struck a trolley pole, swinging the horse northerly across the ditch and up the bank where the carriage struck an elm tree, throwing the plaintiff out, and severely injuring him. The defendant controverts the plaintiff's position on every point and affirmatively asserts, 1, that the plaintiff's horse was not well broken and kind but uncertain and vicious; 2, that the plaintiff when approaching the car was negligent in his manner of driving; 3, that his carriage did not strike an electric pole, claimed to have been negligently set too near the travelled part of the way; 4, that the car was moving up a 4 per cent grade at a slow rate of 4 or 5 miles an hour. The weight of evidence was with the defendant upon all of these propositions, and overwhelmingly so in one or more involving the defendant's own negligence as a contributory, if not the proximate, cause of the accident.

The plaintiff was a blacksmith and had in the hind part of his democrat wagon, as it is called, a barrel of coal. When he crossed the track at the top of the hill he says he was driving his horse with his left hand and steadying the barrel with his right. This testimony of the plaintiff, himself, clearly indicated that, while driving along the road entirely unmolested, the barrel was unsteady and required holding. It is not denied by the plaintiff, and is shown by all the witnesses upon this point, that the barrel remained in the wagon during all the escapades of the horse including his crossing the ditch and climbing a steep bank, so that the coal was "dumped along side of the tree on the bank," as one witness testifies and others corroborate.

In the light of these unquestioned facts the plaintiff says, at about half way between the house of Stone and the pole with which he collided, he released his hold upon the barrel and used both hands in driving his horse.

In contradiction of the plaintiff's unsupported testimony upon this point McGovern, the motorman, and Freemont Allen, who is in no

way connected with the defendant, both testify positively that when the plaintiff passed the front of the car, an instant before his horse bolted, he was driving with his left hand and holding the barrel of coal with his right, in just the manner the plaintiff admits he was driving at first. Upon this vital point in the case, whom does the fact that the coal was not dumped until the wagon reached the tree, corroborate? Because the place where dumped is a powerful physical fact bearing upon the truth of this contention. It may be possible, but it is not probable, that a barrel of coal, which would not sit in the wagon upon the wrought part of the highway, without the plaintiff's hand to support it, could have remained in the wagon, unsupported, while the horse bolted across the ditch and up the bank. The fact that the barrel, under the circumstances, staid in the wagon until it reached the tree, makes the conclusion well nigh irresistible, that the plaintiff was not only holding the barrel when he passed the car, but continued to do so until his wagon struck the tree and was partially overturned, thereby dumping the coal.

We think the testimony of the two witnesses, and that of the situation surrounding the accident, the truth of which cannot be gainsaid, conclusively prove that the plaintiff was negligent in the manner of driving his horse and that his negligence contributed to the cause of his injuries.

The plaintiff, it will be observed by the testimony, claims that the wheel of his wagon struck an electric pole, which had been set so near the travel of the road as to constitute negligence on the part of the defendant, and that had it not been for the proximity of this pole to the road, and his collision with it, he might have passed the car without accident, notwithstanding the fright of his horse. It was not necessary that he should prove any collision with the pole, to render the defendant liable, if it was negligent as charged and he was exercising due care. But the evidence is overwhelming that the plaintiff's carriage did not collide with the pole. This contradiction casts a doubt either upon the honesty or correctness of the plaintiff's narrative of the accident.

As it is unnecessary to pass upon the question of the defendant's negligence, the rate of speed of the car becomes immaterial except as

bearing upon the fairness of the witnesses. Balch, the plaintiff's witness, says the speed was 5 or 6 miles an hour, and his estimate is not in serious conflict with that of the defendant's. But, upon the character of the plaintiff's horse, a sharp controversy arose to which we allude in view of its bearing upon the credibility and candor of the plaintiff. He first testified to the good qualities of the horse. Then when speaking of throwing up his hand to signal the motorman, he says, "After I threw up my hand, I took my horse, of course I paid strict attention to the horse, as I knew him." Knew him how? Does a kind horse need strict attention? After he was injured, and suffering mental and physical pain several witnesses testified to his declaration as to what his wife had told him in regard to using the horse, which was in substance, "my wife told me that horse would break my bones if I didn't get rid of him." On cross examination he denied that he made any such declaration.

Q. Ever make any remark to this effect, or this substance; that my wife told me that if I didn't sell this horse it would break my neck or my leg sometime? A. No sir, My wife didn't tell me any such words. Q. I didn't ask you that, but did you make any such remark? A. No sir; I did not. But this remark was testified to by four witnesses and the plaintiff on redirect undertakes to break the force of his flat contradiction of so many witnesses by what we feel obliged to call an evasion.

He was cross examined as follows:—

Q. You remember your testimony in cross examination when you were on before, you remember what you testified to fully? A. In regard to what? Q. Do you remember when I asked you the question in regard to making this statement of saying that your wife's name wasn't mentioned? A. I did not mention my wife's name. At what time? Q. In the cross examination when you were on the stand yesterday I asked you if you didn't make such a remark that your wife said so and so and don't you remember that you said that your wife's name wasn't mentioned? A. I remember that I said that I never mentioned my wife's name, yes; I did not. Q. You have just testified that you did mention your wife's name? A. I think not. Q. Very well. A. My wife's name is Mattie

A. Moulton, if you please. Q. Then you want the jury to understand that you get around it in that way? A. Well, I understand exactly as I said it you know; I told it exactly as I knew; I wasn't unconscious at the time; I was conscious of every thing that was done. Q. I didn't know what your wife's name was. I asked you if you didn't—A. I took it that you meant my wife's name. Q. You want the jury to understand that that is the way you get around it? A. I am not trying to get around it. Direct examination resumed. Q. You didn't call your wife by name nor mention her name, did you? A. No sir; I did not. Q. You don't understand that you have now when you said, "My wife said"? A. I merely said "my wife."

The original statement by the plaintiff that he did not mention his wife's name was not brought out on cross examination but upon the direct resumed. The effect, however, is exactly the same as the plaintiff so treated it in the above examination.

It is perfectly apparent that the plaintiff when he asserted that he did not mention his wife's name, intended to deny that he made any such statement with respect to what his wife had said, as the several witnesses had attributed to him. He undoubtedly meant that he did not mention the name, wife, and hence could not have made a statement as coming from her. This palpable evasion detracts much from the confidence to be placed in the plaintiff's whole story, especially, when it comes in conflict with other consistent and apparently reliable testimony.

A full analysis or even a summary of the evidence, is impracticable within the reasonable scope of an opinion, and would subserve no practical purpose beyond a decision in this case. The plaintiff's contention in this case is so shaken by the inherent weakness of his own testimony and so strongly contradicted by the positive testimony of witnesses and by the situation and circumstances surrounding the accident as to compel the conclusion that the jury erred in finding a verdict for the plaintiff.

Motion sustained. New trial granted.

APPENDIX.

Questions Submitted by the House of Representatives, January, 1905, with Answers of the Justices of the Supreme Judicial Court thereon.

If two cities have unreasonably neglected to perform their duty of maintaining a bridge which is a part of a public highway between such cities, so as to comply with all the regulations of law, both federal and state, it is within the power of the Legislature to compel a compliance with such regulations through any agency it sees fit to adopt. It may establish a commission for such purpose and direct such commission to remove such bridge and replace it with one so constituted as to comply with all the regulations of law, both federal and state.

The Legislature may impose the burden of assuming and paying the cost of such work upon such cities in such proportion as it may fix, or as may be determined by appraisers appointed for that purpose.

The Legislature cannot authorize a city to increase its indebtedness beyond the constitutional limit; neither can it compel a city to become indebted beyond the prescribed limit even for the purpose of meeting the cost of public improvements, the duty of making which is imposed by the Legislature upon such city.

If a bill imposes upon a city a debt, and such debt is for none of the purposes named in the proviso of Article XXII of the Amendments to the Constitution, and the municipal indebtedness of such city already exceeds five per centum of the last regular valuation, then such bill, if the same should become enacted, would be in violation of the Constitutional Amendment aforesaid.

Constitutional limitations imposed for the protection of the people, or a minority of them, against certain acts of government are not to be regarded as penal but as remedial and are to be so construed as to afford the protection contemplated.

In House of Representatives, January, 1905.

Ordered, That the justices of the supreme judicial court are hereby respectfully requested to give this House, according to the provisions of the constitution of the State in this behalf, their opinion on the following questions:

Question one. Assuming that the municipal indebtedness of the city of Portland is already in excess of five per cent of its total

valuation would the bill entitled, "An act relating to the rebuilding of Vaughan's Bridge," now pending in this House, and a true copy of which said bill is hereto annexed, if the same should become a law be in violation of Article XXII of the amendments to the constitution of this State?

Question two. Assuming as above, would said bill, if the same should become a law be in violation of any of the provisions of the constitution of this State.

House of Representatives, Jan. 26, 1905.

Tabled pending passage by Mr. Hale of Portland.

Ordered printed.

E. M. THOMPSON, *Clerk.*

House of Representatives, Jan. 27, 1905.

On motion of Baxter taken from table. Read and passed.

E. M. THOMPSON, *Clerk.*

A true copy,

Attest:

E. M. THOMPSON, *Clerk.*

STATE OF MAINE.

IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND FIVE.

AN ACT relating to the rebuilding of Vaughan's Bridge.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

Section 1. The mayor of the city of Portland, the mayor of the city of South Portland, the treasurer of the city of Portland, the treasurer of the city of South Portland, and the Commissioner of Public Works of the city of Portland and their successors in office, until the purposes of this act shall have been accomplished, are hereby constituted a commission with full power and authority to carry

out the purposes and provisions of this act. They shall be designated as Vaughan's Bridge Commission and shall serve without pay. The mayor of the city of Portland shall be chairman of said commission, the mayor of the city of South Portland shall be clerk of said commission, and the treasurer of the city of Portland shall be treasurer of said commission. The clerk shall keep a record of all meetings of the commission which shall be public records, and which after the purposes of this act shall have been accomplished, shall be filed in the office of the City Clerk of the city of Portland. The treasurer shall have custody of all funds coming into the hands of said commission under the provisions of this act and shall deposit them in such bank or banks as said commission may direct, and shall give bond to said commission in such sum and with such sureties as said commission shall approve which bond shall remain in the custody of the chairman.

Sect. 2. Said commission shall have full authority to remove the present bridge known as Vaughan's Bridge, connecting the cities of Portland and South Portland, across that part of Portland Harbor known as Fore river, and in place thereof to construct a new bridge across said Portland Harbor at the same points where said Vaughan's Bridge now crosses, the same to be thereafter maintained as a part of the same highway of which said Vaughan's Bridge is now a part, with a suitable draw of sufficient width to accommodate navigation at that point. Said commission shall construct suitable approaches to each end of said new bridge using so much of the highway and approaches to the present bridge as may be, and in case more land is required for the construction of said new bridge or its approaches than is now used and occupied for the present bridge or its approaches, said commission shall have the power to take by right of eminent domain, upon the payment of reasonable compensation therefor, so much land outside the present highway, bridge and approaches to the same as may be necessary for the construction of said new bridge and the approaches thereto, and if necessary, may construct a temporary highway bridge connecting said cities of Portland and South Portland for the use of teams and pedestrians during the construction of said new bridge. In exercising the right of eminent domain

hereby vested in said commission, said commissioners may take land necessary to carry out the purposes of this act after hearing, notice of the date and place of hearing being given by publication in two daily newspapers published in Portland for one week, at least, previous to the time appointed for said hearing, and the clerk of said commission shall keep a record of their proceedings and their determination and decision which shall be signed by a majority of them and which shall set forth a description of the land taken and the owners, if known, and the amount of damages awarded therefor, and upon the signing of said record said commissioners may enter upon the land and take possession thereof for the purposes of this act, and the land so taken shall become a part of the public highway and be subject to all provisions of chapter twenty-three of the Revised Statutes relating to highways. Any person aggrieved by the decision of said commissioners as far as it relates to damages awarded for land so taken, shall have the same right of appeal as is provided from the award of damages in laying out streets in the city of Portland under section nine of chapter 275 of the Private and Special Laws of 1863.

Sect. 3. Said new bridge shall be built of such width and of such materials and in such manner as said commissioners shall determine that the interests of the public will best be subserved and at an expense not to exceed four hundred thousand dollars. There shall be a draw constructed in said new bridge with a clear opening of not less than sixty feet in width in such part and in such manner as shall meet the requirements of the war department of the United States. Said bridge, when completed, shall be suitable for all purposes of ordinary travel between said cities; and if said commission deem it advisable, said bridge may be built so as to allow its use for purposes of traffic by such surface railroads operated by electricity as may obtain permission to use the same from the cities of Portland and South Portland.

Sect. 4. The expense of removing the present bridge, constructing said new bridge including approaches thereto and the taking of land necessary therefor, a draw and the appurtenant structures necessary for the convenient operation of said draw, and the building of a temporary highway bridge, and such other expenses as are necessary

to carry out the purposes of this act, shall be borne and paid by the cities of Portland and South Portland, and apportioned between said cities in such proportion as three referees, selected in the manner hereinafter provided, shall fix. Before entering upon the construction of said new bridge, the mayor of the city of Portland shall select one referee, the mayor of the city of South Portland shall select a second, and the two so selected shall select a third referee. In case the two selected by said mayors fail to agree upon a third referee, any justice of the supreme judicial court, upon request in writing by the two referees selected by said mayors setting forth their failure to agree, may appoint a third referee who shall not be a resident of either city. The expenses incurred for their services shall be met as the other expenses of constructing said new bridge are met.

Sect. 5. Said commission shall make all contracts for materials and labor necessary to carry out the purposes of this act, and to meet the expenses thereby resulting shall raise money by the sale of bonds, with interest coupons attached, which said commission is hereby authorized to issue to a sum not exceeding four hundred thousand dollars. Each bond so issued shall have inscribed upon its face the words, "Vaughan's Bridge Bonds," and shall be signed by the treasurer of said commission and countersigned by its chairman, but the coupons attached thereto may be attested by a facsimile of said treasurer's signature printed thereon. Said bonds shall bear interest not to exceed four per cent per annum, payable semi-annually, and shall be legal investments for savings banks in this State. Said bonds may be made to mature serially or to run for such periods as said commission may determine, but none of which shall run for a longer period than forty years.

So many of said bonds as in amount shall equal the proportional part of the total expenses, authorized by this act, imposed upon the city of Portland by the referees selected and acting under section four, shall likewise have inscribed to shall have inscribed upon its face the words, "Payable by the City of Portland, Maine," and each coupon attached thereto shall have inscribed upon its face the words, "Payable by the city of Portland, Maine," and such bonds and coupons shall constitute a legal obligation of the city of Portland and

shall be met by taxation upon the property and polls within said city; the remainder of said bonds representing in amount the proportional part of said total expenses imposed upon the city of South Portland by said referees acting under said section four shall have inscribed upon their face the words, "Principal and interest payable by the city of South Portland, Maine," and each coupon attached thereto shall have inscribed upon its face the words, "Payable by the city of South Portland, Maine," and such bonds and coupons shall constitute a legal obligation of the city of South Portland and shall be met by taxation upon the property and polls within said city. In case either of said cities shall, before said bridge is completed and the expenses incurred thereby are fully paid by said commission from the sale of bonds under this section, pay to the treasurer of said commission any funds for the purpose of meeting in part or in whole the obligations imposed upon it by this act, the said commission shall then issue bonds against such city only to an amount equal to the difference between the amount so paid and the total obligations imposed upon such city by the decision of the said referees under section four of this act. In no event shall the city of Portland or the city of South Portland be compelled to pay a greater proportion of the total expenditures authorized by this act than is imposed on each by the decision of said referees under said section four.

Sect. 6. In case the cities of Portland and South Portland shall, at any time before the obligations imposed by this act are fully paid, enter into an agreement with any surface railroads operated by electricity to permit the use of said bridge by said railroads for purposes of traffic under such terms and for such periods as they may agree upon, the amount paid by said railroads for such privilege shall be divided and paid to said cities in the same proportion as the expense of construction of said bridge is divided by the referees selected and acting under section four, and if any sums are so paid to said cities for such use before the completion of said new bridge, it shall be at once paid by said cities to the treasurer of said commission who shall apply the sum so paid by each city in part payment of the obligation imposed upon it under this act. If any sum should be paid to said cities by any surface railroads for such privilege after the completion

of said bridge, it shall be paid to said cities in the same proportion as said expense of construction is divided, and the amount so received by each city shall be placed in a sinking fund to be there held and invested and the proceeds thereof applied in part payment of the bonds issued under this act when they become due.

Sect. 7. After the completion of said bridge, on application in writing by said commission, the referees selected under section four of this act shall determine what section of said new bridge the city of Portland shall thereafter maintain as its proportionate share of the expense of future maintenance, and what section the city of South Portland shall thereafter maintain as its proportionate share of the expense of future maintenance which shall be divided as near as may be in the same proportion as the expense of construction; and if, upon such division, any part of said bridge required to be maintained by the city of Portland shall extend within the present limits of the city of South Portland, the territory covered by such part of said bridge shall thereafter be enclosed within the territorial limits of the city of Portland so long as said bridge shall be maintained. The said cities of Portland and South Portland shall thereafter each maintain the section so designated as its part and keep the same in repair, and in case of injury to travellers using said bridge as a highway, each city shall be liable for all injuries resulting from any lack of repair which it was its duty to make under this act, but only under such conditions and limitations and for such amount as it would be liable for a defective street under section seventy-six of chapter twenty-three of the Revised Statutes.

Sect. 8. All acts or parts of acts relating to Vaughan's Bridge heretofore enacted in so far as they are inconsistent herewith are hereby repealed.

Sect. 9. This act shall take effect when approved.

To the Honorable House of Representatives of the Seventy-Second Legislature:

The undersigned Justices of the Supreme Judicial Court have the honor to hereby submit their answer to the questions propounded by

the House of Representatives, by an order passed on the twenty-seventh of January, 1905.

Before considering the question as to whether or not any of the provisions of the pending bill are in conflict with the amendment to the constitution establishing a debt limit for municipalities, it is sufficient to say generally, that in our opinion, the bill, if enacted, would not be in violation of any other provision of the State constitution. We have no doubt that it is within the power of the legislature, if the cities of Portland and South Portland have unreasonably neglected to perform their duty of maintaining the bridge referred to, a part of the public highway between these two cities, so as to comply with all regulations of law, both federal and state, to do so itself through any agency that the legislature sees fit to adopt, and consequently that it may establish the commission provided for in this bill, and may direct that commission to proceed forthwith to remove the present structure and to replace it with a new one, so constructed as to accommodate navigation at that point. More than this, we do not doubt that the legislature may impose the burden upon the cities named, in such proportion as may be fixed by the legislature, or as may hereafter be determined by appraisers appointed for that purpose, of assuming and paying the cost of the work contemplated by the bill, so that, as we have already said, we do not perceive that the proposed legislation is in violation of any other provision of our constitution.

We come now to the important question, to which we have given much consideration, as to whether the fifth section of the pending bill contains any provisions which are in conflict with Article XXII of the Amendments to the Constitution. That amendment is as follows: "No city or town shall hereafter create any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed five per centum of the last regular valuation of said city or town; provided, however, that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made." It is

obvious that none of the exceptions in the amendment are applicable to the questions here involved, so that they may be dismissed from further consideration.

The bill provides that the cost of removing the present bridge and of replacing it with a new one, not exceeding the sum of four hundred thousand dollars, shall be met by the issue of bonds by the commission to that amount, the maturity of which may be extended by the commission in its discretion, to any time not exceeding forty years. The payment of these bonds, as well as of the coupons attached for the semi-annual interest, is imposed upon the two cities, in the proportions to be determined later in the manner provided by the bill. The proportional part thereof to be assumed by the city of Portland, "shall constitute a legal obligation of the city of Portland and shall be met by taxation upon the property and polls within said city." It is assumed in the question submitted to us that the municipal indebtedness of the city of Portland is already in excess of five per centum of "its total valuation," by which is undoubtedly meant, to use the language of the amendment, "the last regular valuation of said city."

Clearly the city itself, under these circumstances, could not create any additional indebtedness, except for some of the purposes named in the proviso. More than that, the legislature could not authorize the city to create or increase its indebtedness. What the constitution has prohibited as to a municipality cannot be authorized by the legislature, since one of the very purposes of the adoption of a constitution is to limit the power of the legislature as well as that of other departments of government. But, it is said, that this constitutional provision is not applicable because it is not proposed that this indebtedness should be created by the city, even with the authority of the legislature; that this proposed indebtedness is to be created by the legislature and imposed upon a municipality without its consent, and that therefore it does not come within the inhibition of the constitutional amendment.

It is undoubtedly true that the proposition is not within the literal meaning of the words of the amendment. The debt is not to be created by the city. It is to be created and imposed upon the city by

the legislature, acting through the commission established for the purpose of replacing the bridge and of providing the means of payment therefor. But is it not within the spirit and meaning of the constitution? And if within the spirit, although not within the letter, it is equally within the meaning. Is not the proposition one of the very mischiefs that was sought to be avoided and prevented by the framers of the amendment, and by the people in its adoption? We think that it is. Constitutional limitations imposed for the protection of the people, or a minority of them, against certain acts of goverment are not to be regarded as penal but as remedial and are to be so construed as to afford the protection contemplated.

The object of this amendment was to prevent municipalities from incurring large indebtedness, even if the majority of the citizens, or their representatives in the city government favored such indebtedness, and even if the legislature authorized it. It was to protect the minority against the extravagance and improvidence of the majority. It was to require municipalities to pay for improvements as the improvements were made, except to the extent of the limit of indebtedness allowed. It should not be easily evaded, but should, we think, be upheld according to its true spirit and the intent of its framers and of the people in its adoption.

It must be admitted that an act of the legislature which authorized a city to increase its indebtedness beyond the constitutional limit would be void; can it be otherwise, when instead of authorizing the creation of a liability, the legislature compels an increase of indebtedness beyond the prescribed limit. In other words, if this bill had provided that the cost of the contemplated work of removal and reconstruction should be paid in certain proportions by the two cities, and that the city of Portland might issue bonds to provide for the payment of its proportional part thereof, it would be clearly unconstitutional. Can the result be different because of the fact that the bill contains the word "shall" instead of "may." A provision of the constitution which could be so easily avoided would be of but little value.

If the legislature cannot authorize a municipality to incur indebtedness with the latter's consent, we do not think that it can compel it

to become indebted, beyond the prescribed limit without or against its consent, even for the purpose of meeting the cost of public improvements, the duty of making which is imposed by the legislature upon the municipality. And here, in our opinion, is the line of demarkation between what the legislature may and may not do in this respect. It may impose the duty and burden upon a municipality, but the municipality, in the performance of that duty, must keep within the limitations of the constitution.

For these reasons, although we appreciate the force of the arguments contained in the answer of some of our associates, wherein they have arrived at a contrary conclusion, and have very carefully considered them, which accounts for the delay in submitting this answer, we are constrained to reply to the first question submitted that, in our opinion, the pending bill, entitled "An Act relating to the rebuilding of Vaughan's Bridge," if the same should be enacted, would be in violation of Article XXII of the Amendments to the Constitution of this State. We have already given our answer to the other question submitted.

February 27, 1905.

ANDREW P. WISWELL.
LUCILIUS A. EMERY.
SEWALL C. STROUT.
ALBERT R. SAVAGE.
FREDERICK A. POWERS.

To the Honorable House of Representatives of the Seventy-Second Legislature:

The following is our answer to the questions proposed by your Honorable Body by an order entitled House Document No. 17, respecting the constitutionality of the bill entitled, "An Act relating to the rebuilding of Vaughan's Bridge."

For the purpose of answering the question proposed, we assume that Vaughan's Bridge directly connecting the cities of Portland and South Portland, is a legal highway which the two cities are obliged by law to maintain and keep in repair. The proper maintenance of a bridge legally located involves the performance of a public duty which the State, through the legislative department, by virtue of its plenary powers over the discharge of public municipal duties, can enforce.

Revised Statutes, chapter 23, sections 56, 57, 58 and 59, specially provide for the maintenance and repair of highways and also the remedy for unreasonable neglect on the part of municipalities to keep them in repair. Section 59 is the one which prescribes the remedy in case of such neglect and reads as follows:

"If the town neglects to make the repairs prescribed by the commissioners, within the time fixed therefor in such notice to the town, they may cause it to be done by an agent, not one of themselves. Such agent shall cause the repairs to be made forthwith, and shall render to the commissioners his account of disbursements and services in making the same. His account shall not be allowed without such notice to the town, as the commissioners deem reasonable. When the account is allowed, the town becomes liable therefor, with the agent's expenses in procuring the allowance of his account, and interest after such allowance and said commissioners shall render judgment against the town in favor of the agent. If a town neglects to pay said judgment for thirty days after demand, a warrant of distress shall be issued by the commissioners to collect for the same." But this section is only declaratory of the sovereign power upon this

subject, when not in conflict with any constitutional provision. With regard to legislative authority, our constitution, article 4, section 1, confers upon the legislature, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States." But it may be said that this broad construction of legislative powers, confers upon the State authority to compel municipalities to perform many other duties which, upon their unreasonable neglect, it can cause to be performed at their expense, and therefore invests the legislature with the power to impose upon municipalities, financial obligations for a variety of public utilities, for which the towns themselves could not provide. This may, in a measure, be true but a sharp line of demarkation must be drawn with respect to the municipal duties, the performance of which the State can and cannot compel.

This line of cleavage is found in the distinction with respect to the public duties which the municipality is obliged to perform, as a legal obligation, and those duties which it may perform, when permitted by law, of a local nature. Of the former character are the obligations resting upon municipalities to maintain highways, which of course include bridges; furnish school facilities, and provide a proper system of drainage. Of the latter character, are such public utilities, of great local value, as water works, electric lighting plants, city halls and public parks, all of which are convenient acquisitions, but not obligatory. While there may be other utilities belonging to each of the above classes, we have alluded to those enumerated simply by way of illustration.

It is evident that some power must exist to compel the performance of these obligatory duties, else the very object of government would cease. An insignificant town could, by neglect or refusal to perform its legal duty, prohibit the use of a great public thoroughfare; or curtail the invaluable opportunities of educating the children; or subject the public health to danger and infection. Therefore, regardless of article XXII, of the amended constitution, it is almost too evident to require citation, that the inherent power resides in the State to compel the maintenance and repair of legally located

highways and bridges. And it has given specific expression to this power, the constitutionality of which has never been questioned, in the summary method prescribed for executing it in section 59, chapter 23, Revised Statutes, above cited. As a corollary of the above proposition, it follows that the legislature can provide any method it may see fit to adopt, for the purpose of carrying into effect its mandate, whenever on account of neglect or refusal of a municipality, it enjoins the performance of any public duty. Hence no objection can arise to the constitutionality of section 1 of the act in question.

In support of the above propositions, if any question is raised, we cite the following authorities. Respecting the general nature of municipal corporations, Judge Cooley says, "They are created for convenience, expediency and economy in government, and, in their public capacity, are and must be at all times subject to the control of the State which has imparted to them life, and may at any time deprive them of it. . . . They have their public or political character, in which they exercise a part of the soverign power of the State for governmental purposes, and they have their private character, in which, for the benefit or convenience of their own citizens, they exercise powers not of a governmental nature, and in which the State at large has only an incidental concern, as it may have with the action of private corporations. It may not be possible to draw the exact line between the two, but provisions for local conveniences for the citizens, like water, light, public grounds for recreation and the like, are manifestly matters which are not provided for by municipal corporations in their political or governmental capacity, but in that quasi private capacity in which they act for the benefit of their corporators exclusively. In their public, political capacity, they have no discretion but to act as the State which has created them shall, within constitutional limits, command, and the good government of the State requires that the power should at all times be ample to compel obedience, and that it should be capable of being promptly and efficiently exercised."

In 1 Dillon on Municipal Corporations, section 74, the author says, "Thus if there is no special limitation in the constitution, and the debt or liability is one to be incurred in the discharge of a public or

State duty, which it is proper for the legislature to impose upon the municipality, it can constitute no objection to the validity of the Act that the debt or liability is to be created without its consent. Accordingly, in the absence of constitutional restriction, it has been decided, and the decision is doubtless correct, that it is competent for the legislature to direct a municipal corporation to build a bridge over a navigable watercourse within its limits, or the State may appoint agents of its own to build it, and empower them to create a loan to pay for the structure payable by the corporation. Thus also, since municipal corporations are instruments of government, created for political purposes, and subject to legislative control, and since it is one of the ordinary duties of such corporations, under legislative authority, to make and keep in repair the streets and highways and bridges connected therewith, the Court of Appeals in Maryland sustained an act mandatory in its terms, which not only empowered but required the city of Baltimore in its corporate capacity to take charge of and maintain as a public highway a specified bridge within that city, and enforced the duty created by the act of mandamus."

In city of *Philadelphia* v. *Field*, 58 Pennsylvania St., 320, it was held, that the legislature could appoint commissioners to build a free bridge over the Schuylkill river, to create a loan for that purpose and require the council of Philadelphia to provide for the payment of the loan. In the opinion, the court say, "The whole law making power of the State is committed to the legislature with certain restrictions and limitations imposed on that body by the constitution. In the exercise of this power, the legislature have dug canals, built bridges and railroads, and paid for them by money raised by loans and taxation. This power is indisputable, and upon its constitutionality depends our large State debt. The legislature could undoubtedly build this bridge over a navigable river at South street, and pay for it by moneys proceeding from loans or taxes, and in doing it they might employ commissioners to erect it. This must be conceded, and it is but one step further, to impose the cost of erection on the city and county."

In *People* v. *Flagg*, 46 New York, 401, it was held that, the

legislature has power to direct the construction of the highway in any town, to compel the creation of a town debt by the issue of its bonds, and to impose a tax upon the property of the town to pay the bonds, without the consent of the citizens or town authorities. The court say:

"The making and improvement of public highways; and the imposition and collection of taxes, are among the ordinary subjects of legislation. The towns of the State possess such powers as the legislature confers upon them. They are a part of the machinery of the State goverment, and perform important municipal functions, which are regulated and controlled by the legislature. Private property cannot be taken for public use without compensation. But this principle does not interfere with the right of taxation for proper purposes. The legislature, in substance, directed certain highways to be made and constructed in the town of Yonkers, and imposed a tax upon the town to pay the expenses of the work, but to prevent too large a tax at one time, it directed bonds to be given, payable at different periods, so that no more than a limited sum should become due at one time.

The bonds to be given are town bonds; they are to be issued by town officers, and the tax to pay them is imposed upon the property of the town. If the legislature may authorize the town to incur this debt, why may it not direct it to be done? As a question of power, I am unable to find any restriction in the constitution. It is not within the judicial province to correct all legislative abuses."

In discussing the general grant of power under part 2, chapter 1, article 4, of the Massachusetts constitution, the purport of which is precisely like ours relating to legislative power, the court in *Hingham & Quincy Bridge Corporation* v. *County of Norfolk*, 6 Allen, page 358, say, "The statute was not designed as an exercise of the right of eminent domain, nor intended to prescribe a mode of determining controverted and conflicting rights between different counties and towns. It was framed under that clause in the constitution, part 2, chapter 1, article 4, which confers on the legislature full power and authority to enact all manner of wholesome and reasonable laws "as they shall judge to be for the good and welfare of this

commonwealth, and for the government and ordering thereof, and of the subjects of the same." One of the main purposes of this general grant of power was to vest in the legislature a superintending and controlling authority, under and by virtue of which they might enact all laws not repugnant to the constitution, of a police and municipal nature, and necessary to the due regulation of the internal affairs of the commonwealth. It is obvious that the exercise of such a power is absolutely indispensable in a wisely governed and careful distribution of certain public burdens or duties. Of these a leading one is the construction, support and maintenance of roads and bridges. From the earliest history of this commonwealth, the legislature have always made ample provision to secure these objects.

Section 4 of the act provides for an apportionment of the expenses necessary for the erection of the proposed bridge, and appoints a tribunal for the determination of such apportionment. We apprehend that the authority of the legislature to apportion the expenses of such work, upon such taxing districts as will, in its judgment most fairly and equitably distribute the proportions, will not be questioned; and when the proportion that each of the divisions or districts should bear is not clearly apparent to the legislature, it is entirely proper for it to provide for the selection of a tribunal to determine the equitable proportion of the whole expense each district should bear. Authorities upon these points are numerous and so far as we have been able to examine, uniform. Cooley on Taxation, 2d edition, pages 149, 239, 682, 688, Dillon on Municipal Corporations, 4th edition, volume 11, section 737. *Waterville* v. *County Commissioners*, 59 Maine, 80. *Hingham & Quincy Bridge, etc.*, v. *County of Norfolk*, et als., 6 Allen, 353. *Salem Turnpike & Chelsea Bridge Co.* v. *County of Essex*, 100 Mass. 282. *Commonwealth* v. *Newburyport*, 103 Mass. 129. *Freeland* v. *Hastings*, et als., 10 Allen, 580. *Jensen* v. *Board of Supervisors of Polk County*, 47 Wis. 313. *Board of Park Commissioners* v. *Common Council of Detroit*, 28 Mich. 235. *Gordon* v. *Cornes*, et al., 47 New York, 608. *Supervisors of Will County* v. *People*, 110 Ill. 511.

If the above conclusions are sound, then it must be granted that the State is invested with the authority to impose in invitum upon

the two cities named in the act, the burden necessarily entailed in the erection of the proposed bridge, and with the power to compel the municipalities thus affected, to provide for the payment of the burden thus imposed. If any authority were needed upon this point, I refer to those above cited. Now if the last proposition is correct, then it is clear that the State through its legislative power has the authority, in case towns are derelict in their duty, to cause a bridge to be erected for such towns, create a debt or liability against them therefor, and to compel them to pay such debt or liability.

If we apply these principles to the case at bar, three propositions are clearly deducible. 1st. If the cities of Portland and South Portland have unreasonably neglected to establish and maintain Vaughan's Bridge, the legislature has the undoubted power to appoint an agent, in behalf of the State to rebuild or repair the bridge, as the case may require. 2d. The legislature has ample authority in the exercise of its plenary powers, to create a valid debt against the municipalities for the liability incurred by the agent of the State in the performance of the duty imposed. 3d. The legislature can summarily compel the payment of such debt by the cities.

Now if the act before us, whose constitutionality is questioned, stopped right here, and did not provide for any method of payment of the debt created, it is then evident that it would fall in exact line with our general statute, which provides for the right of individuals to recover damages against towns for injuries received through neglect in the maintenance and repair of the highways.

Under this statute, the legislature makes a town liable for its neglect for a judgment not exceeding $2000, without prescribing any method by which the town shall pay it. We have never heard the power of the State to impose this liability upon a town, questioned. This statute has been upon our books for years and has been construed a great many times but no one has yet ever appeared with the ingenuity to question its constitutionality. We have alluded to this statute to show that the State has been doing for years just what the act in question proposes, so far as it relates to the creation of a debt or liability, and that, as far as such debt or liability is concerned, article XXII of the amended constitution is not in the least involved.

It does not prevent the imposition of a debt and does not purport to.

For the purpose of applying the amendment to the exact situation before us, we will assume that the act in question, instead of an issue of bonds, provides for the assessment of a municipal tax to pay the debt in question as fast as it accrues; then it will not be contended that the constitutional amendment could be invoked to prevent it. Granted that the legislature can create a debt against these two cities for the erection of Vaughan's Bridge as proposed in the act, then, under the above assumption, we come directly to the bight of the case: Can the legislature, after it has caused the debt to be created, provide, in view of the constitutional amendment, that, instead of the assessment of a burdensome tax in a single year, the debt created may be met by taxation extended over a series of years?

Up to this point it should be observed that the application of the constitutional amendment is entirely eliminated from every phase of the case except the method of paying the debt. So far as the creation of the debt is concerned the amendment "is only the water that has passed over the dam." Shall therefor, a construction of the amendment be invoked now, which in no way interferes with the mischief to be prevented, the creation of a debt, but which may make oppressive the payment of a debt imposed upon these municipalities in invitum? It does not seem to us that it should.

Black on the interpretation of laws, section 8, lays down this rule: In interpreting all written instruments, the intent of the author is the goal we must strive to attain. Naturally we look for and expect to find that intention expressed in the language of the instrument, taking the words used in their ordinary, popular sense, unless obviously used in a technical sense. It is a cardinal rule in the interpretations of constitutions that the instrument must be so construed to give effect to the intention of the people who adopted it. This intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it except in cases where that assumption would lead to absurdity, ambiguity or contradiction. When the meaning shown on the face of the words is definite and intelligible, the courts are not at liberty to look for another meaning even though it should seem more probable or

natural, but they must assume that the constitution means just what it says."

Applying this rule, we find this plain and unambiguous language used: "No city or town shall hereafter create any debt or liability, which singly or in the aggregate with previous debts or liabilities, shall exceed five per centum of the last regular valuation of said city or town." It does not say that no debt, etc., shall be created by the State on account of a town or city by virtue of its paramount authority to compel the performance of public duties. By this language, nothing but the creation of a debt by the city or town is prohibited.

The very spirit and letter of this language is to prevent the creation of a debt beyond the limit named. It is absolutely silent as to payment. We have already established the proposition that the State, regardless of the amendment, can in certain cases create a debt against the municipality. Now under the above language, shall we read into the amendment, "nor shall the State hereafter extend the liquidation of any debt which it may create against a municipality, beyond the payment provided by the assessment of a current municipal tax therefor." While it is true that whatever is necessary to render effective any provision of the constitution, whether the same be a prohibition or a restriction of the grant of a power, must be deemed implied or intended in the provision itself, yet, "when a law is plain and unambiguous, whether expressed in general or limited terms, the authors should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or probable meanings when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." Cooley on Com. Lim. 4th edition, page 58.

It seems to us it would be straining the doctrine of implication beyond its limits to interpolate the above additional prohibition into article XXII. Nor is there any good reason why it should be incorporated in the interpretation of the amendment. Because the amendment, as already seen, does not purport and was not intended to hamper or curtail the power of the State in the discharge of its governmental functions. It accomplishes, we believe, under the interpretation herein given, a result which is consistent with its own language

and in harmony with the purpose it was intended to subserve. It prevents the municipalities from creating any debt beyond the 5 per cent limit, either for the public utilities which it is obliged to maintain, or those local utilities which it would be convenient, but not obligatory to have.

It also prevents the legislature from either allowing the municipality to create any debt above the limit for any local utilities not obligatory, and, from creating any debt, itself, for such purposes; but, on the other hand, it leaves the State when an emergency arises, free to act in the exercise of its governmental functions, with authority to create compulsory indebtedness with respect to the matters above specified. It is not an improbable view that the legislature expressly intended, by the language employed to give expression to the amendment, to still reserve in the authority of the State the power to compel the performance of these obligatory duties, as a supplement to the right, of which the municipalities, up to their debt limit, had been deprived.

Another important consideration to be employed in giving an interpretation to a constitutional provision and ascertaining the intention of its framers, is the history surrounding it and the purpose for which it was adopted.

It is a matter of history that the occasion for adopting the amendment article XXII, was the susceptibility of cities and towns in the years of development following the close of the Civil War, to pledge their credit to almost any amount to secure a line of railroad through or near their limits, or induce the establishment of some industrial institution which the people, in their enthusiasm, might be induced to believe would bring them prosperity and plenty.

The purpose of the amendment was to place an effective check upon further indulgence in this fatuous tendency on the part of cities and towns.

That the purpose was to prevent the State from imposing obligations upon municipalities, or regulating the manner of paying such obligations, when imposed, it seems quite clear was never thought of or intended. In fact the situation and circumstances existing at the time of the adoption of the amendment, either fairly point to an inference

the other way, or to an express intention to leave the distribution of the burden imposed in the compulsory performance of municipal duties in the discretion of the legislature. The power in which the municipality has no voice, but is helpless and powerless, wherein the State not only can create the debt but provide the method of its payment, was existing at the time the amendment was adopted, and had existed from the very birth of the State, and is presumed to have been fully comprehended by the legislature and considered, in pari materia, in passing the resolve for the amendment.

Yet the legislature left in the sovereign power of the State this arbitrary, yet indispensable, power to compel the performance of certain municipal duties and create debts therefor. And is it not rather a fair presumption than otherwise in view of the fact that the amendment is silent, that the legislature, notwithstanding the amendment, intended to still leave within the right of the State the implied power to prescribe the method of discharging the obligations, which by positive power it permitted the State to create? Unless the constitution can be invoked to prevent it, the authorities for extending the payment of such a debt over a series of years, to make it less burdensome are ample. Dillon on Municipal Corporations, 4th edition, volume 1, section 74. Tiedeman on Municipal Corporations, section 15. *People* v. *Flagg*, 46 New York, 401. *Philadelphia* v. *Field*, 58 Pennsylvania St., 320. *Horn* v. *Town of New Lots*, 83 New York, 105.

It has been suggested that the act in question does not disclose the fact that the municipalities affected thereby, have unreasonably refused or neglected to perform their legal duty, in maintaining or repairing Vaughan's Bridge, but this is a question with respect to which we think we need not inquire. Our court has judicially determined after argument that the legislature is the sole judge as to what is reasonable in the exercise of legislative power and that the court cannot review the legislative judgment in that respect. *Moor* v. *Veazie*, 32 Maine, 343, 360. If the legislature should see fit to pass the act, it must be presumed that they have determined the preliminary facts in the affirmative as a prerequisite to the passage of the bill. It is beyond the pale of comprehension that the State in

the exercise of its sovereign power would impose a burden upon a municipality against its will, unless the reason for so doing was clearly and unequivocally made to appear.

It may be said that if the amendment does not intervene, the legislature will be flooded with petitions for public improvements, but as we have already observed, the plenary power of the State can be exercised with respect only to those general public utilities, the maintenance of which is obligatory upon the town and essential to the sovereignty of the State, and then only in invitum.

Buchanan v. *Litchfield*, 102 U. S. 278, a case which has been called to our attention, was a case involving the right of a city to create a debt and issue bonds for the installation of a water plant, under a constitutional provision entirely dissimilar to ours. It provided, "no county, city, etc., shall be allowed to become indebted in any manner or for any purpose to any amount," etc.

But it seems to us this case is not an authority upon the question now under consideration, because the legislature of Illinois undertook to authorize the city to contract a voluntary indebtedness which was plainly a violation of the constitution. But even if the state had undertaken to impose this obligation upon the city of Litchfield, in invitum, which it could not do, by reason of the fact that water works is not one of the public utilities which a state can compel a town to establish, the court of Illinois, we think, would have been obliged to come to the same conclusion by virtue of the language of the constitution of that state, which prohibits a city from "becoming indebted in any manner or for any purpose," etc., while the constitution of our state only goes so far as to say "no city or town shall hereafter create any debt," etc. On the other hand, the case of *Grant County* v. *Lake County*, 17 Oregon, 463, is a case exactly in point, and on all fours with the interpretation herein contended for. The case arose under the constitutional prohibition which says, "that no county shall create any debts or liabilities which singly or in the aggregate, exceed the sum of $5,000," language precisely the same as ours as far as the terms of the prohibition are concerned. The court say: "The circuit court seems to have assumed that a county could not legally become indebted in a sum in excess of five thousand

dollars; that the fact of its owing more than that amount rendered the part thereof exceeding it illegal.

"This I think was erroneous. That no county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars except to suppress insurrections or repel invasions, does not imply that all debts and liabilities against a county over and above that sum are necessarily obnoxious to that provision. To justify the court in finding the said conclusion of law, it should have found that the county created the indebtedness.

"Counties do not create all the debts and liabilities which they are under; ordinarily such debts and liabilities are imposed upon them by law. A county is mainly a mere agency of the state government, a function through which the state administers the governmental affairs, and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount to, cannot be said in reason to have been created in violation of the provisions of the constitution referred to, as they are really created by the general laws of the state in the administration of the governmental affairs. Said provision of the constitution as I view it, only applies to debts and liabilities which a county in its corporate character and as an artificial person voluntarily creates."

With much stronger force this reasoning, we think, might be applied to a New England town or city which acts so often in its private corporate capacity to which the inhibition applies, and so seldom has liabilities imposed upon it by the state and then presumably only in case of necessity.

We are unable to discover any good reason why an interpretation should be given to the amendment in question, which neither by the express language, the history, the original purpose, nor by necessary implication, is required, and which in no way prevents the mischief that it is intended to reach. But to prevent the mischief, it seems to us, is the only good reason that can be assigned for an interpretation,

which, instead of protecting the community, may unquestionably impose onerous burdens upon a municipality which it is powerless to resist or prevent.

Such an interpretation does not prevent the state from imposing the debt. But when the debt is once imposed, then, we submit, it is contrary to justice, equity and all business principles, that a community should be embarrassed and possibly ruined, by being compelled to pay it by a single tax levy, unless the constitution by necessary implication clearly enjoins such action or as clearly prohibits the extension of the time of payment beyond that prescribed by such summary method.

For the above reasons, our answer is, that the act in question, if it should become a law, would not be in violation of Art. XXII of the amendment nor of any other provision of the constitutions of the State.

WM. P. WHITEHOUSE.
HENRY C. PEABODY.
ALBERT M. SPEAR.

IN MEMORIAM.

PROCEEDINGS BEFORE THE LAW COURT, HELD IN BANGOR, TUESDAY, JUNE 14, 1904, IN RELATION TO THE DEATH OF THE

HON. JOHN ANDREW PETERS,

WHO WAS AN ASSOCIATE JUSTICE AND CHIEF JUSTICE OF THIS COURT FOR NEARLY TWENTY-SEVEN YEARS, AND DIED AT HIS RESIDENCE IN BANGOR, SATURDAY, APRIL 2, 1904, IN HIS EIGHTY-SECOND YEAR.

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

At a special meeting of the Penobscot Bar Association held in the library at the court house Tuesday forenoon at 11 o'clock, resolutions were adopted on the death of Ex-Chief Justice Peters. The meeting was called to order by Pres. Paine who called Hon. Franklin A. Wilson, to preside. The following resolutions to the memory of the late Judge Peters, drawn by Gen. Charles Hamlin and read by Mr. Wilson, were unanimously adopted:

The Hon. John Andrew Peters, late Chief Justice of the Supreme Judicial Court of the State of Maine, died at his home in Bangor, Saturday, April 2, 1904, in his 82d year and after a service upon the bench of the court for nearly 27 years and from which he voluntarily retired Jan. 1, 1900.

A committee of the Penobscot Bar was appointed on the following Monday to attend the funeral which occurred on Tuesday and another committee was also then appointed to arrange for memorial exercises before the next session of the Law Court. In accordance with the usual custom of the bar this committee, acting in their behalf and desiring to have a suitable memorial entered upon the records of the

court after their adoption at a meeting of the bar, now submit the following resolutions:

Resolved; That the death of John Andrew Peters occurring at a good old age and after years of service exceeding the average duration of judicial life marked by a various and eminent ability, is an event in the course of nature not wholly unexpected and thus not to be mourned like the loss of a great man in the prime of his strength; yet the members of the Maine Bar are not unmindful that the death of so great a judge, eminent citizen and lovable man should be attended by reverence, gratitude and affection commensurate with a due commemoration of the event.

Resolved; That as we survey and recall his judicial life, it is, with pleasure and pride we remember him as "The Good Judge." That was his crowning glory. In his tribunal all parties were on an equal footing; none was so high or none so low but what he would have justice dealt out to him with a steady hand whose only purpose was to guide and direct to the truth and justice of the case before him. With his great gift of judicial ability, he possessed the greater honor of the absolute trust and confidence of the people. His decisions were clear, firm and sound. He never allowed mere technicalities to stand in the path of truth and justice. His written opinions were recognized in all the courts for their soundness, depth of research and strength. Always preserving a tone of dignity they were works of the literary art. He never published a dissenting opinion—conservative by nature he would not be classed as a reformer. He had no projets du loi. He had unbounded respect for liberty as regulated by law, for existing human blessings, and believed in things substantially as they were. He was not easily persuaded to try experiments that had much hazard in them. Hence he preferred to cling to our system of common law procedure rather than embark on the unknown seas of the code that prevails in other states.

Resolved; That as a man, citizen and friend, we may say he had a rare and cultivated mind, and a generous heart. He was an agreeable man in the commerce of life. He had the simplicity of manners which belongs to strong, true natures, and a tact and sympathy that prompted him to meet all persons on their own ground of

interest and experience. Death breaks the lock of every portfolio and without unveiling sacred places we may venture to add, that beneath the surface lay a rare tenderness that showed itself in acts of delicate kindness to those who needed help or sympathy, which seemed to be only the natural outcome of a generous nature. Only those who knew him in all the relations of life could recognize how many sided his character was and in how many ways he touched his fellowmen.

Very few probably enjoyed a more tranquil and unruffled life. As said by Bacon: "It is a heaven upon earth when a man's mind rests on Providence, moves in Charity, and turns upon the poles of Truth."

With a big heart open to the joys and sorrows of all, in his speeches on social and other gatherings, and which alone will rescue his name from oblivion, he used his brilliant wit to good advantage, but never to wound any person in the least. The presence of dignified persons, and even his associates when off the bench, never repressed his natural humor and wit. His presence at such gatherings was like sunshine after a shower.

Resolved; That although it is his record as a Judge that perpetuates his fame because based upon ample learning, impartial decision, strong common sense, sound exposition, felicitous statement, skillful logic, keen power of analysis and unbounded ability to apply old principles to new cases, we do not forget that as a lawyer practicing at the bar he early achieved high success by these same qualities which, with his fine intellectual powers and good preparation for his chosen profession, admirably fitted him to the duties of the judicial office. He was early recognized as a lawyer of unusual abilities and his services were soon called into a large and active practice. He handled his cases naturally and easily. He prepared them with care and industry. His attitude to the court was polite and exemplary. And as might be expected he rejoiced in a hard fought battle before the jury. His 30 years' practice as member of this Bar, including his services as Attorney General of the State, were sufficient alone to establish his fame as a great lawyer.

Resolved; That his services in the State and National houses of legislation were both valuable and conspicuous. To have been the friend and possessor of the confidence of Blaine, Fessenden, Garfield, Hamlin and Hale was a high honor; his personal influence when he chose to exert it in the House of Congress was remarkable and at times never surpassed by single members. His abundant good nature, witty sayings and ability won him hosts of friends and often overcame opposition to measures that he advocated.

Resolved; That whether as advocate, legislator or jurist, it is the fortune of only the few to acquire such distinction coupled with the enduring love, respect and affection of all who knew Chief Justice Peters.

Resolved; That these resolutions be presented to the Supreme Judicial Court, with the request that they be entered upon its records, and the secretary transmit a copy thereof to the family of the deceased.

At half past two o'clock the court was announced, and after the usual ceremonies the justices took their seats and Hon. Franklin A. Wilson addressed the body as follows:

The partiality of my brethren of the Penobscot Bar has devolved upon me the duty of presenting to this honorable court the resolutions which have this day been adopted by the bar, indicative of its appreciation of the life, labors and character of the Hon. John A. Peters, late Ex-Chief Justice of this court, whose death occurred on April 2d last, at his residence in this city, in the 82d year of his life. Having been unavoidably prevented from paying my tribute of respect on the occasion of the funeral of my esteemed teacher, my congenial business associate, and my beloved friend, it becomes a labor of love to offer these resolutions and to request appropriate action by the court.

Mr. Peters presents himself to me as I indulge in a retrospect of the 50 years of our acquaintance, in the four-fold character of lawyer, judge, man and friend. I regard the six years of his congressional life during the reconstruction period so-called, as merely an excursion out of his chosen profession, in which he found nothing so congenial to his nature and his tastes as the practice of law had been to

him. He was, indeed, able to render laudable service to the nation in the halls of Congress, when weighty questions were pending, the proper consideration and determination of which called for legal acumen of the first order; and his efforts were appreciated by his associate legislators and by his constituents but, at the same time, we remember that he said again and again that his mind and all his tastes converged upon legal rather than legislative problems, and it was a happy day for him when, after mature reflection, he declined to accept another congressional nomination, and gave himself unreservedly to the practice of his profession; and I should say that his happiest years were after his return to active practice, although his early practice had given him a very large and influential clientele and satisfactory pecuniary returns, with a plenty of hard work, in which he revelled.

He fought his legal battles with the sword of the soldier, and not with the dagger of the assassin, by which I mean to say that in the trial of his causes he came out in the open, so that the court and opposing counsel knew always where to find him and were not guarding against traps for the unwary; consequently when he was placed upon the bench, all having business with the court felt and knew that Judge PETERS would be not only learned in the exposition of the law but courteous, kind and approachable toward all who were seeking to get at the truth, but sometimes stern and severe towards those whose weapon was falsehood, and whose object was deceitful gain.

Judge PETERS' conduct with a jury was characterized by extreme patience and tenderness, using the simplest language, and most familiar objects for illustration because, he said, a juryman might be impelled by an honest desire to do right, but be so entangled in a maze of figures or afloat on a sea of facts that only the greatest patience and care on the part of the judge in making his charge would bring that juryman to the intelligent discharge of his duties, which a litigant had a right to expect; therefore, at the risk of repetition and prolixity, having determined which one of the jurymen most needed assistance, he devoted his charge principally to clearing

the atmosphere for that man, knowing that his fellows were already fully equipped for the proper rendering of a verdict.

The traits of character, both as a lawyer and as a man, which attached themselves to JOHN A. PETERS, were integrity and absolute fearlessness and independence in the utterance of his views and convictions, joined with a loathing of cant and hypocrisy. It was 60 years ago that he came a young lawyer from Hancock County, fresh from classical and professional studies at Yale and Harvard universities, of pleasant exterior and winning manners. He attracted hosts of friends and when it was known that he prepared his cases carefully and tried them ably to court and jury, many clients entrusted him with their business, and he went rapidly to the head of this bar, and soon was called into other counties in the trial of causes.

He was successively State Senator, Attorney General of the State, member of Congress, Judge of the Supreme Judicial Court and Chief Justice of the same court, a position which he resigned on Jan. 1, 1900, on account of increasing bodily infirmities. Judge PETERS was a many-sided man. His learning in the law was extensive and accurate. He worked exhaustively in the preparation of his cases for trial, whilst when often eloquent in his arguments he preferred to be always logical. The trial of causes was with him as it is with all self-respecting lawyers, a serious affair and absorbed his entire being whilst cases were on. He felt the responsibility of the relationship of lawyer and client intensely. I would not, however, leave the impression that our deceased friend never allowed himself a relief from the strain of strenuous professional life and labor. On the contrary, the motto, "dulce est in loco desipere," found in him a believer, and when the proper time came when he could throw off care, and rest and recreation succeeded; his wit was bubbling, effervescent and rollicking, and men hung upon and repeated his sparkling sayings.

A member of the bar from another State, who happened to be with me when he heard of the death of Judge PETERS, remarked to me, "The woods of New Hampshire are full of Judge PETERS' witty sayings and his unequalled repartee."

As an after-dinner speaker and raconteur, we shall probably never

see his like again, but let no one believe that these speeches cost no labor of preparation. On an important occasion when the late Sigourney Butler came from Boston to Bangor to obtain Judge PETERS' presence to make a post-prandial speech at a banquet of the Suffolk Bar, himself to be the guest, I urged him to go, as being able to give so much pleasure to his friends and costing him little or no preparation, and he then told me that what was spoken of as off-hand, spontaneous ebulitions, cost him infinite labor of restraint and also of construction, and I suspect such to be the almost universal rule amongst educated men, who feel that they have no right to inflict themselves carelessly upon those who have honored them by an invitation to address them.

One could hardly look upon that symmetrically shaped head and not be convinced that it contained a well-poised brain; his clear eye and finely chiselled mouth betokened both kindness of manners, intellectual strength and the wealth of a generous nature.

A very small book found in my library, contains, to my mind, the philosophy of life in a degree unequalled by any other which aims at being purely philosophical. From the Meditations of the Emperor Marcus Aurelius, I read this: "Now, since these qualities are common, let us find out the mark of a man of probity. His distinction then lies in letting reason guide his practice, in contentment with all that is allotted him, keeping pure the divinity within him, untroubled by a crowd of appearances, preserving it tranquil, and obeying it as a God. He is all truth in his words and justice in his actions; and if the world should disbelieve his integrity, dispute his character, and question his happiness, he would neither take it ill in the least, nor turn aside from that path that leads to the aim of life toward which we must move pure, calm, well prepared, and with perfect resignation in his fate."

I have in mind at this time no man in public position who so perfectly fits our philosopher's definition of a man of probity as the one in whose honor we are met today. And this just judge, this wise man, this large-hearted man, this warm friend, this man with the courage of a martyr, and the gentle heart of a woman ever open and responsive to the wail of grief and to the cry of human suffering, this

man intensely loved and loving in his happy home circle, reached the period of life portrayed by the Sacred Singer when "the grasshopper shall be a burden and the desire shall fail; because man goeth to his long home."

We met in the closing days of the last year, both feeling, neither confessing that it was the last of earth for us—the sweet, personal communion of heart to heart begun 50 years ago was ended, that the soft touch of his hand resting in mine was resting there for the last time, and that the friendly greeting repeated almost daily for half a century must now be changed to wishes and prayers for one another's safety and happiness. We talked of many things too sacred to repeat. His last words to me, engraved upon my heart to be remembered lovingly whilst life shall last, were, "I am not afraid to die, I am not unwilling to live. I have been 80 years in making my record and am willing to abide by it."

In common parlance we say this noble man has gone, but has he gone? What necessity to think that the spark of the infinite which became incarnate 80 years ago, and has now escaped from its frail prison has gone far away? I prefer to believe, and do believe, that that spark has merely returned to its former condition as a part of the great over-soul, and that he is very near us today and ever.

When the close of life comes to one of strong intellect and exalted character and station, his fellowmen are prone to inquire what were his views concerning the things of the Spirit. This curiosity is well nigh universal. Judge PETERS was not one who paraded his convictions in this regard. His delight in the frequent repetition of a few lines written by Whittier, always conveyed to me the assurance of his belief in immortality, and imparted to me the secret of his sweet contentment; lines which have brought comfort to many another soul seeking repose in belief. —

"And so beside the silent sea
I wait the muffled oar;
No harm from Him can come to me
On ocean or on shore.

"I know not where His islands lift
Their fronded palms in air;
I only know I cannot drift
Beyond His love and care."

Remarks by Hon. Albert W. Paine.

May it please your Honors and Members of the Bar:

Judge PETERS, on occasion of whose death we are now collected together, although he had accomplished more than four score years of life, was notwithstanding some ten years my junior in age and also in practice of the law. My first acquaintance with him was during his studentship for admittance to the Bar. From that early period until his death we have ever been on most intimate terms of friendship, socially and as brother members of the profession, during all his various positions, personally and as member of the State and United States Legislative bodies, as Attorney General of Maine and especially as Judge and Chief Justice of our Court. So that what I may have to say at this time may very properly be regarded as the testimony of a witness in the case.

Early and throughout all his practice at the Bar we had very frequent occasion to meet each other as counsel for opposing litigants, and during the twenty-seven years of his occupancy of a seat on the Bench, at almost every law session, I had occasion to present my views of the law on the different subjects presented for decision and although we sometimes disagreed, yet I generally felt that I could not justly find any fault with his conclusion, and the same was the case in the frequent trials of jury cases which took place before him. In social life we were ever constantly meeting each other on the street and elsewhere, and always with kind greetings or familiar recognition. Such, briefly, has been the relation existing between us during all his life after his arrival at manhood and admission to the Bar. And what is very pleasant to remember and to repeat on this occasion is the fact, that in all our business and social and professional relations with each other never to my recollection was there an unpleasant word passed between us.

To specify the respective characteristics of our worthy brother, as a member of the world's family and as indicated in the various positions which he was called to fill, will be simply to repeat in substance what I have already uttered.

As Representative in our State and National Legislative bodies he was an active and useful member, having ever in view, in all his

votes and proceedings, the interests of his constituents, when consistent with those of the public and of the laws governing the subject.

As tenant of the bench he was what may very properly be termed an Ideal Judge, well posted with the law governing the respective subjects presented for decision, and with the firm resolution to render judgment accordingly. As to his ability and fitness for the office for the long term thus held by him, the frequent occurrence of opinions drawn by him, as reported in at least thirty-four volumes of the Maine Reports, present most conclusive proof in his favor.

Remarkably kind to the younger and recently admitted members of the Bar, he was ever patient, tolerant and indulgent whenever the true character of the subject presented permitted him to exercise such indulgence and allow such rulings or suggestions as he was glad to present. To maintain the dignity of the court was regarded by him as a duty, but he never suffered any act to be committed or any words to be used by him, such as would imply any degree of pride or arrogance as a member, but on the contrary he was ever approachable by any one who sought his advice or acquaintance. In all his relations in life, public and private, he was ever possessed of a genial character, accompanied by a spirit of humor, which constantly exhibited itself on every fitting occasion, so that, as all know, he became distinguished for his witticisms and his effective faculty of making his presence always happyfying, whenever the exhibit of this characteristic was appropriate or excusable. His faculty of being ever ready and willing to manifest an intimacy with all whom he might meet was very noticeable, including the young as well as the old, the poor as well as the rich, the ignorant as well as the wise and the learned of all professions and laborers of all industries. In a word, he was a man possessed of all the characteristics that serve to promote one's popularity as a friend to all with the reciprocal fact that all were friends to him. Such was the character of our deceased brother whose memory we now celebrate.

In the death of our distinguished companion we, members of the Court and Bar, and indeed all others feel that thereby we have met with a great loss, but we may be fully reconciled to the change by the reflection that by his removal from his old to his new home he

has merely stepped across the line of separation between the two, where he still lives, in the exercise of all his faculties, a happy and useful life in close connection with those whom he loved and respected on earth and whose reunion he awaits in his new home. Our loss is most assuredly his gain.

Remarks by Hon. Eugene Hale, of Ellsworth.

After the discriminating and extended resolutions which have just been read, and the admirable eulogies by Mr. Wilson and Mr. Paine, the Ulysses and the Nestor of the Penobscot Bar, there is little need for me to attempt an elaborate address. In what I say I shall try to give a tribute of my deep regard for the late Chief Justice PETERS, my appreciation of his very great qualities as a man and as a judge, and of my deep personal affection for him.

The character of Judge PETERS, though marked by originality, was singularly simple and direct. His mind was as clear as the daylight. His mental processes were remarkably straightforward and thorough. All this resulted in his making a deep impression on the minds of men among whom he lived and moved. I used to see this effect every day of my service with him in Congress, when we were both members of the House of Representatives in the Forty-first and Forty-second Congresses. Before my entrance into that body, Judge PETERS had served one term in the National House of Representatives. He impressed especially the men with whom he came in contact in the National Capitol,—the great lawyers who have always been found in the two houses, and these men kept up their interest in him long after he left Congress. I never met Justice Miller, than whom there have been few greater lawyers and judges, or Justice Field, that they did not ask especially for Judge PETERS, and many times I have heard Mr. Justice Field, who was a very great judge and a very great lawyer, express his regret that Judge PETERS could not have been a member of the United States Supreme Court.

When, therefore, Judge PETERS, after he retired from Congress, became a member of this court, he had almost perfect equipment for the high place. His greatest monument is, of course, made up from his opinions which appear in all the volumes of the Maine Reports,

from Volume Sixty-one to Volume Ninety-four, covering more than a third of the entire set of the State Reports. I have been separated from the practice and the conflicts of the bar in Maine, and have not appeared before this court for more than thirty years, but I know something of the law as laid down in the Maine Reports, and there is no volume during these thirty years in which I have not read some of the leading opinions, including those of Judge PETERS. On days when the Senate is unusually dull, it has been a habit of mine to send a messenger to the law library for the last volume of the Maine Reports, and when it is brought to my desk I examine it and read portions of it, not as the old lawyers who I see about me read it, to prepare and fortify their cases, or as the younger members of the bar ought to do, from beginning to end, making their own notes and headnotes, but I read the leading cases, and I go very thoroughly through all of the index-digest to each volume, which for years has been so well prepared by General Hamlin, who now sits near me, and who I hope will continue this preparation for years to come. As I have said, in these Reports is found Judge PETERS' monument as a great judge, and it will endure long after we have all perished from the earth. The law which Judge PETERS expounded and helped to establish makes what I may call live law and not dead law. It is not purely technical law, and the opinions never sacrifice clearness and brevity of expression to an over-ambition for erudition, full as they are of the best learning which generations of English and American judges have furnished to the world.

Aside from these written opinions, these recorded decisions, we all know that Judge PETERS' service in nisi prius trials cannot well be too highly estimated. No other judge ever gave more thorough and even charges to juries, and no judge ever held the balance between suitors more conscientiously. He looked to it that the law and justice had its due course, but he never willingly let that law be the instrument of oppression. In criminal cases, while he did not allow the guilty to go unpunished, he held the prosecution to the burden of proof, and when he came to sentencing the convicted criminal, he reluctantly laid the heaviest hand of the law upon him. "He prepared mercy and truth," and this is what Solomon in one of those

wonderful chapters in Proverbs, which none of us can read too often, declares "will preserve a man." And so it came naturally about that as our great Chief Justice grew in stature morally and mentally, until he was at last like a shock of corn, fully ripe, he became with all the people of the State, what I should call the first citizen of Maine. Nothing but a warm welcome met him wherever he held a court. The lawyers, the officials, the suitors, the spectators who visited the court rooms, delighted to meet him and to show their regard and affection.

What shall I say of his other side, the man's side, the humane side, the tender, pitying side? His heart was the abode of generosity. He was generous to family, to kin, and to hundreds outside of these, and it was all without ostentation. He realized that fine picture of the silent, unproclaimed giver, whose right hand knoweth not what his left hand doeth. What Ingersoll said of his dead brother may be well said of Judge PETERS, "that if each one to whom he had given of his store should lay a rose upon his grave he would sleep today beneath a wilderness of flowers." Nor was there any limit to the helpful word and the good counsel and the pitying note which he had for the suffering. No man, and no woman, beset with calamity, hopeless, desolate, it may be, fallen, ever went to him for sympathy and counsel, and went in vain.

And beyond all, Mr. Chief Justice, what shall I say of Judge PETERS' social side, and his social life? Think of the wonderful letters which he wrote, and which we preserve with jealous care; think of the days and the nights, when care and duty laid aside, he joined his friends and led them all; the humor that warmed like the glow of the fireside, the wit which blazed like the sun, the near companionship, the dear friendships, they have perished. There is no chronicler, and can be none, of these things, but with some of us there has been set in the strain of our lives, a note of sadness, which will stay in all the years when we go our ways without him.

He has gone, but let us hope not wholly gone. His body rests in that fair place which overlooks the great river whose current he had watched for a lifetime, and this beautiful city in which he lived, and which loved and honored him, but that bright spirit which

informed and illumined his mortal part, where is that? It is not for the keeping of Mt. Hope. It is not for the keeping of Bangor, his beloved home. It is not for the keeping of the State of Maine. It dwells in other mansions.

Remarks of Hon. John F. Lynch, of Machias.

Since the death of Judge PETERS, when I think of him, I am reminded of these words of an ancient poet:—

"The soul hears him though he cease to sing."

I believe the soul of each friend he left here will continue to hear him as long as life shall last; and what a wonderful pleasure it will be to us. We all thought of the great loss we should suffer by his death, but it did not occur to some of us that the impress he had left upon us was so powerful that not only could he never entirely go out of our lives, but our memories of him would be so vivid that at any moment when we so desire we can enjoy thinking of him nearly as much as we could being with him. Our memories of him will not only add to our pleasure, but we shall be benefited in more substantial ways. Our love for truth, justice and mercy will be greater. We will have more charity for the weaknesses and frailties of men. Our pleasant memories of him will in some measure enable us to imbibe the brightness and cheerfulness of his lively spirit, and dispel the unseen influences which shadow our lives with gloom and melancholy.

By studying his life and character we can come to a better understanding of what constitutes true greatness in men, and learn that many men who hold high places are very small when compared with him. It needed no special effort or severity of action or manner on his part to impress people with the fact that he was a great man. What would have seemed lack of dignity in others added to his.

The most obtuse of men who were permitted to enjoy his free and easy manner socially did not need to be reminded when he took his seat on the bench that he was a judge. His reverence for law was great but his reverence for truth and justice was greater, and the wonderful ingenuity and courage which enabled him to apply the principles of law to the facts in a case on lines of truth, justice and

equity has blazed the way for timid souls to follow in the same direction.

He believed that the common law is the best expression of common sense and that those who would shroud it in mystery and hedge it about with useless technicalities and rules that tend to defeat the ends of justice, are enemies of mankind. He delighted to make parties, witnesses and lawyers feel that they had a friend in the court. In his presence they could always feel at ease and act their part with confidence.

The little things done by him in his pleasant way were in a measure as important as the great things he did. By his great labors in the judicial service, and his strong individuality which has become impressed upon the pages of our judicial reports, he has exerted an influence that will be permanently felt in the jurisprudence of our State. But as a man and a lawyer he will be felt and remembered by a great number of people of the State who have no occasion to search the judicial reports.

They will remember him as an honest man who hated all frauds and false pretensions, who loved men, women and children and everything else that needed sympathy and encouragement. They, like Rufus Dwinel, will remember him because he was good to the poor. They will remember him as the just judge whose clear insight into human nature enabled him to quickly discover the inner nature of the bad litigant and shield those who were too trusting and confiding from the snares and devices of evil men.

In a letter prepared by Judge PETERS for an occasion like this I find the following words, "To act with common sense, according to the moment, is the best wisdom I know; and the best philosophy, to do one's duties, take the world as it comes, submit respectfully to one's lot, bless the goodness which has given us so much happiness with it whatever it is, and despise affectation." I have no doubt these words, quoted by him from Horace Walpole, express the views of life which were felt by our departed friend. My knowledge of Judge PETERS gained in an acquaintance of 30 years leads me to believe that the words quoted by him accurately express his views of life. He always endeavored to act at all times with common sense, we all

know he took the world as it came and submitted respectfully to his lot, and he could not have been so cheerful and happy under all circumstances if he had not blessed the goodness which gave him so much happiness. That he despised affectation will never be questioned.

I shall never forget one sentiment he expressed at the PETERS banquet; his style of speaking on such occasions was peculiar and during a part of his speech he did not hold my attention; after talking along awhile, without much effort, he suddenly roused up and attracted the attention of everybody present; I turned and looked at him, it seemed to me that his face at that moment was the finest, noblest looking face that I had ever seen. I was held spell-bound until the burst of eloquence ended with these words: "God hates a coward and a hypocrite."

I know but little of Judge PETERS' views of religion; that he did not trouble himself with the fine distinctions between theological dogmas and creeds I feel quite sure, and from what I heard him say the last time I met him, I am certain that he was a believer in an immortality beyond the grave. It was at a small dinner party in Bangor; during the conversation he spoke of his advanced age and reminded us that we should not meet many more times in this world. Some one spoke of death in a gloomy and sad way, he quickly said; "There is no death, it is only a change," and I was reminded of the words of the poet:—

"There is no death,
What seems so is transition;
The life of mortal breath
Is but a suburb of life Elysian,
Whose portal we call death."

There was much about our departed friend to admire. He was a great man, a great lawyer, a great judge, a polished and cultivated gentleman. But it always seemed to me that his grandest trait of character was simplicity. His was a simple nature.

"And as the greatest only are, in his simplicity sublime."

Tribute of Hon. Orville Dewey Baker, of Augusta.

One dead — a State in tears! Yet all the earth
Drest for a festival! Could he come back,
Think you he might not choose, himself, that June,
The rose-apparelled, deck his memory,
Whose days, like June's, were dipped in splendid dyes.

Richly he lived. The streaming years that went,
Were each a very Pactolus to him,
And grains of gold ran, glittering, through his talk.

Joyously, too, he lived. No bitterness —
But, as the robin doth with song the day
Outwear, so with him, whatsoe'er he did,
His Spirit always sang.

Justly he lived. Facing, indeed, his truth,
The lie, unspoken, died upon the lip.
On his clear vision no one might impose,
Who sought the law for malice or offence.
Friendships he had, and strong, but yet no man
Who lived, upon that friendship dared presume
For favor, or to gain a wrongful cause.
His gentleness did not o'er shallows run;
Let but injustice raise her front, and then
The sunny depths of his great nature stirred
To awful indignation. All men knew
Instinctively, who in his presence were,
Justice with her white robe did wrap him round.

Greatly he lived. Not sky, nor solemn stars,
Deep woods vexed by no wind, nor aught beside
Of high, appeasing beauty God doth show,
Move more serenely in their ministries,
Than this great Judge among his fellow men.

Calm in his own, respecting others' strength,
Envy he knew not, malice could not know,
Whose nature was all magnanimity;
His rectitude bred no uncharity,
Justice with mercy tempered was his creed,
Human himself, he loved humanity.

Richly if he received, he richly gave;
Miser of words, but prodigal of thought—
Which words must stand for, else remain but words —
His phrase was terse and tense. His sentences
Did not in open order march, but stood
Serried and close, ranks full, for battle drawn.

Despite past triumphs of the common law,
Full many a problem still were unresolved,
But for some great deliverance, or some
Illuminating phrase, which he has left.
Men gladly glean where he did richly reap,
And we, who follow after, are made proud
By even one wisp of gold, if from his sheaves.

Yet even for him the end, as comes to all.
His high and ministering office, where
He bore himself so long and worthily,
Freely he put away, and was content
To rest awhile before the stream was crossed,
Hail and be hailed of friends, and take his leave.

From dust — through glory — back again to dust!
Wanting but this, the cycle to complete,
A little room to lie, a little sleep,
Then—swift surprise of immortality!

Even to the end, walking the sun-set path,
Life but a mellow light from out the past,
His glistering honors by himself put off,
Naught to bestow, or crave—even thus, by some
Blithe necromancy of his spirit, he
Held all men to him as with hooks of steel.

The grace that was not grace alone, but strength,
Unwounding wit, sun-lit philosophy,
Deep knowledge of mankind—these all were thine,
Departed Friend! Never again shall we
Behold thy like! And yet, because we know
The soul that was within thee hath but struck
Its earthly tent, to pitch it once anew
Upon those plains where camp the glorious Dead,
We, who yet stay, and came today to mourn,
Sprinkle, instead, June roses on thy grave.

Address of Hon. Charles F. Libby, of Portland.

May it please your Honors:

I deem it a privilege to be present on this occasion to offer my affectionate tribute to the memory of Judge PETERS, who, without disparagement to others, stands in the minds of those who have known and loved him as the great Chief Justice of Maine. What constitutes a great judge is not easy of definition, but among the essentials are a strong love of justice, a large knowledge of men and affairs,

and intellectual endowments of a high order. I have not included an extensive knowledge of the law, for that is a possession common to all eminent members of our profession. These qualities are to a large degree summed up in the phrase, "judicial temperament," which includes also a willingness, perhaps rather a patience, to listen.

Among these qualities I should place the love of justice first,—the disposition to work out in every controversy a just result, unbiased by prejudice, fear or favor. That quality I think we all recognize as possessed in an eminent degree by the late Chief Justice. He had the clearness of mental vision and singleness of purpose, which enabled him to seize upon the real merits of a controversy and to make all other considerations yield to the requirements of justice. Some great lawyers and judges have had an undue love of the technicalities of their profession, and carried away by the refinements of their own logic have lost sight of the substantial justice of a cause. This criticism was made of the administration of the law in the palmy days of special pleading, when the ingenuity of judges and lawyers was exhausted in the refinement of its technical rules. The reports were filled with subtleties of learning which would have done credit to the ancient schoolmen, and too often justified the complaint that the substance of the right was sacrificed to the formality of the statement. The recognition of this fact has led in modern times to the practical abandonment of a system which was based on substantial merit,—for accuracy of statement, in legal proceedings, implies a clear conception both of the right and of the remedy. Under no conditions can I conceive of Judge PETERS mistaking the form for the substance or sacrificing the spirit of the law to its letter. Such a course was contrary to the whole make-up of the man, which led him to brush aside non-essentials and technicalities to reach the real merits of a case, and when those were reached, with what terse, cogent, persuasive logic did he support his conclusions. The members of the bar had such faith in his integrity, learning and love of justice that no one ever questioned the honesty and impartiality of any judgment he rendered, and their affection and respect for him personally were such that even in defeat they were inclined to adopt the language of Holy Writ and say, "though he slay me, yet will I trust in him."

He brought to the discharge of his judicial duties a large knowledge of men and a wide experience in business affairs. He had not only that experience which comes from a large and successful practice as a lawyer, but that wider experience which comes from participation in the conduct of public affairs. He had been a member both of the State Legislature and of the National Congress, and had become familiar with the forces and influences which are shaping our state and national life. He had also had practical experience in the making of laws and in the difficult task of adjusting legislation to public needs.

The lessons to be learned in the practical school of legislation are by no means without value in a judicial career, for the human element, with its play of conflicting interests, is an important factor in every controversy, and cannot be ignored if abstract justice is to find its concrete expression. In that school one learns that the principles of the parallelogram of forces applies to human affairs, that out of the conflict of opposing interests can be evolved a resulting diagonal, which marks the line of least resistance as well as of highest usefulness. The best legislation is that which voices rather than advances public sentiment, and which adjusts itself to existing rather than to theoretical conditions.

An accurate knowledge of human nature is not only a key which unlocks many mysteries, but is an essential factor in a wise and just administration of human laws. Finite justice is at best an imperfect system, and the wisest of judges finds it difficult to fit the punishment to the crime. Rarely has anyone exercised the judicial functions with greater wisdom and success than Judge PETERS. His knowledge of men and affairs was so great, his professional equipment so complete, his sense of justice so keen, and his charity so all-embracing, that he seemed to rise above the limitations of ordinary human nature, and to embrace in his survey all the elements of a just and comprehensive judgment. To one who did not know the late Chief Justice, these words may seem to partake of excessive eulogy, but to those who knew him well, they serve to recall the rare combination of faculties which made his judicial career one of unique and transcendent usefulness.

The discussion of legal principles does not furnish much opportunity for the play of fancy or exercise of the literary art. But such discussions at the hands of Judge PETERS could not escape partaking of the distinct personality of the man. They took on a certain personal flavor, a quality of originality which increased rather than diminished their professional value.

He was more than logical, he knew how to make the syllogism attractive, and could invest a statement of facts or discussion of legal principles with an atmosphere of picturesqueness which revealed the artistic temperament not only in the delicacy of touch, but in the skill with which he managed his materials. He had also the saving grace of humor, a certain sense of form and proportion which enabled him to quickly seize upon the relations of things, and to discern their incongruities. He did not make the mistake, which too many of us make, of taking himself too seriously, but his philosophy of life had the broad and happy outlook, which took in the whole procession of things and reduced the individual to his true perspective.

He was a product of New England ancestry and environment and yet was singularly free from some of the characteristics which inhere in the New England type. He had none of the narrowness and intolerance of the Puritan stock. His nature was too buoyant and healthy to accept the Puritan's sombre view of life, and he escaped the danger which attends many intense and earnest natures of mistaking strength of conviction for plenitude of proof. Excess of enthusiasm is another name for fanaticism, from which New England has not been altogether free. Judge PETERS was a Cavalier rather than a Roundhead, and while retaining many of the sturdy and robust qualities of his Puritan ancestors, he had the added graces and virtues of the courtier.

He had a sterling and genuine nature which hated hypocrisy and cant. He had little sympathy with the tendency of human nature to conceal mean motives under high sounding names. He was quick to discover the sound of spurious metal and ready to denounce its use. His protest against sham reforms and sham reformers was likely to be both scathing and emphatic, and he refused even an

outward compliance with accepted standards which he believed either false or unwise.

The straightforwardness of his own nature led him to incur the censure of the "unco guid" rather than to do violence to his convictions as to what was right or expedient. He would not purchase popularity at the price of self-respect, and what he did not seek came to him as the natural tribute of the affection and regard which he inspired, so that I doubt if any man who ever lived in Maine was more universally loved and admired than JOHN A. PETERS. This was due to his personal traits, of the charm of which I need not speak in the presence of his associates of the bar and bench, who have been admitted to the privilege of his personal friendship. He had those rare qualities of tact, kindliness and genuine sympathy, which are summed up in the phrase "personal magnetism," qualities which attracted strangers and friends alike.

In the intimacy of private friendship he shone supreme,—his keen wit, droll humor and unpremeditated sallies made him the life of every social gathering, and put him as an after-dinner speaker in a class by himself. Whoever has heard him in his happiest vein can never forget the spontaneity, the sparkle, the audacity and originality of his remarks. Once or twice in a generation, nature seems to put forth her highest effort in making a complete, harmonious, well balanced man, and, having shown what it can do as an incentive to the race, breaks the mould. Judge PETERS was one of those happy products, and we may not expect to see in our time his like again.

It is not often that we can compare the life of a man with the ideals which he has himself established, and thus test the value of the achievement by the spirit and purpose which inspired the work; but happily we have such a standard in Judge PETERS' case. On the occasion of the banquet tendered to him by the Penobscot Bar, on his retirement from the office of Chief Justice, speaking of his judicial work, he uttered these memorable words in what was to be his last public address, "It was my effort to make the doctrines maintained by these opinions exponents, as far as I could, of the principles of truth and justice, of courage and honesty, of liberality and humanity."

What happier, fitter, truer eulogy of Judge PETERS could be spoken? We can only add our "Ave atque vale."

"Hail and farewell! Through gold of sunset glowing,
Brave as of old your ship puts forth to sea;
We stand upon the shore to watch your going,
Dreaming of years long gone, of years to be."

"The ship sails forth, but not from our remembrance,
We who were once of your ship's company;
Master of many a strong and splendid semblance,
Where shall we find another like to thee?"

Mr. JUSTICE EMERY, Senior Associate Justice, responded for the court as follows.

Gentlemen of the Bar:

We have listened with deep interest and sympathy to your resolutions and addresses commemorative of the life and labors of our lamented Chief Justice. His successor, our present Chief Justice, was so nearly connected with him in name and family that he distrusts his ability to speak on this occasion with due calmness and impartiality, and hence has requested me, the senior associate justice, to endeavor to express our appreciation of him whom we mourn in common with you and the whole people of the State.

I can add nothing to what has been so eloquently said of the man, the friend, the neighbor, the citizen, the lawyer, the legislator. His ability and learning, his wit and humor, his kindliness and great social charm have been recalled to us in language which precludes any words from me. Again, his characteristics and services as a judge at nisi prius are so much better known and portrayed by the members of the bar who have often observed him there, it would be supererogation for me to speak of them here. I must therefore, perforce, confine myself to those qualities perhaps best known to us his associates, his qualities as a law judge. I shall not, even here, speak so much in eulogy as in recital, for I believe if he could now speak he would say with his favorite and oft quoted poet,

"After my death I wish no other herald,
No other speaker of my living actions
To keep mine honor from corruption,
Save an honest chronicler."

Chief Justice PETERS did not come upon the bench a mere lawyer, however learned in law and skilled in procedure. Starting with a fine liberal and professional education at Yale and Harvard, he superadded a large experience in affairs and outside of libraries. He mingled with men and shared their interest in business, politics and all the activities of life that attract able and vigorous intellects. He came to know men as well as books, human nature as well as logic, present day life as well as history.

But, after all, his chief delight and his most effective work were in the law. He retired from Congress, a body which has broad legislative jurisdiction over great states, wide domains and many millions of people. He willingly accepted a seat upon the bench of a court having judicial jurisdiction only over a limited territory and a sparse population. Had he continued in Congress his fame would have spread from ocean to ocean and beyond the oceans. His fame as a judge may be confined to one state or one profession, but it will be none the less brilliant and enduring. We needed him for the State; we could not spare him to the whole nation.

He came to the Maine bench with a mind enriched by the learning of the past, and quickened by a wide knowledge of the present. He also brought with him the profound conviction that the liberty and security of the citizen in his person, family and property, rested in the last resort upon the integrity, courage and learning of the courts. He believed that ignorance, cowardice and even corruption might be endured to some extent in other departments and the republic still live, but if these sins tainted the judiciary, republican government was a failure and it were better to set up a dictator and done with it.

He by no means regarded the judicial office as one of ease, however honorable. He knew it to entail arduous labor and great responsibility. He unweariedly performed the one, and unflinchingly met the other. It was his faith that the court should have and exercise, powers sufficient to protect the individual and the community alike from all unlawfulness. He insisted that the court could penetrate through all forms, to the bottom and to every corner of any transaction, to discover and enforce the very right of it. He maintained that

no form of injustice or inequity could be sheltered from its power behind any statute or legal rule. Loyal as he was to the law when once established either by enactment or judicial decisions, he would push the power of the court to the very line to ensure equity. He sought to discover what were the real rights and duties of parties and then to compel their observance, whatever the arts of avoidance. Yet he was as cautious as bold. He first sought to make sure of the reality of these rights and duties and then to find a safe way for their enforcement. In this he was as calm, patient and unbiased, as he was afterward in action decisive.

I cite an instance. While he did not write the opinion in *Gilpatrick* v. *Glidden*, 81 Maine, 137, he urged its adoption, and afterward in *Grant* v. *Bradstreet*, 87 Maine, 583, he expressly and meaningly affirmed it, though it seemed to some that the court was trenching upon the statutes of wills and descents. In the one case the court decreed an estate should go to those to whom the decedent had for a consideration promised to devise it, but had not. In the other case the court compelled an heir to perform to certain beneficiaries' promises he had made to the decedent in consideration that no will should be made. With characteristic prudence, however, in the latter case, he said: "The facts upon which the equitable superiority over legal formalities is to be allowed should be established by clear and indubitable evidence. . . . The evidence must be strong enough to produce conviction in every reasonable mind."

Another illustration is his concurrence in the answers of the justices to questions propounded by Governor Garcelon in January, 1880, a case where all the justices assumed the power to show the right, however obscured by legal formalities. It was believed by many people that the governor and council in counting the votes for members of the legislature were using legal formalities to defeat, rather than give expression to the people's real will. So great was the outcry, the governor felt impelled to obtain the opinion of the justices. The questions, however, were framed by interested political advisers of the governor, and so shrewdly as to call for categorical answers when categorical answers alone would almost necessarily have given legal color to the proceedings. But the justices refused

to thus limit their answers. They went beyond mere formalities of procedure to the very spirit and right of the matter. So clear and comprehensive in exposition of them were the answers, it was at once seen that they must prevail, as they did prevail in the end.

He was also resolute to wield the whole judicial power to protect the humblest individual from the injustice of the mob. Conservative as he believed the court should be in the use of that formidable judicial weapon, the writ of injunction, he believed in its prompt use when personal rights were assailed. He was not afraid of government by injunction when government by the mob was the alternative. At the time of the riotous conduct of the strikers from the Auburn shoe factories, he heartily approved the action of Justice FOSTER in using the writ to protect the freedom of work and of workers.

The Chief Justice was equally resolute to defend the constitutional rights of the individual against the government itself. He could not tolerate that these rights should be held only by the grace or wisdom of government officials or even the legislature. His opinion in *Gross* v. *Rice*, 71 Maine, 241, illustrates this. In that case he held against the opinion of an able minority, that the legislature could not authorize the warden of the State prison to prolong for bad conduct the term of imprisonment of a convict, and that the warden was liable in damages to the convict for so doing even in pursuance of the statute which had been on the statute books unquestioned for over 60 years. On the other hand, he upheld the power of the State to fully preserve order and promote the public welfare. In his very last published opinion, that in *Dexter* v. *Blackden*, 93 Maine, 473, he maintained the power of the legislature to require innkeepers to give security for obedience to the laws in their business.

Without further specification it may be truly said that Chief Justice PETERS held to the fundamentals. He was not moved away from them by any timidities, refinements or fallacies in reasoning. Again, he believed and acted upon the belief, that the law is made for man and not man for the law, that the law should be adapted for man as he is in his daily circumstances, rather than for the ideal man in the millennium. He deprecated high strung statutes and rules and high strung judicial doctrines. His endeavor was to

reconcile them with the facts of human life, to "make them workable," to use his own phrase. In this endeavor he was dominated by the spirit of equity. With the great Roman jurist Papinian, he held that what was inequitable could not be lawful.

I have heard the late Chief Justice called the Mansfield of Maine. In his efforts to humanize the rules of law, and adapt them to the affairs of life, he was like that great Chief Justice. Like Mansfield he broadened the law; he recognized the customs of business and gave effect to the honest intentions of men, however expressed. Like Mansfield also, he let the leaven of equity leaven the law.

Yet Lord Mansfield was not his examplar. Chief Justice PETERS, even in Mansfield's day, would not have been subservient to a Tory minister and king; would not have advocated war upon liberty loving colonists; would not have denied the right of the jury to determine the question of libel or no libel; would not have opposed the bill to enlarge the habeas corpus act; would not have been scorched by the fiery sarcasm of Junius for his indifference to Magna Charta and the Bill of Rights. I would rather liken him to Sir Matthew Hale, who stood the incorruptible and unyielding opponent of injustice even in the corrupt and tyrannical days of the Stuart Restoration. I would place under his portrait the words, nomine mutato, which that great divine, Richard Baxter, wrote under Chief Justice Hale's; "JOHN ANDREW PETERS, that unwearied student, that prudent man, that solid philosopher, that great lawyer, that pillar and basis of justice, who would not have done an unjust act for any worldly price or motive." I would also liken him to Chief Justice Holt, who first proclaimed the principle that a slave landing in England became free, —who feared neither King, Lords nor Commons in his assertion of the rights of Englishmen,—who alone of the judges of England withstood the witchcraft craze which swept over the land,—who stood firm for the full rights of the accused in trials for treason, and held the prosecution to strict legal proof. Indeed, recalling talks with him upon English history, I feel sure that JOHN ANDREW PETERS would rejoice to be remembered by the people of Maine as Matthew Hale and John Holt are remembered by the lovers of constitutional liberty.

I can add nothing serviceable to what has been said of the written opinions of the chief justice. These speak for themselves. They are his best monument. They will endure longer than monuments of stone. They are embedded in thirty-two volumes of the Maine Reports and will be read even after this solid court house has disappeared. Perhaps the most learned and profound of them all is that written near the end of his service in the case *Farrington* v. *Putnam*, 90 Maine, 405, where for forty pages he exhaustively reasons out the expanding law of charitable associations and charitable gifts. In it he considered no less than sixty judicial opinions besides numerous text books. It is a marvel of discriminating labor.

His style was like his mind, clear, without rubbish. The reasoning flowed steadily and irresistibly on, like the current of a river deep and wide. The reader thinks not of the style but only that he must assent to the reasoning and conclusion. Now and then he let run from his pen some quotation, not to polish but to strengthen the expression of his thought. Thus in *Gross* v. *Rice*, already cited, where the argument was that the convict in durance could appeal from his jailor to the inspectors, he met it with the answer: "'Bondage is hoarse and may not speak aloud,' says the great poet." Again in *Knapp* v. *Bailey*, 79 Maine, 195, desiring to explain how the hopes or fears of men lead them to believe when they should not, or refuse to acknowledge belief when they should, he wrote, "The great dramatist makes a character, reluctant to acknowledge the situation, say, 'I cannot dare to know that which I know,'" while another more quick sighted because anxious to believe, exclaims, 'Seems, Madam! nay, it is. I know not seems.'" He rarely if ever referred to his beloved Shakespeare by name but always as "the great poet," or "the great dramatist."

While insisting on the rights of the court and the respect due the judicial office, he also maintained the rights of the bar. While his rulings were positive, he never made it difficult or disagreeable to obtain a review of them. In the law court he was never anxious to have his rulings sustained. Indeed, I recall a case in which he was the first to point out the error. He encouraged the most friendly relations between the bench and the bar, relations of mutual con-

fidence and helpfulness. He regarded both bodies as designed to work together for the establishment of justice. He believed pleasant, social relations to be helpful to common work, and was a willing and welcome guest at all the bar reunions. To him as much as any one, I think, is due the encouraging loyalty to the court which the bar so pleasantly exhibits.

It remains to speak for a little of his administration as Chief Justice of this court, as seen by his associates. He fully recognized the duties as well as the dignity of that high office. He was solicitous for the honor and dignity of the court and every one of its justices. Like Dumas' Three Musketeers, with him it was "one for all, and all for one." He had no jealousy of any associate. Under him, as under the present Chief Justice, there were no cliques, cabals nor jealousies in the court. Then, as now, reason and argument only were used, and openly; no other inducement was suggested to obtain a concurrence. He never made dissent from his most pronounced opinion disagreeable to the dissentient. He encouraged the utmost freedom of dissent in consultation, though he deprecated the publication of dissenting opinions. In this he differed from some justices, notably of the United States Supreme Court, who hold that occasional publications of dissents are justified and even desirable.

He sought to keep the court in a high state of efficiency, and to evenly distribute the pleasant and unpleasant parts of the work among all the justices, he taking his full share. By his kindly nature and tact he preserved the harmony and unity of the court. He was pleased and showed his pleasure at the good work of any associate, and was glad to know of its appreciation by the profession. He encouraged and stimulated us all. He inculcated the truth that each justice has much to do in elevating or lowering the court in public esteem; that the merit of one increases respect for all. His wit and humor and social tact enabled him to relieve the tension that must sometimes occur among earnest men. When sometimes in consultation wide differences of opinion appeared, and in the eagerness of maintenance there was, though rarely, some danger of forgetting courtesy, he would open the safety valve by some apposite story or witticism, and normal good humor was at once restored. He won the

affectionate confidence as well as the respect of his associates. He held himself as simply primus inter pares, the brother specially charged with the welfare of the family.

When Chief Justice PETERS finally resigned from the bench in the ripeness of his years he did not lose his interest in us. He was still solicitous for the honor and efficiency of the court. He rejoiced at honorable salaries being at last allotted the justices, though too late for him to share. He was still glad to advise and assist. On my files are many letters from him suggesting solutions of troublesome questions, written after he had earned the right to be idle. At my last personal interview with him in February, while he was physically too feeble to leave his room, he showed deep interest in the work of the court, and earnestly urged my clearing the Penobscot docket of dead cases. He had loved the judicial labors. He had lived in "the gladsome light of jurisprudence." In his retirement that love was undiminished; that light still shone about him.

But now we are admonished that he has not only put off the judicial armor, but the armor of physical life. He has now gone to his rest. That rest is where Bishop Hooker said "the law hath her seat; in the bosom of God." He has left us, however, a splendid legacy of judicial exposition to guide us in our continuance of the great work. He has set for us a high standard of excellence to be achieved only by unremitting labor.

We cannot but share deeply in the general sorrow that death claimed him at last. Still, in contemplating the mournful event we may remember that death is but the perfection of life, and may say, with that other great poet, England's Meonides,

> "Nothing is here for tears, nothing to wail,
> Or beat the breast; no weakness, no contempt,
> Dispraise or blame—nothing but well and fair,
> And what may quiet us in a death so noble."

I am instructed to say that the court gratefully accepts the resolutions and orders them recorded as a memorial to the deceased Chief Justice and that in further token of respect the court will now be adjourned.

MEMORANDUM.

The foregoing and most admirable account of the proceedings held before the Law Court in relation to the death of the late Chief Justice PETERS, was prepared by Gen. Charles Hamlin who, at that time, was Reporter of Decisions, and to whom full credit should be given.

G. H. S.

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amendment allowed after demurrer sustained, *Ib.*
because too late to file a second bill, *Ib.*

ESTOPPEL.

See INSURANCE.

When a plaintiff is compelled to submit to a reference, *Cassidy* v. *Royal Ex. Assurance*, 399.

deft. is estopped to raise a defense, in an action at law, which could have been raised before the referees, *Ib.*

EVIDENCE.

See BANKRUPTCY. BOUNDARIES. DEED. MARRIAGE. PLAN. SALES. VERDICT. WILLS. WITNESS.

Declarations of predecessor in title to land, admissible, when, *Phillips* v. *Laughlin*, 26.

such declarations inadmissible as to invalidity of deed to himself, *Ib.*

when such deed appears to be genuine, *Ib.*

and has been duly recorded, *Ib.*

and party to suit claims title under such deed, *Ib.*

Admission of irrelevant or immaterial testimony harmless, *Davis* v. *Alexander*, 40.

when same is not shown to have been prejudicial, *Ib.*

A ruling admitting expert testimony is ipso facto a decision that the witness, has qualified, *Conley* v. *Gas Light Co.*, 57.

and that the subject is one for expert, *Ib.*

Municipal officers of a city passed an order for a public sewer, *Kidson* v. *Bangor*, 139.

presumptively the record shows the full proceedings, *Ib.*

parol, cannot supply, extend or modify such record, *Ib.*

to recover against a city for violation of R. S., c. 21, § 18, *Ib.*

what plff. must establish, stated, *Ib.*

Tending to prove a material allegation not to be excluded, because it also tends to prove matters not alleged, *Ib.*

Plourd v. *Jarvis*, 161.

Parol, admissible to prove that a party has made a written contract, *State* v. *McKinnon*, 166.

when such contract is not the foundation of the cause, *Ib.*

but is simply a collateral fact, *Ib.*

and the contents are not in issue, *Ib.*

deft. indicted for maintaining a liquor nuisance, *Ib.*

office copy of mtg. admitted to prove deft's ownership of building, *Ib.*

held: deft. not prejudiced thereby, *Ib.*

he afterwards testified that he executed it, *Ib.*

A surveyor was directed by the state to survey public lands, etc., *Adams* v. *Clapp*, 169.

EVIDENCE (concluded.)

held : his plan competent, after his death, *I b.*
and sufficient, if not contradicted, *I b.*
to show that the lines were actually run, etc., *I b.*

To recover for injuries caused by defective way, *Orr* v. *Oldtown*, 190.
plff. must prove affirmatively due care on his own part, *I b.*
also on the part of his driver, *I b.*

Under R. S., c. 18, § 51, what town must prove, stated, *Greenville* v. *Beauto*, 214.

Admissible to show custom of deft. to allow passengers to ride upon running board of cars, *Stone* v. *Street Railway*, 243.
although this custom was not known to plff's intestate, *I b.*
admission or exclusion of photographs discretionary, *I b.*

In the trial of an appeal from assessment of taxes, *Fibre Co.* v. *Bradley*, 263.
valuation placed by assessors upon other property inadmissible, *I b.*
likewise valuation of aplt's property in other years, *I b.*
value, distinguished from valuation, etc., may be shown, etc., *I b.*
when property is valued at no more than true value, *I b.*
disproportionate valuation by comparison etc., inadmissible, *I b.*
whether, is inadmissible to show all property in town designedly undervalued, quaere, *I b.*
burden upon aplt. to show ground for relief, *I b.*
opinion of assessors, etc., inadmissible against town, *I b.*

Of custom of ins. company in assenting to assignment of ins. policy inadmissible, *Lyford* v. *Ins. Co.*, 273.

Sufficient to warrant verdict, *Caven* v. *Granite Co.*, 278.

Finding of jury warranted by the, *McCarthy* v. *Claflin*, 290.

Admission of photographs in, largely discretionary, *Babb* v. *Paper Co.*, 298.
photographs may be admitted in, when, *I b.*

When mortgage is given to secure payment of money, *Davis* v. *Poland*, 345.
burden of proving payment is on mortgagor, *I b.*
when mortgage is given for support of mortgagee on the premises, *I b.*
burden of proving breach, etc., is on mortgagee, *I b.*
two actions ; verdict directed for each plff., *I b.*
held : the, did not warrant this direction, *I b.*

Will not be excluded because it subjects a party to ridicule, if otherwise competent, *State* v. *Sandford*, 441.
a part of a statement admitted in, makes whole statement admissible, *I b.*
a verdict should be based on facts proved by the, *I b.*
and not on *belief* of jury on a question not susceptible of proof, *I b.*

A conflict of testimony does not necessarily arise, *Moulton* v. *Railway Co.*, 508.
simply because one witness testifies contrary to another, *I b.*
a verdict must be supported by substantial, *I b.*

EXCEPTIONS.

None to admission to irrelevant or immaterial testimony, *Davis* v. *Alexander*, 40.
when same does not appear to have been prejudicial, *Ib.*
if none to charge, assumed that proper instructions were given, *Ib.*
To refusal to give instructions unsupported by evidence, overruled, *York* v. *Athens*, 82.
Will not be sustained if the excepting party must ultimately fail on the undisputed facts, *Orr* v. *Oldtown*, 190.
None to refusal of single justice to stay judgment and execution after mandate in equity, *Whitney* v. *Johnston*, 220.
Action against town for damages caused by defective way, *Joy* v. *York*, 237.
lie to refusal to instruct jury that damages cannot be recovered for injuries not specified in notice, *Ib.*
Do not lie to exclusion of photographs, *Stone* v. *Street Railway*, 243.
Re-direct exam. of witness called out repetition of matter elicited in cross-exam., *Caven* v. *Granite Co.*, 278.
held : not exceptionable, *Ib.*
inadmissible question, against objection, answered, *Ib.*
presiding justice asked another in its stead, *Ib.*
held : error was sufficiently remedied, *Ib.*
None to exclusion of photographs, *Babb* v. *Paper Co.*, 298.
No, to refusal of presiding justice to order nonsuit, *Snowman* v. *Mason*, 490.
such power is discretionary, *Ib.*
statement in bill of, that deft. did except, *Ib.*
relates to time when objection was made, *Ib.*

EXECUTORS AND ADMINISTRATORS.

See DESCENT AND DISTRIBUTION. WILLS.

When an annuity is given by will, *Merrill* v. *Wooster*, 460.
executor can set apart from estate a sum to meet it, *Ib.*
such fund subject to distribution when annuity ceases, *Ib.*
when executor sets apart a sum to meet an annuity, *Ib.*
such fund must be returned to executor for administration when trust ends, *Ib.*

EXEMPTIONS.

See TAXES.

EXTORTION.

Fish warden writing offender to settle, not guilty of, *State* v. *Hanna*, 224.

FELLOW-SERVANT.

See MASTER AND SERVANT.

FIRE ESCAPES.

R. S., c. 28, § 38, relating to, construed, *Carrigan* v. *Stillwell*, 434.
not applicable to building used as restaurant on first floor with kitchen on third floor with only three persons therein, *Ib.*

FISH AND GAME.

Commissioner of Sea and Shore Fisheries has authority to settle offenses under R. S., c. 41, § 17, *State* v. *Hanna*, 224.
he may persuade or urge offender to settle, *Ib.*
he may point out criminal prosecution as the alternative, *Ib.*
he may authorize his warden to demand payment of penalty, *Ib.*
such warden has no authority to "settle", *Ib.*
such warden may lawfully write offender to settle with commissioner, *Ib.*

FISH WARDENS.

See FISH AND GAME.

FIXTURES.

Mortgagor before mortgage affixed a hot water heating apparatus to his estate, *Young* v. *Hatch*, 465.
held: as between mortgagor and mortgagee same became merged in the realty, *Ib.*
and passed by the mortgage to the mortgagee, *Ib.*

FRAUD.

Parting with property pursuant to fraudulent contract, *Rich* v. *Hayes*, 51.
law does not aid in restoring, *Ib.*

FRAUDULENT CONVEYANCES.

See BANKRUPTCY. QUIETING TITLE.

Assignment of a mere naked right to set aside a, by bankrupt's trustee *held* invalid, *Annis* v. *Butterfield*, 181.

R. S., c. 6, cl. 9, not applicable when plff. stands as a purchaser and not as a creditor, *Ib.*

proceedings to have the cloud of a, removed, *Ib.*

cannot be maintained without proof of possession, *Ib.*

A, is void as to creditors, *Chemical Co.* v. *Huntington*, 361.

and, if void, is a nullity, *Ib.*

real estate conveyed in fraud of creditors is covered by a general attachment, *Ib.*

a special attachment not necessary, *Ib.*

validity of an alleged, to be determined in a proper action brought after levy, *Ib.*

HOMICIDE.

A deft. was convicted of manslaughter, *State* v. *Sandford*, 441.

he had a sick person under his care and control, *Ib.*

he failed to supply food and medical attendance to such person, *Ib.*

deft. relied on a belief that proper treatment of the sick was by prayer, *Ib.*

instructions making conviction or acquittal of deft. depend on belief of jury on question of efficacy of prayer as a means of cure, *held* erroneous, *Ib.*

the guilt or innocence of a person accused of crime, etc., *Ib.*

should not depend on belief of jury on question of efficacy of prayer as a means of cure, *Ib.*

HUSBAND AND WIFE.

See DESCENT AND DISTRIBUTION. MARRIAGE. WILLS.

In an action for unlawfully persuading plff's wife to abandon marital intercourse with plff., *Plourd* v. *Jarvis*, 161.

deft. can be found guilty if his unlawful persuasions were a contributing cause, *Ib.*

punitive damages allowed, *Ib.*

verdict for $2,333.33 not excessive, *Ib.*

In actions of crim. con. record of marriage not sufficient without identity of parties, *Snowman* v. *Mason*, 490.

it must be proof of identity of person, and not of name merely, *Ib.*

INDEPENDENT CONTRACTOR.

An, defined, *Keyes* v. *Baptist Church*, 308.
employer not released from liability by independent contract, when, *Ib.*

INDICTMENT.

See BURGLARY. EMBEZZLEMENT. EVIDENCE.

An, under R. S., 1903, c. 121, § 10, relating to embezzlement, *State* v. *Cates*, 68.
held: not bad for duplicity, *Ib.*
an, charging that deft. took a pocket book, *Ib.*
and secreted it with intent to embezzle, *Ib.*
and convert to his own use, *Ib.*
sets out every fact required by R. S., 1903, c. 121, § 10, *Ib.*
An, for attempting to break and enter railroad car, *State* v. *Doran*, 329.
same contained no description of the overt act, etc., *Ib.*
held: insufficient ; judgment arrested, *Ib.*
what such an, must allege, stated, *Ib.*
when an, in language of statute is sufficient, *Ib.*
when an, in language of statute not sufficient, *Ib.*

INSOLVENCY.

Name of creditor omitted from insolvent's schedule, *Hewins* v. *Whitney*, 37.
discharge in, valid notwithstanding such omission, *Ib.*
unless such omission was wilful or fraudulent, *Ib.*

INSTRUCTIONS.

See HOMICIDE. PRACTICE.

Court should define to the jury legal terms having a specific meaning, *State* v. *O'Connell*, 61.
but is not bound to define words in common use, *Ib.*
not bound to define the term "malt liquor", *Ib.*
no error in the, given, *Ib.*
Making conviction or acquittal of a person accused of crime, *State* v. *Sandford*, 441.
depend on belief of jury in efficacy of prayer, *Ib.*
as means of cure for the sick, are erroneous, *Ib.*

INSURANCE.

See ACCIDENT AND HEALTH INSURANCE. ACTION. ASSIGNMENT. CONTRACT. CUSTOM.

When a fire is caused by negligence of a railroad company, *Dyer* v. *M. C. R. R. Co.*, 195.
an, company which has paid a policy of, upon the property injured, *Ib.*
may maintain an action in name of owner, *Ib.*
against such railroad company to recover am't so paid, *Ib.*
not exceeding the difference between value of the property, *Ib.*
and any sum already paid by railroad company to owner, *Ib.*

Condition in health policy provided that failure to give written notice of sickness, etc., should invalidate all claims under policy, etc., *Whalen* v. *Accident Co.*, 231.
held: that condition was valid, *Ib.*
provisions of R. S., 1903, c. 49, § 95, do not extend to health, *Ib.*
company did not waive notice by sending blank forms of proof of claim etc., to insured, *Ib.*

A policy of fire, is a personal contract, *Lyford* v. *Ins. Co.*, 278.
is not annexed to property insured, *Ib.*
is wholly terminated by transfer of property, *Ib.*
assignment of, void without assent of company, *Ib.*
to recover, upon property plff. must prove at the time of loss (1) an interest in the property; (2) an existing contract of, *Ib.*

Clause in a policy of fire, construed as a proviso etc., *Cassidy* v. *Royal Ex. Assurance*, 399.
burden on deft. to show that loss came within proviso, *Ib.*
after a loss referees were appointed who found the value of the property destroyed, *Ib.*
deft. failed to establish facts before referees vitiating the policy, *Ib.*
held: deft. estopped to require plff. to submit to another reference for that pupose, *Ib.*

To avoid a policy of fire, a sale of the property must be such as passes title to it, *Wood Co.* v. *Assurance Co.*, 415.

INTOXICATING LIQUORS.

See CIVIL DAMAGE ACT. NEGLIGENCE. WARRANT.

R. S., 1883, c. 27, § 33, prohibits the sale of malt liquor, *State* v. *O'Connell*, 61.
Legislature cannot make that intoxicating which is not intoxicating, *Ib.*
but may prohibit the sale of a specific article, *Ib.*
if Uno Beer is a malt liquor, its sale is prohibited, *Ib*
if the liquor sold was a malt liquor, *Ib.*
not necessary for jury whether it was intoxicating in fact, *Ib.*
the prohibition of the statute is absolute, *Ib.*

INTOXICATING LIQUORS (concluded.)

and is not dependent upon amount of alcohol which malt liquor contains, *Ib.*

Warrant to seize, must contain command to arrest person keeping, *Adams* v. *Allen*, 249.

if name of such person is stated in the complaint, *Ib.*

if no such command, warrant is void, *Ib.*

and affords no protection to officer, *Ib.*

Whether one who, lets loose such a dangerous agent, as, *Currier* v. *McKee*, 364.

is not bound to apprehend that the intoxication thereby produced, *Ib.*

is likely to produce unjustifiable assaults and injury to assailant, *Ib.*

is a question of fact for the jury, *Ib.*

a person is responsible for such consequences of his acts, *Ib.*

as ought to have been apprehended, *Ib.*

JUDGMENT.

See APPEAL. DECREE. EQUITY. TRUSTEE PROCESS.

The, in the real action, *Adams* v. *Clapp*, 169.

does not fix dividing line between Townships 4 and 5, *Ib.*

for any other cause between other parties or towns, *Ib.*

JUDICIAL SALES.

In, of personality execution and delivery of instruments of conveyance necessary, *Wood Co.* v. *Assurance Co.*, 415.

failure of an officer of the court to comply with statutory provisions, *Ib.*

or with decree ordering and confirming a, sale, *Ib.*

renders it non-judicial and void, *Ib.*

a decree of annulment of a, cannot be impeached collaterally, *Ib.*

JURISDICTION.

See COSTS. WILLS.

Officer's return on writ showed attachment of a non-resident deft's personal property within the state, *Perry* v. *Griefen*, 420.

also that writ was duly served on deft's agent, *Ib.*

held: that the return must be taken as true for determination of the question of, *Ib.*

parties left to their action against officer if return be untrue, *Ib.*

when court will examine grounds of its, stated, *Ib.*

S. J. C. has, under R. S., c. 79, § 6, par. 8, to construe a will on bill of a devisee, *Snowman* v. *Mason*, 495.

JURISDICTION (concluded.)

and to determine character of estate received by him under the devise, *Ib.*
and the extent of his powers thereunder, *Ib.*
as between himself and other devisees claiming adversely, *Ib.*
when court will not assume, to construe a will, stated, *Ib.*

JURY.

Question of liability, etc., is for the, when evidence conflicting, etc., *Stone* v. *Street Railway*, 243.

A witness for prevailing party discussed merits of case in presence and hearing of certain members of the, *Belcher* v. *Estes*, 314.
verdict should be set aside if objections not waived, *Ib.*
counsel for plff. had knowledge of such misconduct, *Ib.*
he did not insist upon objection but closed the trial, *Ib.*
held: objection waived; motion too late, *Ib.*

LARCENY.

See EMBEZZLEMENT.

LEVY.

See ATTACHMENT.

LIFE ESTATE.

See WILLS.

Will construed as giving widow a, with power of sale, *McGuire* v. *Gallagher*, 334.

LOBSTERS.

See FISH AND GAME.

MALICIOUS PROSECUTION.

See NEW TRIAL. VERDICT.

MARRIAGE.

Record of a, not sufficient to prove, in crim. con. action, *Snowman* v. *Mason*, 490.
there must be proof of identity of person and not of name merely, *Ib.*
in such actions positive proof of a legal, required, *Ib.*
plff. must prove a legal, in first instance, *Ib.*

MASTER AND SERVANT.

See FIRE ESCAPES. NEGLIGENCE. STREET RAILWAY.

Workmen in furnishing ropes for erection of platform, *Beal* v. *Bryant*, 112.
held, to have stood in place of master, *Ib.*
in discharging duty owed by master to his servants, *Ib.*
the duty of master to furnish safe materials, etc., *Ib.*
cannot be delegated so as to relieve master, *Ib.*
from responsibility for negligence in its performance, *Ib.*
workmen may be fellow servants in the *use* of a platform, *Ib.*
but not in furnishing materials to make the same, *Ib.*
when furnished by order of the master, *Ib.*

Master engaged in a dangerous business, *Moran* v. *Street Railway*, 127.
must adopt and enforce rules, etc., for the conduct of his business, *Ib.*
such as will afford reasonable protection to his servants, *Ib.*
servant acting outside of scope of his employment, *Ib.*
master not bound to make rules for his government, *Ib.*
servant acting without master's authority, *Ib.*
also beyond the scope of his employment, *Ib.*
master not responsible for his acts, *Ib.*

Relation of, does not exist between a road commissioner and laborers paid by a city, *Bowden* v. *Derby*, 208.

Care incumbent upon, stated, *Caven* v. *Granite Co.*, 278.
care owed by master not measured by care owed by servant, *Ib.*
a greater degree of diligence incumbent upon master, *Ib.*
master's duty in furnishing appliances, etc., stated, *Ib.*
master's duty to inspect appliances, etc., *Ib.*
servant chargeable with knowledge of condition, etc., when, *Ib.*
when and when not servant assumed a risk, etc., *Ib.*
held: plff's intestate assumed no risk, etc., *Ib.*
also that deft. was negligent, *Ib.*

Defective staging broke causing death of intestate, *McCarthy* v. *Claflin*, 290.
held: staging not constructed by fellow-servant of intestate, master liable, *Ib.*
test of master's liability for negligence of employee, stated, *Ib.*

MASTER AND SERVANT (concluded.)

Servant assumes risks of all obvious and apparent dangers, *Babb* v. *Paper Co.* 298.
also all of which he knows and should appreciate, *Ib.*
notice to fellow-servant not notice to master, *Ib.*
contrib. negligence of servant bars recovery, *Ib.*

MILLS AND MILL DAMS.

See BRIDGES. WATERS AND WATER COURSES.

MORTGAGES.

See EVIDENCE. FIXTURES. REAL ACTION.

Contract between mortgage parties considered, *Rich* v. *Hayes*, 51.

Bill in equity to redeem real estate from a, *Doe* v. *Littlefield*, 317.
must contain statutory prerequisites, *Ib.*

A, given for support of mortgagee on the premises, *Davis* v. *Poland*, 345.
mortgagor entitled to possession until condition broken, *Ib.*
burden of proving breach, etc., on mortgagee, *Ib.*
given for support of mortgagee, *Ib.*
mortgagee entitled to possession, when, *Ib.*

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW. EVIDENCE. TOWNS.

City not liable for nuisance created by sewer, unless vested with special charter privileges, *Atwood* v. *Biddeford*, 78.
no general statute giving city power to construct sewers, *Ib.*
such power lodged in hands of municipal officers, *Ib.*
city constructed the sewer which created the nuisance, *Ib.*
held : this act was ultra vires, *Ib.*

Municipal officers of a city laid out a sewer, *Kidson* v. *Bangor*, 139.
they acted judicially under authority from the state, *Ib.*
and were in no sense the agents of the city, *Ib.*
agents of a city in charge of repairs of sewer after completion, *Ib.*
are not in a legal sense continuing work of municipal officers in laying out such sewer, *Ib.*
a deviation from original laying out of sewer made, *Ib.*
same cannot be subsequently ratified, when, *Ib.*
subsequent ratification cannot cure substantial defect, *Ib.*
in action of municipal officers in laying out sewer, *Ib.*
judicial acts of municipal officers must be entered of record, *Ib.*
the presentation to municipal officers of a petition, signed, etc., *Ib.*
is a jurisdictional fact which must be made to appear, *Ib.*

MUNICIPAL CORPORATIONS (concluded.)

to show a legal laying out of a sewer, *Ib.*

Spec. Laws, 1887, c. 242, § 3, relating to entry of private drains into common sewers in city of Bangor, *Ib.*

has reference to such sewers as are established in accordance with the formal laying out by municipal officers, *Ib.*

such special laws does not enlarge pltf's rights, *Ib.*

Where a road commissioner, in that capacity, is erecting a wall, *Bowden* v. *Derby*, 208.

and employs laborers who are paid by the city, *Ib.*

he acts as a public officer, *Ib.*

and is responsible only for reasonable care in selection of men and materials, *Ib.*

beyond this he is under no liability except for his own acts, *Ib.*

when such commissioner furnishes a derrick, although under no obligation to do so, *Ib.*

he assumes the obligation of seeing that it is reasonably safe, *Ib.*

If two, unreasonably neglect to maintain a bridge, *Opinions of the Justices*, 515.

a part of a public highway between them so as to comply with law, *Ib.*

the legislature may compel a compliance, *Ib.*

and direct a commission to remove such bridge, *Ib.*

and replace it with one complying with law, *Ib.*

also the legislature may impose the burden of the cost of such work upon such, *Ib.*

NAVIGABLE WATERS.

A water pipe laid across a river by authority of legislature, *Water Co.* v. *Steam Towage Co.*, 473.

and in accordance with plans of chief of engineers, *Ib.*

and authorized by Sec'y of War, *Ib.*

held, not to be an unlawful obstruction, *Ib.*

the laying of same deemed affirmatively authorized by Congress, *Ib.*

although the affirmative authority arises by implication, *Ib.*

NEGLIGENCE.

See CIVIL DAMAGE ACT. COMMON CARRIERS. FIRE ESCAPES. INSURANCE. INTOXICATING LIQUORS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS. RAILROADS. STREET RAILWAYS. TOWNS. WAY.

Traveler about to cross street railway at country crossing, *Robinson* v. *Street Railway*, 47.

no absolute rule to look or listen, *Ib.*

NEGLIGENCE (continued.)

but failure to look or listen may be contributory, *Ib.*
rule to be determined by the facts in each case, *Ib.*
held: that plff. was guilty of contributory, *Ib.*

The duty of a master to furnish safe materials, etc., *Beal* v. *Bryant,* 112.
cannot be delegated so as to relieve master, *Ib.*
from responsibility for, in its performance, *Ib.*

Plff. injured by collision with a street railway car, *Butler* v. *Street Railway,* 149.
jury warranted in finding deft. negligent, *Ib.*
but plff. also clearly negligent, *Ib.*
his, contributed to injury as proximate cause, *Ib.*
deft's, contemporaneous with plff's, *Ib.*
not subsequent to and independent of plff's, *Ib.*
doctrine of prior and subsequent, not applicable, *Ib.*
deft's, and plff's, practically simultaneous, *Ib.*
in such case, plff. cannot recover, *Ib.*

In an action to recover for injuries caused by defective way, *Orr* v. *Oldtown,* 190.
plff. must prove no contributory, on his part, *Ib.*
likewise none on part of his driver, *Ib.*

Fire set by sparks from locomotive engine raises inference of, *Dyer* v. *M. C. R. R. Co.,* 195.
sufficient to make out prima facie case, when, *Ib.*

Where a deft's negligent act concurred with any other person, other than plff., to produce the injury, *Bowden* v. *Derby,* 208.
deft. is responsible although his negligent act may not have been the nearest in the chain of events, *Ib.*
proximate cause of an accident is a question of fact, *Ib.*

Street Ry. allowing passengers to ride on running board, without caution, is, *Stone* v. *Street Railway,* 243.

To furnish a defective staging as a completed structure is, *McCarthy* v. *Claflin,* 290.

Plff. guilty of contributory, bars recovery, *Babb* v. *Paper Co.,* 298.

Those whose work makes dangerous a public street, *Keyes* v. *Baptist Church,* 308.
must give proper danger signals, etc., *Ib.*
failure to do so, is, *Ib.*
situation of things may be a sufficient warning, etc., *Ib.*
if so person injured cannot recover, *Ib.*
when evidence is conflicting, etc., verdict on liability must stand, *Ib.*

The law looks to proximate not remote cause of an injury, *Currier* v. *McKee,* 364.
an injury is referred to the wrongful cause, *Ib.*
when the original act was wrongful, *Ib.*

NEGLIGENCE (concluded.)

and would naturally prove injurious to some person, *Ib.*
and results in injury through innocent causes, *Ib.*
it is not the lawful but the wrongful act of third party intervening, *Ib.*
which breaks chain of causation and relieves original wrongdoer, *Ib.*
of the consequences of his wrongful act, *Ib.*

When only one inference as to, can be drawn from undisputed facts, *Water Co.* v. *Steam Towage Co.*, 473.
it is a question of law, *Ib.*
Capt. of a schooner fouling a water pipe in a river, *Ib.*
held, guilty of, *Ib.*
that a tugboat was also negligently managed, no defense, *Ib.*

Plff's contributory, bars recovery, *Moulton* v. *Railway Co* , 508.
rule well settled, *Ib.*
new trial granted, *Ib.*

NEW TRIAL.

Granted when verdict is against great preponderance of evidence, *Phillips* v. *Laughlin*, 26.

Inconsistent verdicts by same jury upon same testimony, *Stevens* v. *Walker*, 43.
set aside and a, granted in each action, *Ib.*

Granted if jury misapprehend the evidence or disregard their duty, *Rich* v. *Hayes*, 51.

Not granted unless verdict clearly wrong, *Stone* v. *Street Railway*, 243.

No, on questions of fact unless jury manifestly erred, *Caven* v. *Granite Co.*, 278.

Motion for a, for misconduct of jurors too late, *Belcher* v. *Estes*, 314.
misconduct known to counsel of losing party before verdict, *Ib.*

NOTICE.

See WAY.

Reference in deed to a prior grant actual, of such grant, *Rollins* v. *Blackden*, 21.

NUISANCE.

See GAMBLING. MUNICIPAL CORPORATIONS.

A lock-up maintained by a town is not a, when, *Mains* v. *Fort Fairfield*, 177.
Cigar store containing slot machine used by customers, *Lang* v. *Merwin*, 486.
held to be a statutory, *Ib.*
same enjoined, *Ib.*

OFFICERS.

See INTOXICATING LIQUORS. JURISDICTION. TOWNS.

Constable committing a prisoner acts for the state, *Mains* v. *Fort Fairfield*, 177.
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WILLS.

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ERRATA.

On page 161, in first line of fourth head note, read "defendant" for "plaintiff."
On page 332, in 23d line from the top, read "CAUSAL" for "casual."
On page 345, in fourth line of second head note, strike out the word "not."
On page 420, for "*John E. Perry* vs. *Richard A. Griefen*" read "*John E. Parry et als.* vs. *Richard A. Griefen.*"

INDEX-DIGEST.

On page 590, between the titles "Fraudulent Conveyances" and "Homicide," insert

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